IN THE INDUSTRIAL COURT OF SWAZILAND

In the matter between:

Case No.374/2008

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION	**APPLICANT**
UNIONIZABLE EMPLOYEES OF THE RESPONDENT	**FURTHER APPLICANTS**
And	
SIYASPA (PTY) LTD trading as NHLANGANO SPAR	**1st RESPONDENT**
THE STATION COMMANDER (NHLANGANO POLICE STATION)	**2nd RESPONDENT**
THE COMMISSIONER OF POLICE	**3rd RESPONDENT**
THE ATTORNEY GENERAL	**4th RESPONDENT**

CORAM:

S. NSIBANDE: ACTING JUDGE

N. MANANA: MEMBER

A. NKAMBULE: MEMBER

FOR APPLICANT: MS. S. NDLELA - KUNENE

FOR RESPONDENT: MR B.S. DLAMINI

JUDGEMENT - 23/10/2008

[1] This is an urgent application brought by the two Applicants against the Respondents for an order:-

> *"1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as an urgent one.*
>
> *2. That a rule nisi be issued with immediate and interim effect, calling upon the Respondents to show cause on a date to be appointed by the above Honourable Court, why an order in the following terms should not be made final;*

2.1. That the Respondents be and are hereby interdicted from threatening, intimating (sic) or otherwise interfering with the safety of the further Applicants.

2.2. That the Station Commander of the Nhlangano Police Station be and is hereby ordered to refrain from sending police officers to threaten, intimidate and assault the further Applicants.

2.3. That the r' Respondent be and are hereby interdictedfrom interfering with the further Applicants right to picket peacefully as the strike is lawful.

2.4 The service upon the Respondents be deemed to be proper service upon the further Respondents.

2.4 That the prayers contained in paragraphs 2.1, 2.2, and 2.3 above operate with immediate interim effect pending the return date to be appointed by the Honourable Court.

3. *Costs be awarded against the Respondents only in the event that one or any of of them oppose the application.*

4. Granting further and/or alternative relief."

[2] The application is opposed by the 1st Respondent only.

[3] The Is Applicant in its Founding Affidavit simply states that as a result of a breakdown in negotiations between it and the first Respondent and the issuance of a certificate of unresolved dispute by CMAC, the Applicants commenced a strike action on 1st August, 2008.

[4] It is alleged that the strike is lawful and that the Respondents are unlawfully hindering the Applicants from picketing lawfully by threatening and intimidating them as well as by assaulting and dispensing them without just cause.

[5] Applicants therefore seek an order to enable them to picket peacefully in terms of the **Industrial Relations Act,** by interdicting the Respondents from preventing them from picketing peacefully.

[6] 1st Respondent, the only Respondent to file any opposing papers, raised certain points of law in its answering affidavit. At the hearing of the matter, the points were not pursued. The 1st

Respondent's position was that the strike was illegal, that the Applicants had not reported any dispute to the Conciliation Mediation and Arbitration Commission nor had a certificate of unresolved dispute been issued. It was also denied that 1st Respondent had any role in the intimidation and assault of the further Applicants.

[7] It was only in its replying affidavit that the Applicants revealed that the basis on which they say the strike is lawful is that on 13th November, 2007, the Conciliation Mediation and Arbitration Commission issued a certificate of unresolved dispute and thereafter on 21st December, 2007 final notice of strike action was given following a ballot exercise that took place on 17th December, 2007. Certain documents were filed in this respect.

[8] The Applicants' failure to set out the full particulars of the strike action not only robbed the 1st Respondent of the opportunity to address squarely, the allegations pertaining to the legality of the strike but also meant that both counsel would end up filling in "the blanks" from the bar - a most undesirable state of affairs. An Applicant, particularly one who comes to court on a certificate of urgency, must make out his case in his founding affidavit and not seek to augment a skeletal case in his replying affidavit and by giving evidence from the bar.

[9] The right to picket is set out in **Section 107** of the **Industrial Relations Act 2000** as amended and is dependant on it being in furtherance of a lawful strike (see **Swaziland National Housing Board vs. The Commissioner of Labour, Alliance of Commercial and Industrial Workers Union (IC) Case No.183/2001).**

[10] **Section 107** reads as follows;

> *"Notwithstanding anything to the contrary contained in this Act or any other law, it shall be lawful for any person to be near or at that person's place of work for the purposes of peacefully communicating or peacefully persuading any other person to work or not to work, provided that such presence is in furtherance of a strike or lock out which is in compliance with this Act. "*

[11] The Applicants allege that the strike is in compliance with the **Industrial Relations Act** while the 1st Respondent denies this and alleges that there has not been compliance with **Section 86 of the Industrial Relations Act 2000** as amended.

[12] The Applicants' attorney stated from the bar that the 2nd Applicants had briefly gone on strike, after complying with **Section 86 of the Act,** in December, 2007 but had suspended the

strike after talks with the 1st Respondent and had gone back to work. According to her, the employees had on 1st August, 2008, resumed the December 2007 strike following a deadlock in collective bargaining negotiations with the 1st Respondent. The 1st Respondent objected to these facts being given from the bar.

[13] It has been held in South Africa that if an employer chooses to allow employees back at work who have neither called their strike off nor accepted that the dispute is over and that, therefore, they will not have the right to resume the strike at a later stage, it (the employer) can not be heard to complain when they resume the strike. (See **Transportation Motor Spares vs. National Union of Metal Workers of South Africa and Others (1999) 20ILJ 690.**

[14] The Applicants in this matter do not allege in their founding affidavit that they were resuming a strike that started but was later suspended nor do they set out the pertinent facts regarding - the nature of the initial dispute, the conditions under which they returned to work having started the strike and whether, the strike of 1st August, 2008 was in fact a continuation of December, 2007 strike. To the contrary, the deponent to the Applicants' founding affidavit states that the strike commenced on 1st August, 2008.

[15] The Applicants did not file any documents establishing the legality of the strike that commenced on 1st August, 2008 nor do they link adequately the actions taken in December, 2007 towards the strike action with the strike action that commenced on 1st August, 2008. The position that the Applicants were resuming a strike started in December, 2007 but later suspended was never put on the papers nor was there any evidence offered in this regard. In the case of **Bernardin B. Bango vs. The University of Swaziland (IC) Case No.342/08** the Judge President Dunseith stated that;

> *"In motion proceedings the Applicant is required not only to plead a prima facie case but also to make out a case on the evidence contained in the founding affidavit. The proper approach is that the founding affidavit alone must be taken into account and the allegations in the founding affidavit must be accepted as established facts... We are required to decide whether the allegations contained in the Applicants' founding affidavit, if proved, will be sufficient to warrant the relief or some of the relief, prayed for by the Applicant."*

[16] On the facts before the Court, we find that the Applicants have not proved on a balance of probability, that the strike action undertaken on 1st August, 2008 was in compliance with the **Industrial Relations Act.** For this reason the application must fail and is dismissed.

[17] There is no order as to costs.

The members agree.

S. NSIBANDE

ACTING JUDGE