(12)

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2064/95

In the matter between:

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION — Applicant

and

NATEX SWAZILAND LIMITED — Respondent

CORAM: S.W. Sapire A.J.
FOR APPLICANT Mr. Shabangu
FOR RESPONDENT Mr. Flynn

Judgment
(15/12/95)

The applicant, the Swaziland Manufacturing and Allied Workers Union, which is duly registered with its Head Office at 2nd Floor, Sikhulile House, Masalesikhundleni Street, Manzini has applied on Notice of Motion for an order in the following terms:-

"(a) That the applicant's members are entitled to payment of their wages for the period during which the respondent has placed them on a short time working programme later labelled by the respondent as lay-off times.

"(b) Ordering the respondent to pay to the applicant's members affected by the aforesaid short time working programme their

wages and other benefits in accordance with their conditions of service.

"(c) That the aforesaid wages be paid with interest at the rate of nine percent per annum calculated from the date on which such wages became due to date of payment.

"(d) Costs of this application.

"(e) Further and/or alternative relief."

In support of this application, a founding affidavit has been attested by Mduduzi Patrick Khumalo, an employee of the respondent and a member of the branch committee of the applicant Union.

I am satisfied that the applicant has properly instructed its attorney by whom it is represented and the question of Khumalo's authority to "make this affidavit on behalf of the applicant" is not an issue in these proceedings.

The applicant is in terms of the Industrial Relations Act (THE ACT) and a recognition agreement between itself and the respondent, concluded as contemplated in the Act the collective employee representative of those of the respondent's employees on whose behalf this application is brought.

The relief sought by applicant arises from action taken by the respondent to curtail production. All employees were advised on the 27th July 1995 in what appears to be a circular memorandum of the respondent's intention to introduce "short time working".

In this memorandum, the respondent told its employees that South Africa had been flooded with cheap imports, and that the company had been unable to maintain the level of its yarn order book. In order to preserve the company's cash resources, Management had determined to:

1. Cut all overtime except that which has been prescribed by negotiation or vital for operational purposes.

2. Cut all casual labour.

3. Cut all new employment.

Other austerity measures were to be introduced which are of no significance in this application.

The workers were also advised that although shift patterns were to stay the same, the production shifts in Weaving and Finishing Divisions would not work Saturdays or Sundays for consecutive weekends commencing on Saturday the 12th August and ending on the 24th of September.

The memorandum also informed those to whom it was addressed that the Management regretted having to institute these unwelcome decisions, and an undertaking was given to lift short time working as soon as it is possible to do so.

On the 25th August 1995, the applicant delivered a memorandum to the respondent's Management in which the following points were made:

1. The applicant's members who were on short time presented themselves on the 19th August 1995 only to find that their clocking cards had been removed.

2. The applicant's members were still willing to come to work in the succeeding weekends.

3. "If Management can actually change her mind over the short time issue, we are even more ready to come."

4. Great losses incurred during the short time period would be claimed.

The memorandum required Management's response before the end of the day.

On the 29th August 1995, the respondent replied to the memorandum of the 25th August 1995 and pointed out that the points made therein had

been dealt with both in meetings on the complex and at the Labour Office in Manzini. The Management observed that the workers did not want to recognise that the profound effect, that the lack of fabric orders has had on the company's ability to operate on a continuous basis in the Weaving and Finishing Divisions and had necessitated a lay-off situation having to be implemented whether they liked it or not. Here I pause to remark on the significant change made in the use of words to describe the curtailment of working hours. In the first letter the words "short time" were used whereas in the second letter the words "lay-off" were used.

Management stressed that the workers were aware that it was not Management's wish to cut employees wage packets unnecessarily, but for the sake of the company and its employees the sooner the situation was restored to normality the better it would be for everyone. The notice concluded in the following terms: "However, you were given sufficient notice of the situation and of Management's intentions in the matter and any claims for alleged shortages in wage packets that cannot be substantiated will be rejected."

It will be observed that until this last memorandum, the situation was described in terms of "short time working", but in the memorandum of the 29th August, Management claims that a "lay-off" had been effected.

The points in dispute were brought into sharp focus when the applicant's attorney wrote to the Managing Director of the respondent. After advising that he acted for the applicant, the applicant's attorney stated that the management of the respondent had placed a number of their employees on a "short time" working programme with the aim on management's part that the employees would not be paid for the time that the management has placed on short time. This, it was said was a breach of the contracts of employment of the workers concerned. The workers tendered their services and requested Management to inform the branch committee of the acceptance or rejection before 5.00 p.m. on Thursday 31st August 1995. The letter went on to warn that if Management did not accept this tender, proceedings would be taken to recover the workers' wages for the period that they had been placed on short time.

To this the respondent replied by saying that they categorically refuted that certain of the union members who are also its employees had been placed on what the union described as a short time working programme. Management then went on to suggest that it was the lay-off provisions of the current wages order which was applicable. In the light of this management was of the view that no question of the tendering of services arose. Management then referred the applicant to its attorneys in the event of the latter wishing to litigate on the matter.

In terms of Legal Notice No. 60 of 1994 promulgated in terms of the Wages Act of 1964, regulations relating to wages in the Manufacturing and Processing Industry were made operative. These it was common cause are applicable to the respondent's employees on whose behalf the applicant seeks relief. Regulation 13 and regulation 17 are apposite. The former provides for "short time" and the latter for "lay-off." Regulation 13 reads as follows:

"(1) If an employer finds it necessary for reasons beyond his control to employ an employee on short time, he may do so subject to the Labour Commissioner consenting in writing to such an arrangement, and on the understanding that the employer intends resuming full time working within three weeks.

(2) Where an employee has been placed on short time under sub-regulation (1) he shall be paid not less than fifty percent of his weekly wages where he is employed for periods which, in aggregate, are equivalent to or less than fifty percent of his normal weekly hours of work.

(3) No reduction shall be made in an employee's earnings where the employee has been placed on short time,and works in aggregate, more than fifty percent of his normal weekly hours of work during any week he has been placed on short time."

Regulations 17 reads as follows:-

"(1) Due to circumstances beyond his control an employer may lay-off employees for up to fourteen working days, without pay provided

that at the end of this period he shall either re-employ the employees in their original jobs, or give them notice of termination of service in accordance with the provisions of the Employment Act, 1980.

(2) During the period of any lay-off, the employer shall not engage other employees to replace the employees he has laid off.

(3) The employer shall give:-

(a) a permanent employee fourteen days' notice before the lay-off.

(b) a seasonal employee twenty-four hours' notice before the lay-off.

(4) An employer may apply for a temporary exemption for a specified period according to the circumstances of the enterprise, from the application of regulation 17(3)(a), after consultation with the employees organisation, for a reduction of the period of notice to be given to employees, before lay-off."

It will be seen that the two regulations envisage different situations.

There is no definition of the words short time or lay-off in the regulations. The proper course therefore is to interpret the words in their context in accordance with the normal dictionary meaning.

That the employer used the words "short time" in its original memorandum does not necessarily describe the category of work curtailment introduced by the respondent. In order to determine the question in issue, the actual steps taken by the respondent must be compared with the provisions of the respective regulation.

By the use of the words "short time" in its original memorandum, the respondent has perhaps given rise to the present dispute.

In terms of regulation 13 "short time" may be introduced subject to the Labour Commissioner's consent in writing to such an arrangement. No such consent, it is common cause was ever sought or obtained, and no objection was taken on this ground. If the respondent considered that it was acting in terms of Regulation 13, it would surely have observed the requirements of the Regulation and sought the Labour Commissioner's consent.

Moreover short time may be introduced only on the understanding that the employer intends resuming full working hours within three weeks. There was clearly no such intention as the arrangements of which the workers were notified was that Saturday and Sunday shifts would not be worked for a period of seven weeks. It is clear therefore that notwithstanding the use of the words "short time" in the original notification, the respondent was not acting in terms of Regulation 13.

The actual arrangements made by the respondent on the other hand are in accordance with Regulation 17 which allows the employer to lay-off employees for up to fourteen working days without pay. The regulation does not require that the fourteen days be consecutive but does require that at the end of the period the employer is obliged to re-employ the employees in their original jobs, or give them notice of termination of services in accordance with the provisions of the Employment Act of 1980. The number of days affected was fourteen, i.e. two days per week for seven weeks. It is surely not coincidence that this period of fourteen days is the period specified in Regulation 17.

If a short time situation obtained, the respondent would be obliged to make payment to its employees in accordance with the provisions of the regulation. If on the other hand the employees had been laid off, they are not entitled to pay. Having regard to the structure of the regulations, it appears that the correct interpretation of "short time" is a reduction of a number of hours per day to be worked by an employee while still obliging the employee to work on those days which in terms of his contract of employment are working days. A lay-off situation on the other hand refers to a situation where one or more full days of employment are declared to be non-working days, on which

the workers involved are not required to present themselves for service. The steps taken by the respondent in my view fall in the latter category and the workers were laid off in terms of regulation 17 and not placed on short time in terms of Regulations 13.

It follows that the applicant is not entitled to the relief claimed and the application is dismissed with costs.

S.W. SAPIRE
ACTING JUDGE