IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 323/17**

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (SNAT)	**1st** Applicant
SWAZILAND NATIONAL ASSOCIATION OF GOVERNMENT ACCOUNTING PERSONNEL (SNAGAP)	2nd Applicant
SWAZILAND NURSES ASSOCIATION (SNA)	3rd Applicant
THE NATIONAL PUBLIC SERVICE AND ALLIED WORKERS UNION (NAPSAWU)	4th Applicant

and

THE MINISTRY OF PUBLIC SERVICE	1st Respondent
THE ATTORNEY GENERAL N.O	2nd Respondent

Neutral citation: *Swaziland National Association of Teachers & Others v The Ministry of Public Service & Another (323/2017) [2017] SZIC 137 (November24, 2017)*

HEARD SUBMISSIONS ***16/11/17***

DELIVERED RULING ***24/11/17***

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

SUMMARY---Labour Law---Dispute of interest and dispute of rights---Distinction between the methods of resolving such disputes---Declaration of deadlock in negotiations---Steps to follow after deadlock.

RULING ON POINT OF LAW

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1. The 1st to 4th Applicants are Public Sector Unions duly registered in terms of the Industrial Relations Act of 2000 as amended.

2. The 1st Respondent is a Department of the Swaziland Government which represents the employer (Swaziland Government) in negotiations of terms and conditions of service between the parties.

3. For the purposes of facilitating and guiding the negotiations process, the parties established a Joint Negotiations Forum (JNF) and its constitution. (See: **ANNEXURE JNF 1** of the founding affidavit).

4. The parties being guided by the JNF constitution engaged in negotiations regarding Cost of Living Adjustment (COLA). The Applicants put forward the amount of 9.15% based on the inflation rate of 7.85% and the economic growth of 1.3%. The 1st Respondent offered 0%.

5. The Applicants were not pleased with the offer of 0% and regarded the 1st Respondent as being not *bona fide* and not treating the negotiation process with the seriousness that it deserves. The Applicants therefore approached the Court and filed an application under a Certificate of Urgency for an order in the following terms;

1. *"Dispensing with the usual forms, time limits and manner of service relating to the institution of proceedings and that this matter be heard as a matter of urgency*.

2. *That the Applicant's non-compliance with the Rules to the afore-said forms, limits and manner of service be condoned*.

3. *Directing the 1st Respondent to return to the negotiation table, to negotiate in good faith and not to deliberately stall the process of negotiations between the parties, per the behavior and such deliberations to be concluded within 3 days of this order*.

4. *Directing and declaring that the parties when at the negotiating table, they shall use as a variable and as a basis in the negotiation process, the inflation rate over the last year 2016, as one of the*

paramount factors in the negotiation process when determining the said rate to be used for the cost of living and adjustment deliberations, in particular;

4.1 That the percentage for the cost of living adjustment hereby issued in terms of 4 shall be a sum determined by the Central Bank of Swaziland, under the direct instruction of the Governor of the Central Bank;

4.2 *Failing which, the parties are hereby directed to return before this Honourable Court within (5) days of the order for the said percentage and/or rate as per 4.1 to be determined by the above Honourable Court*.

Alternatively:

5. *Directing that the Applicants request and/or demand for the cost of living adjustments to their salaries be and is hereby granted at the rate of inflation as issued by the central Bank of Swaziland as the case may be to avoid them being in a worse position that they are;*

6. *Further and alternative relief.*

7. *Costs of the application at attorney and own scale*."

6. When the matter appeared before the Court on 29th September 2017, an order in terms of prayer 3 was granted by consent.

7. The negotiations resumed but still the 1st Respondent offered 0%. The parties have now reached a deadlock.

8. The 1st Respondent has now filed its answering affidavit herein. The Applicants have also filed their replying affidavit thereto. The matter is now before the Court for arguments on the merits for a relief in terms of prayers 4 to 7 of the Notice of Motion.

9. The 1st Respondent however raised a point of law that this Court has no jurisdiction over this matter because;

   9.1 *The parties have reached a deadlock in the negotiations.*

   9.2 There is no dispute of right between the parties.

   9.3 The relief sought is not competent in a dispute of interest between the parties.

10. The Court is therefore presently called upon to make a ruling on the point of law raised.

11. On behalf of the 1st Respondent it was argued that;

   11.1 *The issue is not justiciable in the light of the deadlock signed by the parties on 11th October 2017.*

   11.2 *The dispute between the parties is a dispute of interest and not a dispute of right.*

11.3 *The Applicants have not established any legal entitlement to the COLA*

12. *Per contra* it was argued on behalf of the Applicants that;

12.1 One can contract outside his /her rights as long as it is not illegal.

12.2 The Court does have the jurisdiction as per clause 6.2 of the JNF constitution.

12.3 The Court has a duty to enforce the provisions of the constitution, the constitution clothes this Court with the necessary jurisdiction over this matter.

13. It is important for the purposes of this Ruling that the provisions of Article 6 of the JNF constitution be reproduced in full herein. The Article appears as follows;

"6. **DISPUTE RESOLUTION**

6.1 If there is a deadlock in any issue deliberated upon by the JNF, the issue shall be referred to Conciliation Mediation, and Arbitration Commission (CMAC).

6.2 Notwithstanding clause 6.1 above, either party may approach the Industrial Court for an urgent relief after having notified the other party in writing.

6.3 Issues that are before the JNF shall be dealt with to finality without the involvement of other fora unless this is agreed to by the JNF."

14. On behalf of the Applicants it was argued that although this is an interest dispute, the Court is given the authority to adjudicate by virtue of Article 6.2. During submissions, when this Article was interrogated further the Applicant's attorney conceded that there may be issues of bad drafting of the Article.

15. In terms of the canons of interpretation, the Court is bound to opt for an interpretation that will give a constructive meaning to the document. It is not disputed that the parties are dealing with a dispute of interest. All the parties are *au fait* as to what steps to follow in terms of the Industrial Relations Act after they reach a deadlock in negotiations. This much was acknowledged by the Applicants in paragraph 26 of the founding affidavit where the deponent stated that;

> *"The matter, as it stands now, is at a deadlock and the only option available, under the normal circumstances would be to embark on a strike. This, in our view, would be irresponsible*

and is not an option to the Applicants, at this point for the following reasons:…."

16. The Applicants in clear language acknowledged that the next step is to engage in a lawful strike action. They are saying they are deliberately not exercising their right because of their own reasons that they stated in their papers. The question that arises is; can the Applicants unilaterally remove the dispute from the negotiation table and refer it to adjudication by the Court without the consent of the other party? The Court is unable to agree with the Applicants' interpretation of Article 6.2. The Court is unable to give an interpretation that will tend to cloud the distinction between rights and interest dispute because of the following reasons;

16.1 The spirit of the Industrial Relations Act, 2000 as amended is clear that rights and interest disputes are to be resolved by different methods. If the Legislature intended that both rights and interest disputes are to be resolved by adjudication by the Court, it would have simply said so.

16.2 After the negotiations, the parties sign a Collective Agreement which becomes part of the terms and conditions of employment between the parties. The Court has no right to impose any terms and conditions of service on the parties, unless the parties agree in writing.

16.3 The parties agreed to a dispute resolution procedure in terms of Article 6 of the JNF constitution. To interpret Clause 6.2 to mean that one party has the right in a dispute of interest to unilaterally decide that the dispute be resolved by adjudication by the Court could have the effect of blurring the distinction between a dispute of right and a dispute of interest.

17. **CONCLUSION:-**

Taking into account all the foregoing observations and also all the circumstances of this case, the Court will make the following order;

a) The point of law raised is upheld.

b) The application is dismissed.

c) There is no order as to costs.

18. The members agree.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

APPEARANCES :

For Applicants:	*Mr. L. Howe* *(Attorney at Howe Masuku Nsibande Attorneys)*
For Respondents	*Mr. G.N. Dlamini* *(Attorney from the Attorney – General's Chambers)*