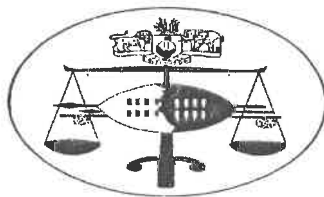

IN THE INDUSTRIAL COURT OF ESWATINI

RULING

CASE NO. 39/2019

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF TEACHERS (SNAT)	APPLICANT
and	
THE MINISTRY OF EDUCATION AND TRAINING	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

Neutral citation	:	Swaziland National Association of Teachers (SNAT) vs The Ministry of Education and Training & Another [39/2019] SZIC 17/2019 [28 February 2019]
Coram	:	**L. MSIMANGO – ACTING JUDGE** [Sitting with Mr. P.S. Mamba and Mr. E.L.B. Dlamini Nominated Members of the Court]
Date Heard	:	11th February 2019
Date Delivered	:	28th February 2019

SUMMARY: The Applicant has brought an application to Court to interdict the 1st Respondent from proceeding with the roll out of data collection form system, on the basis that the Applicant has not been consulted in terms of the Recognition Agreement signed by the parties.

RULING ON POINTS OF LAW

[1] The Applicant is the Swaziland National Association of Teachers a union duly registered in terms of the provisions of Part IV of the Industrial Relations Act No. 01/2000. It is presently the sole collective bargaining agent for all teachers within its bargaining unit.

[2] The 1st Respondent is the Ministry of Education and Training. A Ministry of the Government of Eswatini c/o Education Building, Mbabane, Hhohho District cited in these proceedings as an interested party with material interest and for convenience. It is represented in these proceedings by the 2nd Respondent.

[3] The Applicant has brought an urgent application to Court, seeking an order as follows:-

(a) That the usual forms and service relating to the institution of proceedings and notice in terms of the Industrial Court Rule 14, be

dispensed with and that the matter be heard as one of urgency in terms of Rule 15 of the above Honourable Court's Rules.

(b) That the Applicant's non-compliance with the Rules relating to the above said forms and service be condoned.

(c) That a rule nisi do hereby issue calling upon the Respondent to show cause on a date to be determined by the Honourable Court why prayer (e) should not be made final.

(d) Granting the Applicant, the relief sought in prayer (e) only on an urgent basis, to operate with an interim effect pending finalization of the proceedings.

(e) That the 1st Respondent be and is hereby interdicted from implementing and / or rolling out the data collection form system pending consultation with the Applicant in terms of the Recognition Agreement between the parties.

(f) Directing the 1st Respondent to initiate consultative meetings with the Applicant before implementing the data collection form system in terms of the Recognition Agreement between the parties.

(g) Costs of suit.

(h) Further and / or alternative relief.

BACKGROUND

[4] The Applicant concluded a recognition agreement with the Government of Eswatini on the 18th March 1992. The said agreement still subsists and binding upon the parties.

[5] The Applicant argues that the Respondents are therefore bound to inform the Applicant of any changes or developments that could impact the employment relationship. In violation of its duty to consult with the Applicant, the 1st Respondent introduced a system referred to as the Data Collection Form without notifying the Applicant.

[6] It is Applicant's contention that it has been denied an opportunity to make representation on the system, furthermore, the Applicant wrote to the 1st Respondent on the 17th October 2018, requesting a meeting on the way forward with regards to the rolling out of the forms, however, there was no response. The Applicant submitted further that, it, again wrote to the 1st Respondent on the 8th November 2018 and the 1st February 2019, and on both occasions the 1st Respondent did not acknowledge receipt of the letters, nor even respond thereto.

[7] The Applicant submits that the system will / or is used to monitor absenteeism, in particular monitors who attends SNAT activities and participate in protected industrial action. The system will therefore lead to disciplinary action and termination of employment and requires at least consultation before implementation.

[8] The Applicant contends that the system has been partially introduced to some schools in the country without consulting the Applicant, and this is in violation of the Recognition Agreement. Thus the purpose of the application is to stop the rolling out and implementation of the data collection form system without consulting the Applicant, furthermore the system will be used to maintain an illegitimate policy which is not a product of fair labour practice and with an unlawful objective.

[9] In its answering affidavit, the 1st Respondent raised several points of law. It must be mentioned, however, that the Court will only deal with the point of law relating to urgency, so as to ascertain whether good cause has been shown for the Court to direct that the matter be enrolled as one of urgency.

[10] Urgent applications are governed by Rule 15 of the Industrial Court Rules of 2007. Wherein the Applicant is required by this rule to explicitly set forth the circumstances and reasons which render the matter urgent, the reasons why the provisions of Part VIII of the Act should be waived and reasons why the Applicant cannot be afforded substantial relief at a hearing in due course. On good cause shown the Court may direct that the matter be heard as one of urgency.

[11] The Applicant argued that the following reasons render the matter to be heard on an urgent basis:-

11.1 The matter involves issues of gross injustice perpetuated in violation of the backbone legislation governing the workplace. The potential collapse of workplace harmony and the associated damage on the entire education system cannot be overstated.

11.2 Secondly, the Applicant's members could be victimized for participating in lawful union activities in violation of the Act. That is because the 1st Respondent convened a meeting with Schools' Heads on the 25th January 2019 wherein the Schools' Heads were instructed to use the data collection form system to identify all those teachers who will participate on the then

proposed industrial action scheduled for the 28th January 2019.

11.3 Lastly, that there has been a lamentable series of intimidations, harassments and frustrations the Applicant has suffered. The Honourable Court is the custodian of peace in the workplace and as such the circumstances require that this matter which is so patently one of great importance for the country and for the proper functioning of the constitutional order, be dealt with out of the ordinary course.

[12] On the other hand the 1st Respondent argued that the Applicant has failed to address the requirements of Rule 15 of the Industrial Court rules, which rule governs the procedure on urgent applications, in that no facts or allegations are made from which it is demonstrated that irreparable loss or irreversible deterioration and prejudice will ensue. Further that, the Applicant has failed to exhibit a prima facie right.

[13] In this regard the 1st Respondent cited the case of **H.P. ENTERPRISES [PTY] LTD VS NEDBANK LTD CASE NO. 788/99** (Unreported) where the court held that:-

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".

[14] The 1st Respondent submitted that the Applicant has failed to demonstrate that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted, further that, the application is academic as it is channeled to events of the 25th September 2018; and the balance of convenience does not favour the Applicant for it stands to suffer nothing on the basis that no industrial action has taken place since then. As it stands, the application should be dismissed,

[15] As stated earlier on, urgent applications are governed by Rule 15 of the Industrial Court Rules. In considering this rule, the Court in **JIBA VS MINISTER: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS [2010] 31 ILJ 112 LC**, held that:-

"The rules of Court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an Applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules".

[16] Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the Applicant seeking relief will not obtain substantial relief at a later stage. In all circumstances where urgency is alleged, the Applicant must satisfy the Court that indeed the application is urgent. Thus, it is required of the Applicant adequately to set out in his or her founding affidavit the reasons for urgency and to give cogent reasons why urgent relief is necessary.

[17] Again, urgency must not be self-created by an Applicant, as a consequence of the Applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation, by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the

event giving rise to the proceedings, the more urgency is diminished. In short, the Applicant must come to Court immediately, or risk failing on urgency.

[18] The Applicant has failed to take the Court into its confidence, by its failure to justify a case of urgency in its papers. As it has been mentioned earlier on, the Applicant submitted that the matter is urgent for the reason that Applicant's members could be victimized for participating in lawful union activities, further that, the 1st Respondent convened a meeting with schools' heads on the 25th January 2019, wherein the schools' heads were instructed to use the data collection form system to identify all those who will participate on the then proposed industrial action scheduled for the 28th January 2019.

[19] On the other hand, in paragraph 10 of the founding affidavit, the Applicant submitted that the system was introduced in response to the Applicant's intention to engaged in a protected industrial action scheduled for the 25th September 2018, which industrial action was suspended until the 23rd November 2018. In the period between the 25th September 2018 and 23rd November 2018, the Applicant engaged in a number of lawful activities including branch visits and meetings. These actions angered the 1st

branch visits and meetings. These actions angered the 1st Respondent and it then introduced the forms as a way of intimidating the Applicants.

[20] The question then is, why did the Applicant not approach the Court then, to interdict the alleged and apparent unlawful action.

[21] The Applicant simply offers no explanation why no urgent legal proceedings were instituted immediately after, between the period 25th September to 23rd November 2018 or January 25th 2019.

[22] The Applicant seems to adopt the view that because the introduction of the forms is unlawful, therefore it is entitled to urgent relief. That is simply not so. The lack of particularity where it comes to urgency in the founding affidavit is concerning, and may even serve to draw an inference that the Applicant knew that in effect it had no explanation for the delay in bringing this matter and sought to avoid addressing it. The mere allegation of unlawfulness of the conduct of the 1st Respondent cannot in itself serve to establish urgency.

[23] In the case of **MASHABANE VS MEC FOR PROVINCIAL DEPARTMENT OF HEALTH: MPUMALANGA LC J567/2015**, the Court held that:-

"It cannot be re-emphasized enough that if an Applicant seeks to have a matter treated as urgent, there is a need to demonstrate that the matter was indeed treated with urgency, from the commencement of the cause of urgency. It has often been repeated in this Court that urgency is not there for asking, and it is not for Applicants to decide when a matter is urgent. Where an application does not satisfy the requirements of urgency, it follows that the urgency should be deemed to be self-created, and that application should not be deserving of the Court's urgent attention".

[24] There can be no doubt from the Applicant's argument that there has been an inordinate delay in the bringing of this application to Court, in that, the data collection forms were introduced to avert a strike action which was to take place either on the 25th September 2018 or the 28th January 2019. If the situation was that urgent, the Applicant should have taken immediate action.

[25] It must be mentioned again that, in order to succeed in obtaining an interdict of this nature the Applicant must establish the following requirements:-

(i) The existence of a clear right.

(ii) Apprehension of irreparable harm.

(iii) The absence of alternative relief.

(iv) The balance of convenience.

[26] In applying the above principles relating to urgency to the facts of this matter. The Court has no little hesitation in concluding that the Applicant's application is not urgent, in that it has failed to establish the necessary requirements for the granting of an interdict. Furthermore, there has been unexplained delay in bringing the matter to Court.

[27] In the case of **MAGAGULA & OTHERS VS ACTING JUDGE OF THE INDUSTRIAL COURT AND ANOTHER, HIGH COURT CASE NO. 112/14**, the Court held that:-

"A Court must be satisfied that the balance of convenience favours the grant of an interim interdict. It must juxta pose the harm to be endured by an Applicant if interim relief is not granted with the harm the Respondent

bear if the interdict is granted. Thus a Court must assess all relevant factors carefully in order to decide where the balance of convenience rests".

[28] In the circumstances the Court makes the following order:

(a) The point of law on urgency is upheld.

(b) No order as to costs.

The Members agree.

L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. S. Mnisi
(S.S. Mnisi Attorneys)

For Respondent : Mr. M.E. Simelane
(Attorney General's Chambers)