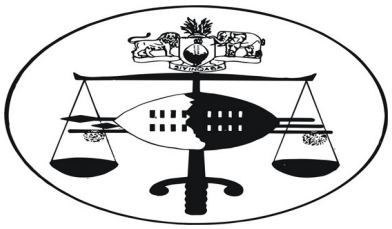

IN THE INDUSTRIAL COURT OF SWAZILAND

EX TEMPORE - JUDGMENT

CASE NO. 209/2012

In the matter between:-

SWAZILAND GOVERNMENT

APPLICANT

And

SWAZILAND NATIONAL ASSOCIATION OF TEACHERS AND 18 OTHERS

RESPONDENTS

Neutral citation: Swaziland Government V Swaziland National Association of Teachers and 18 others (209/2012) [2012] SZIC18 (8th July 2012)

CORAM: **D. MAZIBUKO J**
(Sitting with A. Nkambule & M. Mtetwa
(members of the Court)

Heard: 7th July 2012

Delivered: **8**th July 2012

Due to time constraints this judgment is delivered ex-tempore. The Applicant (Swaziland Government) moved an application under a certificate of urgency claiming relief as follows;

(*1)* *Dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.*

(2) Condoning Applicant's non-compliance with the Rules of Court.

(3) Calling upon the Respondents to appear before this Honourable Court on a date and time to be determined by this Honourable Court to show cause, if any, why they (Respondents) should not be attached and committed to gaol for a period of (30) days for contempt of court.

(4) Declaring that the Notice dated 3rd July 2012 and appointing the 6th of July as the date of the strike action is in conflict with the court order issued on the 20th June 2012 and the provisions of the Industrial Relations Act 2000 (as amended) and therefore null and void and the intended strike be interdicted.

(5) Directing the Royal Swaziland Police to ensure assistance if necessary in the service of the order upon the Respondents.

(6) Costs of the application on attorney and own client scale.

(7) Further and/or alternative relief."

2. There are two (2) main issues that the Court is called upon to determine.

2.1. The Applicant has prayed for an order calling upon the Respondents to show cause if any, why they should not be attached and committed to gaol for a period of thirty days (30) days for contempt of a Court order dated 20th June 2012.

2.2 The Applicant further challenges the strike action called by the 1st Respondent beginning 6th July 2012 and running indefinitely. Inter alia the Applicant seeks to have that strike action;

2.2.1 declared in conflict with the order of Court 20th June 2012.

2.22 declared null and void and further interdicted.

2.3 Ancillary to the two (2) main prayers aforementioned, is a prayer for costs of suit (at attorney and own client scale) and assistance by Royal Swaziland Police in serving the order that will be obtained.

3. The Application is founded on the main affidavit deposited to by Mr Evart Madlopha who is introduced as the Principal Secretary in the Ministry of Public Service. The founding affidavit is supported by eleven (11) other affidavits.

4. The Application is opposed. The answering affidavit of the 1st Respondent is deposed to by madam Sibongile Mazibuko who is the President of the 1st Respondent. There are thirteen (13) other affidavits supporting the answering affidavit. There are nineteen (19) Respondents in all. They are represented by a panel of three (three attorneys) led by Mr M. Mkhwanazi. The Respondents have challenged the matter on the merits and on the points of law.
5. The first point that the Respondents raised was that of *lis pendens.* According to the Respondents the same matter before Court is pending between the same parties on the same cause of action. The Applicant launched an urgent Application before the Industrial Court on the 29th June 2012 in which the Applicant wanted an order for the attachment of the 1st Respondents' members for contempt, and that they be kept in gaol for a period of (30) days. The order which the 1st Respondent and its members are alleged to have acted in contempt of was the one of the 20th June 2012.

6. The Respondents argued that the Applicants are back in Court to seek inter alia a similar order. They have not withdrawn their application of the 29th June 2012. That application is therefore pending before this Court.

7. The Application which the Respondents are referring to was disposed of by order of this Court dated 29th June 2012. A copy of that order was presented in writing to both parties. That application was not postponed or dismissed. The Court did not enrol that application as a result of the failure by the Applicant to follow the rules when presenting it to Court. Though it was brought to Court as an urgent application, the Applicant failed to

follow the peremptory provisions of Rule 15 (2). As a result the Court refused to enrol that application. The Court however indicated that the matter has not been heard on the merits. The Applicant was allowed the liberty to launch a fresh application if it so desires, provided it follows the rules. That application is not pending before Court.

The Applicant was and still is entitled to bring a fresh application to Court as it has done so presently. That point of law is accordingly dismissed.

8. The second point *in limine* which the Respondent raised was that the Applicant has failed to comply with the requirements of an interdict, namely;

   8.1 a clear right,
   8.2 an injury which has commenced or is reasonably apprehended,
   8.3 absence of an adequate alternative relief.

9. The Respondents argued that the Applicant has failed to show that the strike action of the 6th July 2012 is illegal and therefore not protected. According to the Respondent that strike is lawful. The Respondents have taken steps prescribed in the Industrial Relations Act No. 1/2000 (as amended) to prepare for the strike which they called 'indefinite'. The steps referred to by the Respondents are as follows;

9.1 <u>FIRST NOTICE</u>

A notice in terms of section 86 (2) of the Act was issued and dated 12th June 2012. That notice is marked annexure **AG1** and

is attached to the Applicant's founding affidavit in the application that was filed in Court on the 19th June 2012. As far as the Respondents are concerned annexure **AG1** is their first notice for the indefinite strike.

CMAC CERTIFICATE

9.2 According to the Respondents their demand was conciliated upon at CMAC and CMAC failed to resolve their differences. The main issue at CMAC was the Respondent's claim to a 4.5% (four point five percent) cost of living adjustment.
CMAC issued a certificate of unresolved dispute dated 5th March 2012. The certificate was also attached to the Applicant's affidavit in the application filed on the 19th June 2012 marked annexure **AG2**

SECOND NOTICE

9.3 The Respondents issued a second notice in terms of section 86 (7). That notice is dated 3rd July 2012. That notice is attached to the Applicant's founding affidavit in this application marked **AG2.**

BALLOT EXERCISE

9.4 According to the Respondent a ballot exercise was conducted by Swaziland Coalition of Concerned Civic Organizations (SCCCO). The members of the 1st Respondent voted in favour of a strike action. The Respondents referred the

Court to the results of the ballot exercise dated 15th June 2012 annexured to the answering affidavit and marked annexure **D**.

9.5 Annexure **D** is a letter written by the co ordinator of the coalition (SCCCO) dated 15th June 2012 a certain Mr Musa Hlophe. This letter indicates the following information;

9.5.1 That members of the 1st Respondent (SNAT) are 9,505 in all.

9.5.2 Total number of members of SNAT who voted are 4, 506 (47.41%)

9.5.3 The total number of SNAT members who voted Yes are 4,436 (98.45%).

9.5.4 The conclusion drawn was that among the SNAT members who voted on the 14th June 2012, a majority of them (98.45%) voted in favour.

10. The question that the Court is facing is, what exactly did the SNAT members vote in favour of on the 14th June 2012? According to the 1st Respondent (SNAT), their members voted in favour of an indefinite strike action. The Applicant denies that contention. According to the Applicant, the 1st Respondent's members did not vote in favour of the strike action on the 14th June 2012 but voted in favour of a protest action.

11. The Applicant has referred the Court to the contents of annexure **D** which reads as follows;

> "Please find hereunder the results of the Secret Ballot votes by the SNAT Membership in terms of section 86 (5) of the IRA [Industrial Relations Act] 2000 (as amended).

This took place on the 14th [June] 2012 and in preparation for a lawful protest action commencing June 20, 2012".

(Record Page 125)

This letter is addressed to the Labour Advisory Board.

12. According to the Respondents' counsel the author of annexure **D** made a typographical error in writing 'protest action' in the letter. He actually meant strike action. The Respondents' Counsel (Mr Mkhwanazi) submitted that the phrase 'protest action' in annexure **D** is wrong. The correct phrase that was intended by the author of annexure **D** was 'strike action'.

13. The Court has difficulty with Mr Mkhwanzi's argument for several reasons;

13.1 Mr Mkhanwazi is not the author of the annexure **D**. He is therefore not in a position to tell the Court what was in the mind of the author when he wrote annexure **D.** Mr Mkhwanazi's argument on this point is based on speculation and conjecture.

13.2 The letter marked annexure **D** was introduced to Court by the Affidavit of Madam Sibongile Mazibuko in support of her evidence. Madam Mazibuko did not challenge the phrase 'protest action' in annexure **D.** As the Respondents' counsel, Mr Mkhwanazi cannot present an argument which is contrary to or which is not supported by the affidavit of his client.

14. As a result the Court is not certain what the Yes-vote was in the favour of in the ballot exercise of the 14th June 2012. Mr Mkhwanazi argued that the Court should look at the surrounding circumstances and draw a conclusion that the author of annexure **D** made an error in writing 'protest action' . He intended to write 'strike action'. The letter marked annexure **D** speaks for itself. The Court is not entitled to read in annexure **D** that which is not written in it.

15. The Applicant's argument is that the 1st Respondents' (SNAT) members who voted Yes in the ballot exercise of the 14th June 2012 voted in favour of the protest action and not a strike. The SNAT members have not voted in favour of an indefinite strike action. The indefinite strike is therefore illegal.

16. With the aforegoing the Court concludes that the 1st Respondent has failed to satisfy the Court that it has followed all the required steps preceding a lawful strike as aforementioned in the Act. What is more telling is that the coalition (SCCCO) which was mandated to supervise the ballot, sent the results of the ballot exercise (annexure **D**) to the Labour Advisory Board. This conduct was consistent with a ballot for a protest action and not a strike action as provided for in section 40 of the Industrial Relations Act. Mr Mkhwanazi's suggestion (and not the Court's suggestion) to look at the surrounding circumstances leads us to the same conclusion, that the ballot exercise was for a protest action and not a strike action.

17. The Applicant has used annexure **D** as a leverage to support its argument that it has a clear right to apply for an interdict to restrain an unlawful strike action.

18. It was further argued by the Respondents that the Applicant has an alternative remedy other that an interdict. The Respondents' counsel proposed the following available remedies;

18.1 that the Applicant pays the 1st Respondents' members the 4.5% (four point five percent) cost of living adjustment as per their demand,

18.2 that the Applicant should institute criminal proceedings, leading to the arrest and prosecution of the 1st Respondents' members, who are found to have participated in an unlawful strike,

18.3 that the Applicant should institute disciplinary action against those found to have participated in an unlawful strike.

19. The Applicant argued that paying the 4.5% (four point five percent) which is demanded by the 1st Respondent's members is not an alternative remedy within the contemplation of the law. The Court agrees that a requirement that the Applicant should pay the demanded cost of living adjustment does not amount to an alternative remedy as required by the law, but would amount to a surrender on the part of the Applicant. The 1st Respondent's suggestion does not address the issue which the Applicant is dealing with in the application for an interdict.

20. The Applicant further argued that the criminal prosecution as well as a disciplinary action which may be instituted against the 1st Respondent's (SNAT) members is not an alternative remedy.

21. An Alternative remedy or relief is one that will achieve the results intended, that is-to prevent the harm or injury which is of concern to the Applicant.

21.1 A disciplinary action will necessarily follow at a later stage. It has a process of its own that needs to be followed. A disciplinary action cannot stop a strike from taking place or restrain an existing one from continuing.

21.2 A criminal arrest and prosecution may take place after investigation is done by the police. It therefore cannot prevent a strike that is being planned or discontinue a strike that is in process.

22. The Court therefore concludes that the alternative relief or remedy as suggested by the Respondents' counsel does not suffice in preventing the injury or harm which the Applicant has sought to avert by way of an interdict.

23. The 1st Respondents' counsel argued that, another requirement for an interdict was that the Applicant must demonstrate with evidence the potential injury or harm that might or will occur if an interdict is not granted. The Applicant submitted that since the teachers' (SNAT) strike is indefinite it has the effect of depriving students or pupils at school of their right to education. Without adequate education the students or pupils cannot succeed in their academic training. That will negatively affect their ability to enter their job market in the future.

24. The Court finds that the Applicant was entitled to move an urgent application for an interdict to restrain the indefinite strike which commenced 6th July 2012.

25. The Court finds further that the indefinite strike which was called by the 1st Respondent is unlawful for failure to comply with the law relating to the balloting. The Court is not satisfied that the 1st Respondent's members voted in favour of a strike action on the 14th June 2012 or at all.

26. Another point which was raised by the Respondents was that of service of the application papers before Court. The Respondent argued that service was not effected by the deputy Sheriff, but by members of the Swaziland Royal Police. The service was further defective in that certain police officers deposed to affidavits in support of the founding affidavit of the Applicant.

27. The Applicant has not denied that the service was effected on the 1st Respondent by members of the Swaziland Royal Police Service. What is not clear from the Respondents is whether the same police officers who served the Court papers are the deponents in the supporting affidavits. The Respondents' counsel did not make that point clear yet it is an important point in support of their argument.

28. It is irregular and improper for a party who has an interest in a matter before Court to proceed to serve the Court papers on the defendants or respondents, which papers institute legal action either by way of summons or application. It is therefore proper that service of Court papers commencing legal action be effected by the sheriff or his deputy for the purpose of transparency, neutrality and fairness in that service.

29. It the Applicant had appeared in Court on the 6th July 2012 without any appearance by or for the Respondents this Court would have refused to enrol this matter. This Court would have ordered service on the Respondents before the matter is heard. However the defect in the service was cured by the appearance of the Respondents' counsel Mr Mkhwanazi accompanied by 2 (two) attorneys assisting him. Mr Mkhwanzi indicated to the Court that he had instructions to oppose matter. He asked for time to prepare and to complete drafting papers in opposition since service had been effected late the previous night. Time was given. After a delay of about 2 (two) hours the Respondents filed a comprehensive affidavit and supporting affidavits. There was a no point in the Court insisting on proper service as the parties were adequately represented and ready to proceed.

30. It transpired that service was effected on the Respondents' attorney Mr Mkhwanazi and also on the 1st Respondent.
Service of Court papers is of vital importance as it determines whether or not the Respondents have been informed of the proceedings and have been given sufficient time to draft their papers and further prepare their arguments (defence). Though the matter had been brought to Court on the 6th July 2012 as an urgent application, it was postponed to the 7th July 2012 at 10.00 a.m. That gave both parties time to prepare for argument. It is the Court's finding that though service is defective on the other Respondents, no prejudice or miscarriage of justice has occurred. The Court is satisfied that the Respondents filed their papers and were given sufficient time to prepare their argument.

31. The Court is satisfied that a case has been made for prayer 4 namely, for an order interdicting the indefinite strike.

32. In prayer 3 the Applicants have asked for a rule nisi calling upon the Respondents to show cause why they should not be attached for contempt of the Order of Court of the 20th June 2012 and be committed to gaol for 30 days.

33. We are persuaded that justice and fairness require that the Respondents be properly served with the Court papers on a matter where their arrest and committal to gaol is sought. The Respondents should also be given sufficient time to draft and file their affidavits in response to the allegations made against them. It is noted by Court that some of the Respondents have already filed affidavits before Court in which they resist the prayer for arrest and committal. Others have not filed at all. There is no proof that they were served. That may explain the reason they did not file their affidavits.

34. With the aforegoing the Court makes the following orders,

    34.1 The strike action, also known as an indefinite strike action which is being carried out by the 1st Respondents and its members commencing 6th July 2012 is hereby declared unlawful and interdicted.

    34.2 The Applicant is directed to serve the application papers on the 2nd to 19th Respondents and any other Respondent whom the Applicant may wish to join, not later that 24th July 2012.

34.3 The Respondents are directed to file in Court their affidavits if any, and serve same on Applicant's attorneys not later that 13th August 2012. The affidavits that are already filed in Court will be considered at the hearing of the matter.

34.4 The matter is postponed to 20th August 2012 for a call.

34.5 Cost will be costs in the cause.

Members agree.

D. MAZIBUKO
INDUSTRIAL COURT – JUDGE

For Applicant : M.J. Dlamini (Attorney General)
Appearing with M. Khumalo and T. Vilakati.

For Respondent : M. Mkhwanazi
Appearing with S. Mnisi and S. Gumedze