

The Right to Strike and Essential Workers in Eswatini

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INTRODUCTION

- The right to strike is a fundamental human right that has found recognition in international, regional, and domestic law
- The right to strike in essential services is regulated somewhat differently from other sectors, as these services are deemed critical for the functioning of society

INTERNATIONAL LAW

- The international provisions governing the right to strike in Eswatini are derived from international instruments such as the Universal Declaration on Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) as well as ILO labour standards

INTERNATIONL LAW

- Article 8(1) (d) of the ICESCR provides that “the State Parties to the Covenant undertake to ensure the right to strike *provided it is in conformity with the laws of the particular country*”. (my emphasis)
- Although there is no direct provision on the right to strike in the ICCPR, this right is normally inferred from the provisions of Article 22(1) which provides for the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

INTERNATIONAL LAW

- The Universal Declaration on Human Rights (UDHR) also does not make direct or explicit mention of the right to strike for all people, this can be inferred from the right of everyone to peaceful assembly and association (Article 20(1) read with Article 23(4) which provides for Everyone has the right to form and to join trade unions for the protection of his interests.

INTERNATIONAL LAW

- Further, in Article 29 (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations *as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

INTERNATIONAL LAW

- Under the auspices of the International Labour Organisation , the right to strike has been recognised as one of the international labour standards and as a fundamental human right despite there not being a definition of the right to strike in any of the ILO binding instruments

INTERNATIONAL LAW

- The recognition of the right to strike as a fundamental right in the context of ILO standards has been as a result of the work of two of its supervisory bodies: the Committee on the Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

INTERNATIONAL LAW

- There has been wide consensus among member states of the ILO that there is a positive right to strike that is inextricably linked to and is an inevitable corollary of the right to freedom of association.
- However, the ILO Governing Body has sought an advisory opinion for the International Court of Justice (ICJ) on whether Convention 87 may correctly be interpreted to include the right to strike.

INTERNATIONAL LAW

- The ILO Convention on the Right to Freedom of Association states in Article 3 that;
 "organisations of workers and employers have the right to adopt their own statutes and rules, complete freedom to choose their representatives, to organise their administration and activities and to shape their programs".
- The word 'activities' in this provision has been interpreted to mean strikes and other forms of pressure Convention 87 on the Freedom of Association and Protection of the Right to Organise, 1948.

INTERNATIONAL LAW

- The ILO states, with regard to strikes in essential services, that "the right to strike in essential services should be regulated to ensure minimum disruption to the provision of these services and to protect the lives and safety of the population"

REGIONAL LAW

- The African Union adopted the African Charter on Human and People's Rights in 1981 and most of the rights and freedoms in the African Charter are those found in UN human rights treaties. While the Charter does not specifically provide for trade union rights, it does provide for the protection of the freedom of association and assembly.

REGIONAL LAW

- Article 10 of the Charter provides for the freedom of association, stating that everyone has the right to form societies and other associations, *as long as they respect the law*.
- The Charter goes on in Article 11 to provide for the right to freedom of assembly. These provisions of the Charter have been interpreted to include the right of trade unions to federate and function freely, and the right to strike.

REGIONAL LAW

- SADC member states adopted the Charter of Fundamental Social Rights in SADC in 2003.
- Under Article 4 providing for freedom of association and collective bargaining, the Charter provides in part for the right to resort to collective action in the event remaining unresolved, which, for workers, includes the right to strike and to traditional collective bargaining.

DOMESTIC LAW OF ESWATINI

- The protection of workers' rights in Eswatini is enshrined in section 32 of the Constitution. Section 32(2) of the Constitution provides that;
A worker has a right to –
 - (a) freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker; and
 - (b) collective bargaining and representation.

DOMESTIC LAW OF ESWATINI

- Further protection may be found in section 25 (2) of the same Constitution which guarantees the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.

DOMESTIC LAW OF ESWATINI

- Section 86 (1) of the Industrial Relations Act gives the right to parties to a dispute that remains unresolved after conciliation to take lawful action by way of lockout or strike action on condition they follow the procedures laid down in the Act.

DOMESTIC LAW OF ESWATINI

- Section 86 is however limited by section 91 of the Industrial Relations Act which provides that;
“An employer or employee carrying on or engaged in an essential service shall not take strike action or institute a lockout in connection with any such essential service and section 96 shall be applicable for such service.”

DOMESTIC LAW OF ESWATINI

- Section 96 provides for shorter conciliation periods for disputes involving parties in essential services, and that such disputes, where they remain unresolved following conciliation, may be referred to arbitration and that the costs for proceeding under this section shall be borne by government.
- Section 96(2) states that a conciliator shall attempt to resolve disputes in essential services within seven days, as opposed to the 21 days allowed for other types of disputes.

DOMESTIC LAW OF ESWATINI

- Essential services is defined as a service whose interruption would endanger the life, personal safety or health of the whole or part of the population or a service determined as such by the Essential Services Committee.
- The Minister responsible is mandated, following consultation with the Labour Advisory Board, a tripartite body established in terms of section 23 of the Act, to consider and advise the Minister on matters relating to employment, as well as the Minister responsible for the Public Service to establish a Essential Services Committee.

DOMESTIC LAW OF ESWATINI

- The Industrial Relations Act identifies certain sectors, such as water services, electricity services, fire services, health services, sanitary services and telephone and telegraphic services as essential services.

DOMESTIC LAW OF ESWATINI

- The Industrial Court of Appeal of Eswatini in the case of ***Swaziland Government v Swaziland Nurses Association and Another*** (25 of 2012) [2012] SZIC 25 (18 April 2012) wherein the Government had filed an application for a strike to be declared to be unlawful, ruled in favour of the Government stating as follows;
‘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’.

DOMESTIC LAW OF ESWATINI

- The Court went on to quote the case of ***The Board of Trustees of The Swaziland Nazarene Health Institutions V Dr Lukotji Tshibungu & Others case no. 400/2000*** which was taken as is sufficient authority for the proposition that essential services employees were not without remedy. The court went further to say that their matters will not be treated like the rest of the disputes which come before this court for adjudication day in and day out.

THE POSITION IN SOUTH AFRICA

- In the Republic of South Africa, the Constitution Section 23(2)(c) affords all workers the right to strike. The Labour Relations Act (LRA), however, does provide for limitations or restrictions of the right to strike for employees engaged in essential services.

THE POSITION IN SOUTH AFRICA

- Section 213 of the LRA defines an essential service, in the same way as the Industrial Relations Act of Eswatini, as a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.

THE POSITION IN SOUTH AFRICA

- The LRA however then goes on to include the Parliamentary Service and the South African Police Service in the list of essential services.
- Eswatini makes no mention of the Parliamentary service and excludes, in section 3 of the Industrial Relations Act, members of the Police force from the application of the Act altogether.

THE POSITION IN SOUTH AFRICA

- The LRA mandates the Minister, in consultation with NEDLAC to establish as Essential Services Committee to decide on the services to be designated as essential.
- Under the South African law, employees engaged in essential services are given the option of referring their disputes to compulsory arbitration in lieu of embarking in a strike action.

CONCLUSION

- An analysis of the legal framework governing strike actions in essential services in Eswatini reveals both national and international recognition of the right to strike as a fundamental right, and the restrictions or limitations placed on this right by the law are found to be in conformity with those of neighbouring South Africa, and allowed by international and regional rules.