IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIV.APPEAL NO.12/91

In the matter between:

SWAZI PAPER MILLS LIMITED Appellant

and

SWAZILAND MANUFACTURING AND
ALLIED WORKERS UNION Respondent

C O R A M : DUNN J.
FOR THE APPELLANT : MR P. FLYNN
FOR THE RESPONDENT : NO APPEARANCE BY OR ON BEHALF OF RESPONDENT

JUDGMENT

26 February 1993

This is an appeal against a ruling of the industrial Court, directing the appellant to recognise the respondent as the exclusive collective representative of the appellant's employees. Notice of Set Down of the appeal was served on the respondent but the respondent did not avail itself of the opportunity to argue the appeal.

The appeal arises, as will be seen from the brief history of the dispute between the parties which I will set out, from a failure by the Labour Commissioner to appreciate and properly formulate the "unresolved dispute" between the parties for referral to the Industrial Court. The history of the dispute between the parties is as follows-

The respondent applied on the 9th October 1990 to the appellant for recognition as the exclusive collective

/representative...

representative of the appellant's employees. The appellant replied on the 16th October, 1990 requesting the respondent to specify what category of the appellant's employees the respondent sought to represent. The respondent did not respond to this letter and took up the stand that the appellant was demanding "unnecessary details". A reading of Section 36(1) of the Industrial Relations Act, 1980 (the Act) however shows that such details as were requested by the appellant were not unnecessary and that the respondent was obliged to provide the same in its application. The section provides:

> An industry union or staff association which has been issued with a certificate under Section 18, may apply in writing to an employer for recognition as the exclusive collective employee representative for such categories of employee as are named in the application concerning all terms and conditions of employment including wages and hours of work.
>
> (my underlining)

The procedure for recognition by a Union is further set out under subsections (2) through to (5). It is necessary to set out these subsections,

> 36 (3) If less than forty per cent of the employees in respect of which the industry union or staff association seeks recognition are fully paid up members of the organisation concerned, recognition shall be at the discretion of the employer and the employer shall, within thirty days of the receipt of the application, reply in writing to the organisation.

(4) Where an employer decides to recognise an industry union or staff association in terms of subsection (3) the conditions under which the employer agrees to recognise the organisation shall form part of the reply to be given to the organisation.

(5) If forty per cent or more of the employees in respect of which the industry union or staff association seeks recognition are fully paid up members of the organisation concerned, the employer shall, within thirty days of the receipt of the application and in writing -

(a) grant recognition to the organisation; or

(b) if he decides not to grant such recognition, lodge with the Court his reasons for the refusal to grant recognition and shall serve a copy thereof on the industry union or staff association, as the case may be.

These subsections further highlight the obligation to specify the relevant category of employee by the union in an application for recognition.

The respondent proceeded to report the appellant's insistence on compliance with Section 36(1) as a dispute to the Labour Commissioner on the 10th December 1990. The Labour Commissioner was able to secure a settlement of the dispute and the parties drew up a memorandum of agreement in terms of section 57 of the Act on the 8th January 1991.

Paragraph 1 of the memorandum provides -

(a) The applicant (present respondent) agrees to amend for their part their application letter to read as follows-

> "For being recognised as the sole representative of all categories of employees except those that are categorised staff".

Applicant further agrees to deliver the said amendment by 9/1/91 to the respondent.

(b) For their part management (appellant) agree to embark on a membership count immediately after receipt of the amendment at 1(a) above and in any case this shall not be later than the 25th day of January 1991.

The parties further requested the Labour Commissioner to forward the memorandum to the Industrial Court for registration as an order or award of that court. It is not clear from the papers but it may be safely assumed that the respondent complied with 1(a) of the memorandum. The appellant proceeded to carry out its undertaking in terms of the memorandum and in so doing secured the assistance of the Swaziland Federation of Employers (SFE) of which the appellant is a member. The respondent objected to the involvement of the SFE in the membership count. No valid reasons were advanced for the objection. It does not appear that the appellant was prohibited from relying on outside assistance and expertise in carrying out its obligations under the memorandum. It is not necessary for me to make a

ruling on this point but the fact is that the respondent should have given reasons for its objection to the manner in which the appellants sought to conduct the membership count. The membership count did not take place as a result.

Following the objection, the respondent reported the matter as a dispute to the Labour Commissioner. The Labour Commissioner issued a Certificate of an Unresolved dispute in terms of section 58(1) of the Act. The issue in dispute was formulated as "Recognition" by the Labour Commissioner. The Labour Commissioner gave the following reasons for holding that no useful purpose would be served by continuing to conciliate -

> "(a) Argument advanced by Applicant Union is that it was not recognised by the respondent inspite of the application having been made in terms of section 36(5) of the Industrial Relations Act of 1980.
>
> (b) Respondent submitted that efforts to recognise the union were frustrated by its demands that Mr Peter Dodds should not attend so as to advise how respondent should handle the membership count."

It is quite clear that the dispute (if it may be termed as such) between the parties was as to the appellant's right to enlist the assistance of the SFE in the membership count. That is the question which ought to have been put to the Industrial Court for determination. A ruling either way by the court would have given direction to the parties as to the conduct of the membership count. The outcome of the count would have enabled the appellant to know under which subsection (36(3) or 36(5)) to proceed in response to the respondent's application.

Section 25 of the Code of Practice set out in the Schedule to the Act sets out the practice to be followed in applications for recognition under section 36 of the Act. Section 25 of the Code provides, in part -

> Preferably, this process (the membership count) should be voluntary, but in the event of a dispute the matter can be referred to the Industrial Court. In replying to an application for recognition, management is entitled to know how many employees in the undertaking are members of the union, but not their identities.

Unfortunately, the Industrial Court was presented with an application by the respondent which did not correctly reflect the dispute between the parties. The respondent sought the following relief -

> The applicant prays that the court, as a remedy:
>
> (a) Rules that the Respondent (or employer) has no right to join a federation of employers
>
> (b) Orders the Respondent to recognise the applicant forthwith.

The Industrial Court did not find it necessary to deal with prayer (a) and made no ruling thereon. It is, in the circumstances, not necessary for this court to consider the matter except to state that this matter was totally irrelevant to the dispute which had arisen between the parties namely whether or not the appellant was entitled to enlist the assistance of the FSE in the membership count. The court granted the relief under (b).

7/ ... ...

In granting the relief under prayer (b) the Industrial Court went beyond what the parties had agreed to in their earlier memorandum. In terms of that agreement the respondent was concerned with all the appellant's employees except those categorised as staff. The effect of the Industrial Court Order was that the respondent was recognised as the sole representative of all categories of the appellant's employees. The order had the further effect of declaring, without any inquiry, that forty percent or more of the appellant's employees were fully paid up members of the respondent. This the Industrial Court was not empowered to do. The order made by the industrial Court is set aside with costs. The parties are returned to the stage when the memorandum of agreement was signed by them on the 8th January 1991. The appellant is to proceed with the membership count, with such assistance as it may be legally advised to enlist, within 30 days from to-day's date.

B. DUNN

JUDGE