IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1620/2004

In the matter between:-

SWAZI TIMBER PRODUCTS	Applicant
And	
MADUDUZA ZWANE N.O.	1st Respondent
THE CONCILIATION FOR MEDIATION	
ARBITRATION COMMISSION	2nd Respondent
SWAZILAND MANUFACTURING AND	
PROCESSING INDUSTRY STAFF	
ASSOCIATION	3rd Respondent
Coram	Annandale, ACJ
For Applicant	Mr. S. Nsibande
For 3rd Respondent	Mr. P.R. Dunseith

JUDGMENT

8 September 2004

By way of an urgent motion the applicant obtained an interim order of the High Court in the following terms:-

1. That a Rule Nisi do hereby issue returnable on Friday the 9th July, 2004 calling upon the Respondents to show cause why:
1.1 the ruling of the 1st Respondent dated 24th May 2004 in the matter between SMAPISA and Swazi Timber Products under CMAC file No. DSPT 026/04 should not be reviewed and corrected and/or set aside;

1.2 the ruling as aforementioned should not be stayed pending the outcome of the present review application.

2. That the rale as set out in paragraph 1.2 above do operate as an interim interdict pending the return date.

This order was granted by consent on the 18th June 2004, although not so reflected in the copy of the order itself. The learned Judge who made the order gave further directives as to the filing of papers in the matter and on the return date, the 9th July 2004, the interim relief was further extended until the 23rd July 2004, the date on which argument was heard. On this date, the applicant sought a final order to confirm the rale nisi as well as a prayer for costs against the third respondent.

Initially at the hearing, the third respondent wanted to raise certain points in limine, based on the issue of urgency, but these points were abandoned in court at the onset of argument and I need not deal with it.

The essence of the matter is that an issue was referred for arbitration and that the outcome is not acceptable to the applicant who now seek to have it set aside on review.

Briefly, the position is that the Swaziland Manufacturing and Processing Industry Staff Association ('SMAPISA') reported a labour dispute and sought some eleven issues to be settled with Swazi timber Products (Pty) Ltd (the present applicant). The first respondent (the arbitrator) was appointed by the second respondent (the Conciliation, Mediation and Arbitration Commission - 'CMAC') to deal with the outstanding seven issues which could not be settled by agreement.

The parties (SMAPISA and Swazi Timber) then agreed to have the outstanding issues arbitrated. Although both parties are ad idem that eleven issues arose of which six were settled, they are equally ad idem that seven

issues remained for arbitration. Six and seven does not amount to eleven and according to the papers, the seven (sic) issues are listed but add up to six. I will proceed from the premise that it is a mutual error and that only six issues were arbitrated on, and list the six separate issues hereunder, with the positions of the Union, the company and the arbitration awards tabulated, for ease of reference.

Issues for Arbitration Union Company Award

1. 1 Overtime l1/2 times Mon. Nil 1 1/2 times Mon - Sat to Saturday Double time Nil Double Time on Sunday Sunday and and Public Holiday

Public Holiday

2. Transport E6 per day Nil E2.50 per day

3. 3 Canteen E13 perday E4.75 per E4.75per day

Day

4. 4 Housing E600-0Q E3 36-00 E431-00
5. 5 Bonus 13th Cheque Nil Nil
6. 6 Salary Increase 20% Nil 5%

As can be seen from the above table, the union had its six demands which were not agreed to by the employer and the arbitrator determined his awards, each as listed. It is the awards made by the arbitrator which are now sought to be set aside on review on the grounds that:

'He arrived at a decision which was so grossly unreasonable as to justify an inference that he failed to apply his mind to the matter in accordance with tenents (sic) of natural justice by reason of one or more or all of the following:

- In not assigning proper weight to the fact that the applicant is in dire financial difficulties which is borne out by the fact that over 300 employees have been retrenched between December 2003 and May 2004;
- In granting the affected employees an increase in their salaries at the rate of 5% despite that retrenchments were ongoing;
- In granting the affected employees housing, canteen and transport allowances in the face of a retrenchment exercise.'

(Paragraph 13 of the founding affidavit of the applicant's Managing Director)"

To this criticism of the arbitrator, the union's president replies that the arbitrator indeed applied his mind, considered all relevant factors and ultimately made awards that lean more in favour of the company than the workers.

To support especially the latter contention he points out no bonus or 13th cheque was awarded, that the overtime rates are in accordance with legislation on minimum wages, that the canteen allowance is in line with the

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offer of the company and not the demand of the workers, that the demand of the workers for a housing allowance of E600 vis-a-vis the company's offer of E336 was awarded at E431, that the transport claim of E6 per day (with no offer by the company) was awarded at only E2.50 per day and that the (refused) salary increment demand of 20% was awarded at 5%, which accords with the current inflation rate.

This he stated in order to show that the arbitration award was not capricious or biased or that it was made without an application of his mind, as averred, but also to indicate that the arbitrator indeed applied his mind, inter alia to the financial position of the company.

The arbitrator gave scant reasons for his award. It records in the relevant portion that:

'Having heard submissions of both parties and made my analysis of the submissions and taking into consideration the financial position of the business, the financial state of the affected employees, the voluntary agreement between the parties to have the award effected from the 19th October, 2003 and to promote uniformity at the work place, I make the following award..,'

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From the above, it cannot in any way be ascertained how calculations were computed, how much weight was attached to which factor he mentioned, what his knowledge of the financial position of the company was, what is meant by the promotion of uniformity at the workplace and how he reasoned to get to the different awards. But ex facie the award document and the "reasons" stated therein, especially having regard to the different outcome of each individual outcome, it is obviously clear that there was no consistent pattern of mathematical equality applied to the issues as a whole. Each and every one of the different points in dispute has a unique formula, with the exception of the instances where no award was made at all. In whichever way he applied his mind, I find it hard to accept the contention that he did not apply his mind at all.

The clearly stated ground for asking this court to intervene on review is that the company was facing dire financial difficulties, causing retrenchments on a large scale, in view of which the awards that were made cannot be seen as in accordance with natural justice.

Be that as it may for the time being, the union's president brings it to the attention of this court that the company voluntarily agreed to refer the

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matter to arbitration and that it submitted to the award of the arbitrator being final and binding, further that it also agreed that any award would be effective retrospectively from the 1st October 2003. I will revert to the aspect of finality of an arbitration further down.

The applicant company tries to bolster its cause by stating that when earlier ways negotiations deadlocked, it advised the employees of its financial difficulties with the resultant retrenchment and discontinuation of temporary employment. Further, that during the arbitration, many more employees were on notice of retrenchment, since then finally retrenched. The company is at odds with the arbitrator's award of financial benefits to its employees despite the financial dire straits faced by the company, so much so that it resorted to payment of terminal benefits to retrenched employees over a period of time instead of forthwith upon termination.

It is therefore said that his decision should be reviewed and set aside because his decision constitutes a gross irregularity of arbitration proceedings, is grossly unreasonable and that he failed to apply his mind.

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The respondent union does not have an issue with the declared financial difficulties of the applicant but it does contest the allegations of gross irregularity of the proceedings. It states that 'the present application appears to be motivated solely by the applicant's pique because the arbitrator did not fully accept the applicant's submissions.'

From the onset, I clearly state my sympathy with an employer who has the proverbial cake to cut with only so many slices but who has an overpowering demand for bigger slices of that limited cake. It is the stark reality of modem economics that labour has a different understanding of financial constraints in which a business entity operates, than the view held by the employer's financial management. The workers have their demands for increased wages to cope with their own needs, just as the business needs to cope with the realities of its own expenditures. To achieve an equilibrium between these two opposing poles frequently is the determinating factor by which the company falls or grows - the consequences of an unsustainable balance is to the detriment of employer and employee alike. Demands that cannot be met result in retrenchments and ultimately in the downfall of both parties. The reality remains that it is not always possible to achieve an

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acceptable compromise whereby the spoon that feeds the mouth does not fall to the ground.
Before considering the submissions of the applicant's attorney, already enumerated above to the greater extent, as to why the arbitrator's decision should be found grossly unreasonable and set aside on review, it is first necessary to determine whether this court actually do so, if need be.

Initially at the hearing, the 3rd respondent argued that the existing legislation does not empower the High Court to set aside an arbitration decision. Mr. Dunseith contended that section 16 of the arbitration act, 1904 (Act 24 of 1904), provides that this court may only set aside an arbitration award if the arbitrator has misbehaved himself or that the arbitration or the award has been improperly procured.

When Mr. Nsibandze pointed out that the Industrial Relations Act, 2000 (Act 1 of 2000), more specifically section 19(5) thereof, provides for the review of the decision of an arbitrator's decision despite the limited provisions of the arbitration Act, especially so when considering the explicit right of a dissatisfied party to seek review by the High Court. The 3rd

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respondent's attorney conceded the point and withdrew his argument in that regard.

It is thus not necessary to delve on to the merits and demerits of the jurisdictional powers of the High Court on review of a matter like the present and decide this aspect. Suffice to say that it is trite that with some limitations, the High Court of Swaziland does indeed have the power of review in so far as awards made by an arbitrator are concerned. Section 19(5) of the Industrial Relations Act, 2000 (Act 1 of 2000) reads that ' (a) decision or order of the court or arbitrator (my emphasis) shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law'.

Before considering whether the decision of the arbitrator is '...so grossly unreasonable as to justify an inference that he failed to apply his mind to the matter in accordance with the tenets of nature's justice...' that the award needs to be set aside on review, it is useful to bear in mind the rationale behind arbitration. In Amalgamated Clothing & Textile Workers Union v Veldspun Ltd 1994(1) SA 162 (AD) at 199 F - Hs Goldstone JA stated that:

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'When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under Section 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course, and especially so on the labour field where it is frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator and in good faith.'
The applicant makes the bold allegation that the arbitrator did not apply his mind to the matter. It did not ask for reasons from the arbitrator as to how the individual amounts it complains of were calculated and derived at. There are thus no further reasons from the arbitrator before this court save what has been incorporated in the award itself, referred to above. He does however state that he did consider the financial position of the applicant when making the award.

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There is no ground to infer gross misconduct on the part of the arbitrator. Gross unreasonableness is the issue at stake. On review, the High Court is not in a position to substitute its own award in the present matter, nor is it asked to do so. The application is to set aside the arbitration award in toto. There is no further relief that is sought, save for an interim stay of the ruling pending the outcome of this review. Should the applicant be successful, the effect would be to have the parties placed in the position that they were before the arbitration now complained of, but negating their joint acquiescence to arbitration. This is not what they agreed to. They agreed that the remaining unresolved disputes be referred for arbitration, but now that the applicant company is dissatisfied with the outcome of the matter it seeks to have it set aside on review, due to the arbitrator allegedly not having applied his mind to the matter. None of the factors that the applicant sets out in paragraphs 13.1 to 13.3 are new issues, unknown to the arbitrator. The real gripe of the applicant company is that he did not attach so much weight to it that he came to the conclusion that the workers were not entitled to anything better than what the company offered.

An analysis of the arbitrator's award does not support the applicant's contention that he did not properly apply his mind. Six issues were at hand

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and they are tabulated above. The first issue was overtime payment. In its papers, the respondents pointed out that in regard to both overtime payments for public holidays and Sundays and for weekdays, the award is merely in line with already existing statutory requirements. The effect of the award is to have overtime paid in accordance with the existing laws of Swaziland. This was not disputed by the applicant. Had the arbitrator not applied his mind as alleged and had he ruled as wanted by the applicant, it would have resulted in a negation of statutory law.

The workers wanted E6 per day in respect of transportation costs while the company was unwilling to pay anything. The arbitrator awarded E2.50 per day, less than half of what the workers wanted. If the applicant company was unwilling to have this issue arbitrated it could have refused to do so. Had the arbitrator not applied his mind, as contended, the only way in which he could have satisfied the company was to award nothing to the workers. Whether the applicant is satisfied with this aspect of the award or not, it cannot, in my view, be construed as a failure to apply his mind in accordance with the tenets of natural justice.

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The third issue related to canteen costs. The workers wanted E13 per day and the company offered E4.75 per day. The award was E4.75 per day. Here, it is the workers who could have held the attitude now adopted by the company. The award is far less than what they agitated for and 100% in line with the company offer. Yet, it is the amount awarded by the arbitrator having considered the facts before him. It is part of the award that the company now seek to have overturned. The applicant did not ask that this item not be set aside on review, even though the award was made in accordance with its offer.

The housing allowance was awarded at E431 per month, in dissonance with both the claimed E600 and the offered E336. It is E105 more than the offer and El69 less than the claimed amount. If there is any substance to the averment that the arbitrator did not apply his mind, this item shows otherwise. The arbitrated amount is not an mathematical halfway mark but leans towards the company. How exactly the amount was derived, mathematically, is not known, but it does not serve to warrant the assertion by the applicant.

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The item relating to a bonus 13th cheque for the workers resulted in a zero award by the arbitrator. If he did not take the financial position of the applicant company in consideration, as is now contended, it is hard to find justification for that, when looking at this item. Both the issue of a non bonus and an increase of 5% instead of the claimed 20% auger in favour of his stated reasons, namely that he did consider the financial position of the business, the financial state of the affected employees and that he analysed the submissions of both parties.

The respondents state that the wage increase is in line with inflation. Although they do not state the rate applicable to the date of the award, 5% is rather on the lower end of financial information, not higher.

From an assessment of the award, it is not in my view an indication that the arbitration was devoid of natural justice, that it was grossly unreasonable or that the arbitrator failed to apply his mind. It is therefore that the award complained of is not set aside on review.

Accordingly, the application stands to be dismissed and the interim relief is set aside.

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Mr. Dunseith convincingly argued that the court should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith, as held by Goldstone JA in the Veldspun matter referred to above. In the present matter, apart from decrying its financial dire straits, there is no indication that the conduct of the applicant was otherwise. The costs order which follows the outcome of the event is awarded at the scale of attorney and client to mark the disapproval of the unwarranted delay in the implementation of the arbitration award. This costs order, as well as compliance with the arbitration, may well result in further retrenchments by the applicant in order to make ends meet. Should that be the consequence, it will be due to other reasons than a capricious arbitration.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE