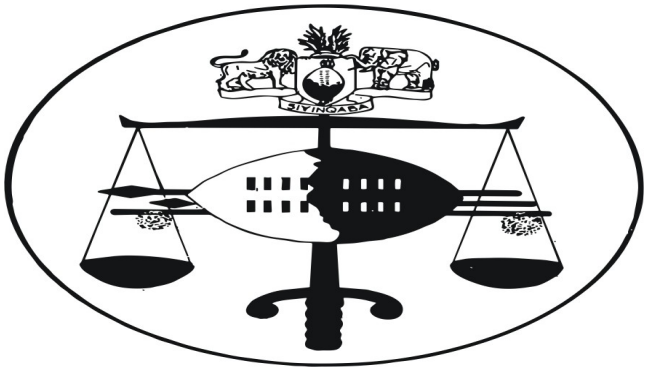

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGEMENT**

**CASE NO. 25/2012**

In the matter between:-

**SWAZILAND GOVERNMENT** **APPLICANT**

And

**SWAZILAND NURSES ASSOCIATION** **1ST RESPONDENT**

**SWAZILAND NATIONAL ASSOCIATION OF CIVIL SERVANTS** **2ND RESPONDENT**

**Neutral citation**: *Swaziland Government v Swaziland Nurses association and another (25/2012) [2012] SZIC 25 (18 April 2012)*

**CORAM:**

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| **THULANI A. DLAMINI** | **:** | **ACTING JUDGE** |
| **D. NHLENGETFWA** | **:** | **MEMBER** |
| **P. MAMBA** | **:** | **MEMBER** |
| **Heard** | **:** | **14 APRIL 2012** |
| **Delivered** | **:** | **18 APRIL 2012** |

*Summary : Labour law – Industrial relations – Applicability of section 18 of the Occupational Safety and Health Act – the right of Employees to remove themselves from danger - reasonable Justification – imminent and serious risk – Section 91 of the Industrial Relations Act – essential services – right to strike.*

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[1] The Applicant has applied to this court for a an order declaring a strike action called by the Respondents on the 27th January, 2012, as not being in conformity with the Industrial Relations Act of 2000 and therefore unlawful. The Applicant further seeks an order interdicting and restraining the Respondents from embarking on or going on with, promoting, encouraging, supporting or participating in the strike action called by the Respondents.

[2] When the matter was first called before court on 01st February 2012, it was postponed to the next day to allow the Respondents to file their papers in opposition. Thereafter it was subsequently postponed to the 06th to allow parties to enter into settlement negotiations. On the 07th February the parties approached court with a settlement agreement which they sought to be made an order of court. Indeed this court endorsed their settlement agreement as an order of court.

[3] The settlement agreement provided inter alia as follows;

- That the Respondents agree to return to work with effect from the 08th February, 2012.

- That the Applicant undertakes to put into effect the action plan as reflected in annexure 'A' within the time period agreed therein.
- That the Applicant would, within a period of two (2) months, address the following issues;
    1. secure a new ambulance
    2. sluice machine
    3. obtain expert advice about the installation of U.V. lights, coughing booths and on the flow of dead bodies.
- In the meantime the Applicant was to immediately;

a) swap and/or obtain a partitioned ambulance from another hospital.

b) install the existing sluice machine;

c) consult the workers representatives on finalizing of the draft policies and guidelines.

- The Applicant agreed that members of the respondents would not be forced to wash the current dirty linen with their hands.
- The matter was removed from the roll with liberty to each of the parties to reinstate same with notice to the other parties.

[5] As per the agreement recorded above, members of the 1st and 2nd Respondents subsequently returned to work and continued rendering their services at the TB hospital. However they were again to stop rendering their services on the 29th March, 2012, an issue I will address later on this in this judgment.

[6] It should be pointed out herein that that both Respondents vehemently opposed the application by the Swaziland Government

and had filed the necessary papers in opposition thereto wherein they raised some preliminary points of law and further pleaded to the merits.

[7] The case of the Applicant is as follows;

7.1 Since November 2011, the Applicant, through the management of the TB Hospital, has been engaged in a series of meetings with members of the Respondents pertaining issues of transport, staff feeding, maintenance, welfare and safety.

7.2 Paramount in these meetings between the management of the TB Hospital and the members of the Respondents was the issue of the workers safety.

7.3 Steven Shongwe, the deponent to the Applicant's founding affidavit, contends that the issue of the worker's safety in so far as infection control is concerned is well taken care of and in accordance with the World Health Organization's policy on TB infection control.

7.4 Due to concerns by the staff members of the TB Hospital on their safety at the institution, Shongwe in his capacity as the Principal Secretary in the Ministry of Health convened an extra ordinary meeting with the relevant stakeholders where all the issues were discussed and an action plan to resolve same was drafted. In this regard the University Research Council was approached and immediately pledged to upgrade and fix the maintenance problems.

7.5 On 26 January 2012, management of the Hospital held a meeting with members of the Respondents, apparently with a view of giving feed back on proposed interventions by the Ministry of Health in conjunction with its development partners. It transpired at this meeting that members of the Respondents were to meet on the next day where a resolution was to be taken on whether or not to proceed with a strike action was to be taken.

7.6 Indeed on the 27th January 2012, such resolution was taken and in pursuance of same members of the Respondents wrote a letter and addressed it to the Principal Secretary wherein they advised that nurses at the Hospital had resolved to remove themselves from the hospital.

7.7 Despite pleading with the nurses to bear with Government and return to their duty stations whilst Government endeavored to address their concerns, they did not do so hence the present application before court.

7.8 The Principal Secretary contends that members of the Respondents form part of the essential services category and as such cannot therefore engage in a strike action, especially because the Industrial Relations Act stipulates procedure to be followed where there are disputes in this category of employees.

[8] As pointed out afore, both Respondents oppose the application by the Swaziland Government and in that regard filed the necessary papers in opposition thereto. For the 1st Respondent Bheki Mamba filed the answering affidavit in his capacity as President of the Swaziland Nurses Association. At the very outset he objects to the jurisdiction of this court arguing that members of the 1st

Respondent withdrew themselves from the TB Hospital complaining about their safety. As such and in terms of sections 18 (2) and (4) and 39 of the Occupational Safety and Health Act of 2001, this court has no jurisdiction to determine the safety status of the TB Hospital and grant the prayers sought.

[9] In the merits, the case of the 1st Respondent is as follows;

9.1 The 1st Respondent through its President confirms the meetings between the parties and goes on to mention that at these meetings management of the hospital acknowledged the existence of the safety deficiencies. He goes on to mention that there are no air gauges and extractor fans as well as broken windows and doors.

9.2 Bheki Mamba vehemently denies that the nurses are on strike and contends instead that in terms of section 18 (2) of the Occupational Safety and Health Act the nurses are perfectly entitled to remove themselves from a place they deem hazardous.

9.3 Further to the afore going, Mamba also contends that the Industrial Relations Act 2000 (as amended) is not applicable in this matter having regard to the provisions of section 18 (2) of the Occupational Safety and Health Act.

9.4 He submits as well that the Applicant is not entitled to the remedy it seeks and accordingly prays for a dismissal of the application with costs.

[10] The President of the 2nd Respondent, Quinton Dlamini filed the affidavit in support of the Swaziland National Association of Civil Servants' case. As a preliminary point, he argues that the Applicant has failed to satisfy the requirements of an interdict in that it does not have a clear right to the relief sought or establish an injury actually committed. This contention is based on the argument also made by the 1st Respondent, to the effect that the nurses actions are permissible in law as they fall within the ambit of section 18 (2) of the Occupational Safety and Health Act 9/2001.

[11] In the merits, the case of the 2nd Respondent is as follows;

11.1 As a starting point, Dlamini admits that the Applicant, through management of the TB Hospital, has been engaged in a series of meetings with staff unions (the Respondents herein) deliberating issues of transport, staff feeding, maintenance, welfare and safety. He goes on in fact to point out that these meetings had started earlier than November 2011, as asserted by the Applicant.

11.2 Dlamini further confirms the meeting between the parties held on 19 January 2012, whereat the safety of the nurses was deliberated, specially the transmission and spread of MDX XDR TB.
11.3 Dlamini also confirms the assertion by the Principal Secretary that on 26 January 2012, management of the Hospital held a meeting with members of the Respondents, apparently with a view of giving feed back on proposed interventions by the Ministry of Health in conjunction with its development partners. However he disputes that the nurses were to engage in a strike action on the next day, instead he states that the nurses

'indicated that they will invoke their rights' in terms of the Occupational Safety and Health Act No.9/2001 should their problems not be attended to.

11.4 Like the President of the 1st Respondent, he also prays for a dismissal of the present application before court, and with costs.

[12] In support of the Applicant's case Vilakati argued that in the present application, the Swaziland Government seeks an order declaring the actions of the Respondents as not being in conformity with section 18 (2) of the Occupational Safety and Health Act, and as such constitute an unlawful strike.

[13] He pointed out that the application is not for the declaration of the hospital as a health hazard but rather to interdict what he calls 'unlawful conduct' of the nurses. Sections 18 (2) and (4) and 39 of the Occupational Safety and Health Act do not oust the jurisdiction of this court, Vilakati further argued. As such, he explained, the preliminary points to the effect that this court has no jurisdiction on this matter and that the Applicant has failed to satisfy the requirements of an interdict are misguided since the Applicant seeks an order to prevent the 'unlawful strike'.

[14] Vilakati further argued that in terms of section 18 (2) of the Occupational Act, the employees can only remove themselves from danger and not because of a hazardous situation. In this regard he referred the court to the letter of 27 January 2012, in which the nurses communicated to their employer their resolution to 'remove themselves from the hazardous hospital'. He argued therefore that the nurses have a right only to remove themselves from danger and not from a hazard. What Vilakati seems not to appreciate herein is that in fact the word hazard is a synonym of

the word danger. The use of the word ‘hazard’ by the employees in their letter of 27 January 2012, has little effect on their intentions in terms of the relevant section. They did not have to specifically use the word ‘danger’ to advise the employer of their intention. All they needed do was to convey their intention of removing themselves in terms of section 18 (2).

[15] Vilakati went on to submit that for section 18 of the Occupational Safety and Health Act to apply in casu, there must be evidence to suggest that the hospital poses a imminent and serious risk to the health and safety of the nurses. In this matter, the allegation is that the situation at the hospital has persisted since 2011 and the Respondents have continued to render their services, whilst having demanded that the employer attends to their safety concerns. He therefore argues that for them to continue rendering their services in the alleged hazardous workplace on the one hand whilst giving government time to work on their demand on the other then means that section 18 (2) is no longer applicable.

[16] For the above proposition the court was referred to the South African case of ***National Union of Mine Workers & Others V Chrober Slate (PTY) LTD 2008 (3) BLLR 287 (LC).*** The principle laid down in that case is to the effect that for provisions of the withdrawal of services clause to obtain, there must be evidence to suggest that the workplace posed serious danger to health and safety. Further to that, there must also be evidence to show that the employees left the workplace due to the danger. So that if the employees remain in the alleged dangerous workplace, this then raises serious doubts about the serious danger aspect. The conduct of the nurses of continuing to work in the hospital, after their demands, defeats the argument that it is poses

‘imminent and serious risk’ to their safety and health, so argued Vilakati.

[17] Further argument by counsel for the Applicant was to the effect that the provisions of the Occupational Safety and Health Act cannot be considered in isolation to the Industrial Relations Act. They have to be considered in conjunction with the relevant provisions in the Industrial Relations Act 2000 (as amended). In this regard he referred the court specifically to the provisions of sections 91 and 96 of the Industrial Relations Act. Section 91 prohibits strike or lockout action by employees and employers engaged in an essential service. On the other hand section 96 lays down the procedure to be followed where there is a dispute between the parties. Counsel’s argument herein was to the effect that since there is a dispute between the parties with regard to the condition in the hospital; the employees alleging that the hospital is a hazard and the employer alleging that there are challenges, then the matter ought to have been dealt with in accordance with the provisions of section 96.

[18] Mr. Vilakati also brought to the fore the issue of the agreement of settlement which was made an order of this court by consent of the parties on the 07th February 2012. In terms of that order, the nurses agreed to go back to work whilst Government undertook to address their demands. Vilakati’s argument herein is that by agreeing to return to work in the same allegedly hazardous hospital further proves that indeed the danger alleged is not ‘imminent and serious’. If anything, he further argued, the Respondents have breached the court order in that whilst the matter was before court, they decided to again remove

themselves from their workplace on 29 March 2012, thereby impairing the dignity of this court.

[19] Mr. Madzinane, for the 1st Respondent, started off his arguments by pointing out that the Applicant in this matter seeks an order declaring an alleged 'strike' by the Respondents unlawful in that same is not in conformity with provisions of the Industrial Relations Act. He pointed out that the Applicant is very much aware that in fact the Respondents are not on strike but rather withdrew their services in terms of section 18 (2) of the Occupational Safety and Health Act. He further referred the court to paragraphs and annexures in the book of pleadings in which he submitted it was succinctly clear that the nurses had 'removed' themselves as opposed to being engaged in a 'strike'. As such, he submitted, this court cannot grant the prayers the Government seeks as that would amount to determining the safety of the hospital.

[20] Madzinane also addressed the court on the settlement agreement which was made an order of court. He submitted that when the Swaziland Government failed to carry out their end of the bargain in terms of the settlement agreement, it then fell away. In effect he was arguing that the court order then became a nullity because of the failure of the Government to perform its obligations in terms thereof. To put issues into perspective, he submitted that the settlement agreement, to the extent that it takes away the rights of the Respondents is void *ab initio.* He also pointed out that in terms of section 9 (1) of the Occupational Safety and Health Act the employer is duty bound to ensure the safety and health of all employees during employment by securing safe and healthy

working conditions in that employer's undertaking, and the Government was no exception to this.

[21] In relation to the applicability of section 91 of the Industrial Relations Act, Madzinane argued that since the employees are invoking section 18 (2), then it follows that the provisions of section 91 for essential services do not apply.

[22] Mr. Lukhele in support of the 2nd Respondent's case argued that the Applicant has no clear right to the relief it seeks because the action of the nurses is permissible in law as they fall within the ambit of section 18 (2) of the Occupational Safety and Health Act. In fact, the Government does have a remedy to this debacle, he submitted. And in this regard Lukhele referred the court to section 19 of the Occupational Safety and Health Act which requires the Minister to set up a tripartite advisory technical committee for occupational safety and health. This court cannot therefore usurp the powers of the Minister, so he argued. Like his co-counsel, Lukhele also argued that the Applicant is not entitled to the relief it seeks because the nurses are not engaged in a strike action. Instead they are merely asserting their rights as expounded by the Occupational Safety and Health Act. He then referred the court to the judgement of this court in the case of ***Swaziland Government V Dr. Augustine Ezeogue & Others IC case no.474/2006*** where Nkonyane J stated at paragraph 30 thereof that: 'where the conduct of the employer is unlawful and is the cause of the employee not rendering his service, it cannot be said that the employee is on strike'. He maintained that when the nurses withdrew their services on 27 January 2012, the risk was serious and imminent. Interestingly Lukhele suggested to the court that it should not even consider the second withdrawal by

the nurses arguing that the reason the matter was before court was because of the first withdrawal. He even submitted that since this issue was not in the pleadings, we need not delve into it.

[23] For a proper determination of the issues entailing in this matter we consider it of paramount importance that the following legal questions have to be considered; these relate to:

- The applicability of section 18 (2) of the Occupational Safety and Health Act.
- Whether the conduct of the nurses in withdrawing their services amounts to a strike.
- The status of the settlement agreement which was made an order of this court.

**APPLICABILITY OF SECTION 18 (2) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT**

[24] Section 18 (2) is crafted as follows;

***"An employee shall have the right to remove himself or herself from danger when such an employee has reasonable justification to believe there is <u>imminent and serious risk</u> to the safety and health of that employee."*** (Court's emphasis)

[25] This section of the Act gives employees the right to immediately remove themselves should they have a reasonable justification to believe that there is 'imminent and serious risk' to their a) safety and b) health.

[26] The concise oxford dictionary, 9th edition, defines the word 'imminent' to mean 'impending; about to happen', and it qualifies this definition by fore stating as follows (of an event, esp. danger).

[27] In essence, for the provisions of section 18 (2) to obtain the inquiry is two pronged. There must be sufficient evidence to suggest that there is imminent and serious risk to the health and safety of that employee. Further to this, there must also be evidence to show that the employee immediately removed himself or herself due to that risk. It should follow that employees have a right to remove themselves immediately they perceive their workplace to pose imminent and serious danger to their safety and health.

[28] In this matter before us the evidence is that as way back as 7 September 2011 the 1st Respondent had written a letter in which it apparently raised concerns regarding certain challenges faced by the TB hospital and demanded that same be addressed. A Dr. Mohammed Kamal responded to that letter wherein he advised the 1st Respondent that management was working towards addressing the challenges highlighted and further appealed to the 1st Respondent to 'remain calm and patient' as they worked towards finding ways of addressing the 'problems/challenges'. (see: pages 68-72 of book of pleadings).

[29] Further to this, at paragraph 8 of the founding affidavit the Principal Secretary in the Ministry of Health states therein as follows;

> *"I state that since November, 2011, the Applicant through the Management of the National TB Hospital has been*

*engaged in a series of meetings with the Staff Unions, Representatives of Respondents pertaining issues of transport, staff feeding, maintenance, welfare and safety"*

[30] Both Bheki Mamba and Quinton Dlamini, presidents of the 1st and 2nd Respondents respectively, admit this assertion by the Principal Secretary. In fact Dlamini deposes as follows in his answering affidavit;

*"I admit the allegations herein, but further state that the series of meetings between the Applicant and Respondents members had started earlier as can be seen in Annexures S2 and S2 attached hereto"*

[31] Clearly the fore going show that the concerns on the safety and health of the employees were being deliberated between the parties. And it is a fact that the nurses remained at the hospital and continued rendering their services whilst Government undertook to address their concerns. This then raises serious doubts about the imminent and serious risk aspect when the nurses subsequently decided to remove themselves.

[32] Perhaps they could be given the benefit of doubt to say when they subsequently removed themselves on the 27th January 2012, the danger, which all along had not been so severe, had then been compounded and was now imminent and serious. However their second removal on the 29th March 2012 (which this court has taken judicial notice of) cannot be ignored. This is where their case falters.

[33] Esther Van Kerken in her article '*The right of an employee to stop work in dangerous circumstances at the workplace: An*

*international perspective on South African law* (1997) 18 ILJ 1198 states as follows at page 1211;

> ***"Allowing a worker to stop work merely because the work poses serious danger, without further qualification, leaves the door wide open for abuse. <u>It is submitted that the right to stop work should arise only if there is a serious danger to safety or health which is imminent and cannot be avoided except by stopping work</u>…"*** (Court's emphasis)

[34] This cannot be said in the circumstances of the present case. As pointed out earlier, the nurses in this matter have been constantly making demands to the Government, some of which related to their safety in the TB hospital. They even picketed on these issues. We note as well that even before they decided to remove themselves they decided to meet where that resolution was taken. This is not what is anticipated by section 18 (2) of the Occupational Safety and Health Act. Where the risk is imminent and serious the only remedy available to that employee is to stop work. Not to make demands.

[35] Danger in the workplace is always present. Although an employer has a duty to provide safe working conditions for its employees, absolute safety is not guaranteed. And the words of Tindall, AJP as he then was in the case of ***Barker v Union Government 1930 TPD 120 at 129*** are apposite in this respect. The learned Judge had this to say in his judgement;

> "***Absolute safety under all circumstances is not guaranteed to the labourer by the contract of***

***employment. The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best possible methods for its operation, in order to relieve himself from responsibility. He is only required to furnish instrumentalities that are reasonably and ordinarily safe and well adapted to the purpose for which they are designed'***

[36] It is also worth mentioning that internationally the right to stop work is limited to circumstances where the danger is serious and constitutes an imminent threat to the employee's life or health (see ILO Convention 155).

[37] It is accordingly a finding of this court that section 18 (2) of the Occupational Safety and Health Act is not applicable to the present case. The reliance by the Respondents thereon as a basis for their removal on the 27th January 2012 and any subsequent dates thereafter clearly amounts to an abuse of this legislation which this court cannot condone.

**DOES THE CONDUCT OF THE NURSES IN WITHDRAWING THEIR SERVICES AMOUNT TO A STRIKE?**

[38] This question can best be answered with the assistance of the interpretation section in the Industrial Relations Act 2000 (as amended). Under section 2 of this Act, the word strike is defined to mean:

*"…a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any*

*other concerted action on their part designed to restrict their output of work against their employer, if such action is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand concerned with the employer-employee relationship."*

[39] The evidence before this court is that since the last quarter of the year 2011, the nurses, through their union, have been persistently making a litany of demands. Amongst these was that of their safety. Seeing that the Government was moving at a snail's pace in addressing the demands they met on 27 January 2012, where they resolved that they 'shall remove themselves' from the hazardous hospital. They purported to do this under section 18 (2) of the Occupational Safety and Health Act, 2001, and we have already made a finding that their conduct was an abuse of this section of the legislation.

[40] That being the case, and having regard to the definition of the word strike in the Industrial Relations Act, then it means that their complete stoppage of work on 27 January 2012, was nothing but a strike action. This we say taking into account that this was done following their demands, and on noting that Government seemed not to be appreciating same they resolved on the work stoppage with a view of inducing compliance with the demands. We are mindful of the authority of the ***Swaziland Government V Dr. Augustine Ezeogu & others*** case. However, that case is distinguishable from the present case before us.

[41] What the nurses seemed to conveniently overlook was that under section 93 (9) of the Industrial Relations Act, they are classified as

an essential service. Further to this and in terms section 91, they are prohibited from engaging in a strike action. Section 96 of the same Industrial Relations Act provides for procedure in dealing with disputes in essential services.

[42] Judge President Nderi Nduma, as he then was, had this to say in the case of ***The Board of Trustees of The Swaziland Nazarene Health Institutions V Dr Lukotji Tshibungu & Others case no. 400/2003*** *at paragraph 7;*

> ***"Where a fundamental breach of the terms of the contract by the employer is alleged, the employees are entitled to an urgent remedy by the Industrial Court upon proof of such breach. Such remedy is more readily available in case of employees in 'essential service' because they have a statutory duty to serve the public"*** (Court's emphasis).

[43] The above assertion by the then Judge President is sufficient authority for the proposition that essential services employees, such as the present Respondents before us, are not without remedy. Their matters will not be treated like the rest of the disputes which come before this court for adjudication day in and day out. This we assert also taking into account that in terms of section 8 (1) of the Occupational Safety and Health Act nurses have a duty not to 'do anything that endangers or is likely to endanger the safety, health or welfare of the that person or any other person'

**STATUS OF THE SETTLEMENT AGREEMENT WHICH WAS MADE AN ORDER OF COURT.**

[44] The case of the present Respondents is further compounded by their conduct of withdrawing their services at the second instance on 29 March 2012. We cannot turn a blind eye to such wanton disregard of the authority and dignity of this court. When the nurses withdrew their services after the settlement agreement had been made an order of this court, that agreement had the full force and effect of the order of court it was. The court was seized with the matter. So that if any of the parties were aggrieved they had to immediately approach this court for an urgent remedy. The actions of the Respondents display a conduct that not only erodes the authority of this court but further undermines the confidence and administration of justice in this jurisdiction. And this court will not, under any circumstances, countenance such conduct.

[45] The Applicant itself is also not blameless. Had it sought to urgently attend to its obligations we would not be where we are today. The health and safety of employees is an issue too important to leave to a process which is frequently dominated by political interplay and politicking. Government needs to do more by coming up with policies which will give effect to broad principles on this issue with the aim of achieving the necessary balancing of the interest of all parties, as is required by public policy and public interest.

[46] The powers of this court as expounded in the Industrial Relations Act are to hear, determine and grant appropriate relief in respect of any matter which may come before it. With these powers in mind we make the following orders;

***a) The points in limine raised by the Respondents on the jurisdiction of this court and on the failure of the***

***Applicant to satisfy the requirements of an interdict are hereby dismissed.***

***b) The strike action called by the Respondents under the guise of section 18 (2) of the Occupational Safety and Health Act on the 27th January 2012 is hereby declared not to be in conformity with the Industrial Relations Act 2000, as amended, and therefore unlawful.***

***c) The Respondents and their members or the Applicant's employees are hereby interdicted and restrained from embarking on or going on with, promoting, encouraging, supporting or participating in the strike action called by the Respondents on 27 January 2012 or any subsequent date thereafter.***

***d) The Respondents are hereby ordered and directed to return to work with effect from the 19th April 2012.***

***e) The Minister of Health is hereby ordered and directed to forthwith undertake the process of setting up the Tripartite Advisory Technical Committee in terms of Section 19 of the Occupational Safety and Health Act to action the safety and health challenges obtaining at the TB Hospital.***

***f) No order as to costs.***

The members agree.

**DELIVERED IN OPEN COURT ON THIS 18TH DAY OF APRIL 2012.**

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**T. A. DLAMINI**

**ACTING JUDGE – INDUSTRIAL COURT**

***For Applicant : Mr. T. Vilakati***

***For 1st Respondent : Mr. S. Madzinane***

***For 2nd Respondent : Mr. A.M. Lukhele***