IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Civil Case No. 4276/2010**

In the matter between:

The Swaziland Government	**First Applicant**
The Principal Secretary Ministry of Housing & Urban Development	**Second Applicant**
The Principal Secretary Ministry of Public Service & Information	**Third Applicant**

And

Swaziland National Association of Civil Servants (SNACS) (On behalf of Swaziland National Fire and Emergency Employees)	**First Respondent**
Nkosinathi Nkoyane N.O.	**Second Respondent**
Dan Mango N.O.	**Third Respondent**
Gilbert Ndzinisa N.O.	**Fourth Respondent**

CORAM	MCB MAPHALALA, J
FOR APPLICANT	S. Khumalo
FOR RESPONDENTS	A. Lukhele

Summary

Labour Law - application to review decision of the Industrial Court -Section 19 (5) Industrial Relations Act 2000 empowers High Court to do so on Common Law Grounds - review grounds include material errors of law

JUDGMENT
7th APRIL 2011

[1] This is an application to review and set aside the decision of the Industrial court of Swaziland under case No. 494/2010 delivered on the

18th October 2010. The Applicants further seek an order that the said decision be substituted by another decision dismissing the earlier decision of the Industrial Court; alternatively, they prayed that the matter be referred back to the court *a quo* to be heard *de novo.*

[2] It is common cause that the First Respondent brought an urgent application before the court a quo for the following relief:

> 1. Dispensing and waiving the usual requirements of the rules regarding notice, service and form of application and directing that this application be heard as one of urgency.
>
> 2. Staying and suspending the implementation of the new four shift system until such time as discussions with regard to the system are held between the Applicant and the Respondents and until the new four shift system is agreed between the Applicant and the Respondents.
>
> 3.That a rule nisi, to operate with interim effect, is to issue calling upon the Respondents to show cause on a date to be determined by this Honourable Court why an Order in the following terms should not be made final:
>
> 3.1. That pending finalization of this application and/or determination of the matter by CMAC the Respondents be and are hereby interdicted and restrained from giving effect and implementing the new four shift work system;

3.2. That pending finalization of this application, the Respondents be interdicted and restrained from preventing the Applicant's members from carrying out their functions following the old shift system

4. Directing and ordering the Respondents to engage the Applicant and its members in discussions concerning all issues pertaining to the implementation of the new four shift work system.

5. That the Respondents be ordered to pay the costs of this application.

6. Further and/or alternative relief.

[3] The Applicants had opposed the application on the basis that they had consulted with the shop stewards of the Swaziland National Fire and Emergency Services who are members of the First Respondent on the introduction of the new Four Shift System since February 2009; that they had consulted with the branch executive on the 21st January 2010 and 14th February 2010; and, that pursuant to the intervention of the court a quo, they had also consulted with the First Respondent on the 22nd and 25th October 2010. The applicants further argued that they were not obliged to negotiate with the First Respondent on the introduction of the four shift system because this was a work practice and not an alteration of service, nor was it a negotiable item in terms

of the Recognition Agreement concluded between the First Applicant and First Respondent.

[4] At paragraph 15 of the Founding Affidavit, the First Respondent had submitted that the Applicants had not consulted with the First Respondent on the introduction of the Four Shift System. The First Respondent had stated as follows at paragraph 15:

> "15.1 In terms of the Collective Agreement between the parties and the Award of the Arbitrator any changes on the shift system ought to have been discussed between the Applicant and Respondents and as such the new four shift system materially affect our members' conditions of service and employment.
>
> 15.2. It is unfair, unreasonable and in breach of the Collective Agreement between the parties for the Respondents to unilaterally implement the new shift system.
>
> 15.3. The applicant and our members understand that from time to time conditions of service affecting its members must be reviewed.
>
> 15.4. The applicant is also aware that a task team was established by the Swaziland Government on the four shift work system.

15.5. The said task team recommended *inter alia* that consultations must take place with the Applicant on any changes in the old shift system....

15.6. The Respondents without any consultations with the applicant and/or its members have unilaterally introduced the new four work shift system."

[5] The applicants denied that the new four shift system was introduced unilaterally without consultation with the First Respondent; that numerous consultations were held between the parties with regard to the new shift system. They alleged that the four shift system affects the conditions of service favourably in that the employees no longer work for twenty four hours. They further argued that the government acted in accordance with the recommendations of the task team which called for consultations between the parties.

[6] The First Respondent had filed a Replying Affidavit arguing that it was recognized by the Applicants as the exclusive representative for those categories of applicants' employees including those under the Swaziland National Fire and Emergency Department. The First Respondent denied that the Applicants had ever invited them to any meeting for consultations on the issue of the new four shift system; they further denied attending any meeting with the applicants where this issue was discussed. However, the First Respondent conceded that there were meetings held between the shop stewards and the service management at Shop Floor level and not at Union and Government Negotiation Team Level. They further submitted that

even in that meeting the Fire Service Management was advised by the Shop Stewards that the said meetings were not the proper forum for discussing the introduction of the new four shift system. They further submitted that the alteration of hours of work is a negotiable subject in terms of the Recognition Agreement between the parties and in particular Article 7 (c), (e) and (k). They further argued that the old three shift system had been operational since the inception of the Fire Service Department in 1976 and was further confirmed by the Arbitration Award of 2004; they conceded, however, that prior to the Award they were not paid overtime.

[7] Subsequent thereto, the applicants were granted leave by the court a quo to file a Supplementary Affidavit in which they argued that the introduction of the new four shift system is a matter for consultation and not negotiation; and that in terms of Article 7 of the Recognition Agreement, the introduction of a shift system or measures to curb overtime are not subjects for negotiation. They further argued that the introduction of a shift system does not relate to hours of work nor does it relate to rates of pay. They also argued that the introduction of a shift system is a matter that falls within managerial prerogative; however, they accepted and acknowledged their duty to consult. with the First Respondent within the broader framework of good industrial relations as well as within the framework of the Recognition Agreement.

[8] They argued that in the context of a consultation they are entitled to formulate a policy position, and thereafter consult with the First

Respondent on that policy; they further submitted that consultations pertaining to this matter began in February 2009. The Applicants engaged in fact gathering processes, including commissioning of a consultant to provide an expert report on the matter, after which it formally put the proposal to the First Respondent; and, that from the onset the First Respondent adopted an obstructive and belligerent attitude and was not geared towards a meaningful consultation. They argued that due to the need to manage the department and to attend to the Financial constraints at hand, they had an obligation to proceed with the implementation of the Four Shift System and could not be held to ransom by the First Respondent.

[9] The applicants further argued that the arbitration award pertained to the payment of overtime hours, provision of institutional housing, normal working hours and the computation thereof; and that the award does not deal with the issue of Managerial prerogative to determine business efficacy, and to reduce overtime expenditure. They further argued that the change in the work practice does not amount to a unilateral change of the contract of employment; and that the applicants have the prerogative to restructure their business operation, and, that it is not obliged to negotiate with the First Respondent on this issue except to consult with them. They refer to the meetings held with shop stewards as well as those held with the First Respondent on the 22nd and 25th October 2010 as evidence of the consultation.

[10] It is common cause that the last two meetings were held after the proceedings in the court *a quo* had been instituted and in terms of a consent order; when the matter was first heard on the 13th October 2010, a consent order was made an order of court. The said order provided that "the parties agree to go to negotiation table on the issue of a new shift system and are to conclude and report to court within fourteen days; and, that whilst negotiations are ongoing, the old shift system will be retained". However, the parties could not agree on the introduction of the new shift system during the two meetings held on the 22nd and 25th October 2010.

[11] The Respondent inturn filed a Supplementary Affidavit to their Replying Affidavit. They argued that the applicants have not complied with the Arbitrator's Award which required members to work a three shift system of eight hours each; and, that the said system would have relieved the applicants of the burden of paying overtime allowances. They further argued that the issue of the shift system was covered by Article 7 of the Recognition Agreement and that it was an item for negotiation between the parties. They further argued that the Shift System necessitated a change on the hours of work and allowances to be paid; and, that these are items covered by Article 7 of the Recognition Agreement. However, the First Respondent conceded that the issue of a Shift System fell within Managerial prerogative; however, they agued that they had to be consulted where the changes affected their members.

[12] The First Respondent further denied the accusation that they adopted a belligerent and obstructive attitude on the issue relating to the four shift system; and that they had pointed out inaccuracies on the reports relied upon by the Applicants. They further denied that the four shift system was favourable to their members.

[13] During the hearing of the merits in trie court *a quo,* it became apparent that the First Respondent is a registered Union and that it was acting on behalf of its members who are civil servants in the Ministry of Housing and Urban Development under the Department of Fire and Emergency Services. It was not in dispute that the affected members of the First Respondent were currently working under the three shift system; it was also common cause that in terms of the said system, the employees were paid overtime and extended duty allowances. It is further not in dispute that the payment of overtime and extended duty allowance is in accordance with an agreement between the parties signed in July 1994. The applicants felt that the three shift system was expensive; and, it engaged consultative meetings with shop stewards of the First Respondent. Thereafter, the applicants implemented the new four shift system; the First Respondent brought an application in the court *a quo* to stop the implementation of the new four shift system because they alleged that they were not consulted by the Applicants prior to the implementation of the new shift system.

[14] The First Respondent had argued that the conduct of the Applicants was unlawful and contrary to the Recognition Agreement

signed by the parties providing that changes to the terms and conditions of employment of its members will be subject to negotiations between the parties in particular Article 7 of the Recognition Agreement; the latter outlined in detail; the issues which were subjects of negotiation between the parties. The applicants had argued that the consultations they had with the shop stewards were sufficient as a pre-requisite for introducing the new shift system. They further argued that as the employer they had a right to regulate and run the department in the best possible manner and to improve efficiency by ensuring that employees work the normal eight hours per day instead of long and arduous hours. They further argued that the employees do not want the new shift system because it won't guarantee them overtime as well as the extended duty allowances. They also argued that the new system does not constitute a change in the terms and conditions of employment, and, that it was merely a change in work practice and not a subject of negotiations but mere consultations with the First Respondent; the applicants concluded their submissions by emphasizing that the new four shift system is not part of the issues that are subject to negotiation in terms of Article 7 of the Recognition Agreement.

[15] Article 7 of the Recognition Agreement outlines the issues which are subjects of negotiation; they are as follows:

> " (a) Principles of Engagement, Dismissal and Termination of Service including Redundancy, Probation, Transfer, Promotion and Housing;

(b) Leave and leave pay including pubic holidays and maternity leave;

(c) Hours of work;

(d) Sick leave and sick pay

(e) Rates of pay - normal and overtime hours and allowances.

(f) Uniforms and protective clothing;

(g) Sickness benefits/medical schemes;

(h) Training;

(i) Safety measures;

(j) Loans

(k) Any other matters affecting conditions of service as may from time to time be agreed upon by both parties."

[16] The court *a quo* in granting the application stated that the parties had expressly provided in their Recognition Agreement that issues relating to hours of work and rates of pay including normal and overtime hours and allowances will be negotiated. It further held that the new four shift system will affect hours of work, overtime hours and allowances. The court rejected the contention by the applicants that there was no need for the parties to negotiate since the new system would affect the workers positively in that they would now work the normal eight hours. The court also took the view that the three shift system, overtime hours and extended duty allowances are based on a negotiated agreement between the parties concluded in July 1994. The court further rejected the contention by the applicants that the

employees have no right to work extended duty allowances in the light of the July 1994 agreement.

[17] The Court further rejected the contention by the applicants that the First Respondent was not entitled to the orders sought on the basis that in their application they had asserted that they were not consulted; yet, in their submissions before court, they argued that there should have been negotiations between the parties. The reason advanced by the court was stated at page 34 of the Book of Pleadings of the present application at paragraph 11 as follows:

> **"11.....This argument will be dismissed by the court as it is clear in the main prayers 2 and 4 of the Notice of Motion that all that the Applicant wants is that discussions be held between the parties. Both consultation and negotiation involve discussions. The applicant used the words consultation and discussions interchangeably in the Pounding Affidavit."**

[18] The Court further stated in paragraph 12 of its judgment that "a lot of time was spent on arguments whether or not the employer was supposed to consult or to negotiate with the Union". However, the Court conceded that there is a distinction in meaning between consultation and negotiation. They referred to two cases which dealt with this distinction in **Usuthu Pulp Company t/a Sappi Usuthu v. Swaziland Agricultural Workers Union & Another** case NO.

16/2006 (ICA), and that of **Swaziland National Association of Civil Servants (SNACS)** and **Two Others v. Swaziland Government** case No. 331/02 (IC). The Court stated as follows at paragraph 12:

> "The courts pointed out that consultation involves seeking information or advice on, or reaction to a proposed cause of action and that negotiation is used synonymously with collective bargaining and refers to the voluntary process whereby management and labour endeavour to reconcile their conflicting interests and aspirations through the joint regulation of terms and conditions of employment. In case 331/02 the Court held on page 6 that:
>
> "The distinguishing mark between the two terms is that in negotiations the parties work towards an agreement or compromise, whereas in consultation, though advice, permission or approval is sought, parties need not agree or reach compromise."

[19] With regard to the Points of Law raised, the court further ruled that the question of urgency had been overtaken by events partly because the court had allowed the parties after the first hearing to meet and consult on the introduction of the new four shift system and partly because the matter has already been argued on the merits. The court further held that the First Respondent had satisfied the requirements of a final interdict because Article 7 of the Recognition Agreement gives them a clear right to be engaged in negotiations by the employer; furthermore, that there was a reasonable apprehension of harm as the employer had started to implement the four shift system in violation of the First Respondent's right to be engaged in

negotiations. Lastly, that they had no alternative remedy other than to seek the interdict.

[20] The court *a quo* concluded its judgment by stating that the introduction of the four shift system was subject to negotiation in accordance with Article 7 of the Recognition Agreement; and, that the meetings held between the parties on the 22nd and 25th October 2010 did not comply with the said Article 7. The court proceeded and granted an order in terms of prayers 2, 4 and 5 of the Notice of Motion.

[21] It is on the basis of the above order that the applicants have brought before this court an urgent application to review and set aside the decision of the court a quo; they further seek an order dismissing the application brought by the First Respondent in the court *a quo.* In the alternative, they seek an order referring the matter back to the court *a quo* for it to be heard "*de novo*".

[22] Section 19 (5) of the Industrial Relations Act No. 1 of 2000 provides as follows:

> **"A decision or Order of the court or arbitrator shall at the request of any interested party be subject to review by the High Court on grounds permissible at Common Law."**

[23] The Applicants submitted in paragraph 13.2 of its Founding Affidavit that the decision of the court a quo was unreasonable, and that no reasonable court could have come to that decision. At paragraph 14 of their Founding Affidavit, the applicants laid down the basis for the Review as follows:

"14. It is submitted that the finding by the court that the introduction of a new four shift system constituted a matter for negotiation was grossly unreasonable and constituted an error in law for the following reasons:

14.1. The reliance by the court on the Recognition agreement was erroneous in that the introduction of a four shift system does not relate to rates of pay. It also does not affect the conditions of service.

14.2. The introduction of a four shift system is a work practice that falls squarely within managerial prerogative as conceded by the First Respondent in its supplementary affidavit wherein the deponent stated:

Whilst accepting that the issue of the shift system might fall within managerial prerogative, any changes thereto and that affect our members that does not exonerate the Respondent of the duty to consult us".

[24] The applicants further submitted that art employer is not obliged to negotiate with an employee on a change in the manner in which work is to be performed; and, that the introduction of a new shift system does ı not constitute a variation of terms and conditions of employment but a work practice.

[25] The applicants further argued that "SNACS2" did not introduce a three shift system; hence, the finding by the court a quo that it was obliged to negotiate the introduction of the new four shift system was grossly unreasonable. The applicants argued that the court should have found that the introduction of a new shift system is not amongst the items for negotiation reflected in Article 7 of the Recognition Agreement.

[26] The applicants further argued that it was unreasonable for the court to find that "consultation and discussions meant negotiation, and that both consultations and negotiation involve discussions; and, that these terms could be used interchangeably. The applicants argued that the court should have found that they did consult adequately with the First Respondent; hence, the introduction of the four shift system was both fair and reasonable. Furthermore, it was argued that the court should have found that the Applicants were entitled to rationalize their workplace for economic and efficiency reasons.

[27] The First Respondent deposed to an Opposing Affidavit in which it stated at paragraph 6 that "the present application is an abuse of the

Review jurisdiction of the High Court as the application is nothing but an appeal against the decision of the Industrial Court disguised as a review application". They further re-iterated the contents of paragraphs 12 and 17 of their Founding Affidavit which read as follows:

> "*12.2.* **The Respondents have also taken a position regarding the new four shift system and have indicated that they will not entertain any negotiations on the issue....**
>
> **17. The Respondents refuse to negotiate with the Applicant, thus the Applicant has exhausted all remedies with the Respondents and has no other remedy other than to approach this Honourable Court for the relief claimed."**

[28] The First Respondent also referred the court to prayer 2 of their application in which they sought "the staying and suspending the implementation of the new four shift system pending discussions and agreement on the new shift system". They argued that the applicant had already taken a position and introduced the new shift system unilaterally without consultations with them.

[29] They further argued that the court a quo applied its mind on the terms "consultation" and "negotiation" and reached a correct decision; and, that in terms of the Consent Order between the parties, the Applicants committed themselves to "negotiation" and not to

"consultation". They further argued that the complaint by Applicants of the terms "negotiation" and "consultation" are disingenuous and have no merit.

[30] The First Respondent further argued that the grounds relied upon by the applicants, are grounds of an appeal and not a review; and, that this matter does not fall within the provisions of Section 19 (5) of the Industrial Relations Act of 2000.

[31] The applicants have referred the court to the case of **Takhona Dlamini v. The President of the Industrial Court and Another Appeal Court of Swaziland** case No. 23/1997; **Tebbutt JA** who delivered the majority decision, after analysing Section 11 (1), 11 (5) and 19 of the Industrial Relations Act of 1996, as well as South African cases stated the following at pages 15-16:

> "...it is a matter of construction of the statute conferring the power of decision as to the reviewability of such decision where the tribunal concerned has committed a material error of law. In the present instance the legislature although it created a specialist court in section 11 (5) of the Act specifically retained in the High Court the power to review decisions of the Industrial Court on common law review grounds. It therefore did not give exclusive jurisdiction to the Industrial Court of Appeal on errors of law."

[32] **Tebbutt JA** also referred to the judgment of **Theron en Andere v. Ring Van Wellington and Another** 1976 (2) SA (1) AD where he stated that the question of whether an error of law is reviewable

depends on the intention of the legislature. That intention may have been to confer exclusive jurisdiction to decide the question of law in issue on one Tribunal and to exclude reviewability of it.

[33] **Tebbutt JA** also referred to the decision of **Local Road Transportation Board and Another v. Durban City Council and Another** 1965 (1) SA 586 AD in which **Holmes JA,** delivering the judgment of the court cited with approval the decision in **Goldfields Investment Ltd and Another v. City Council of Johannesburg and Another** 1938 TPD 551 where it was held that "A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.".

[34] **Tebbutt JA,** further cited the case of **Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd** 1988 (3) SA 132 at 152 A-D where **Corbett JA** stated the common law grounds of review as follows:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice .... Such failure may be shown by proof, *inter alia,* that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president

misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated...."

[35] His Lordship cited with approval the case of **Hira and Another v. Booysen and Another** 1992 (4) SA 69 (A) at 93 where **Corbett CJ** said the following:

"To sum up the present-day position in our law in regard to common-law review is, in my view, as follows:

1. Generally speaking, the non performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review (see the Johannesburg Consolidated Investment case supra at 115).

2. Where the duty / power is essentially a decision-making one and the person or body concerned (I shall call is "the tribunal") has taken a decision, the grounds upon which the court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the Johannesburg Stock C exchange case supra at 152 A-E.

Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

4. Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable; statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

> Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion then normally (i.e. in the absence of some other review ground) there would be no ground for interference. *Aliter,* if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or failed to apply its mind to the relevant issues in accordance with the behests of the statue': and that as a result its decision should be set aside on review."

[36] The decision in **Hira and Another v. Booysen and Another** (supra) was approved and followed by the Supreme Court of Appeal in the case of **Paper Printing, Wood & Allied Workers Union v. Pienaar N.O.** 1993 (4) SA 621 (A) at 626-627.

[37] **His Lordship Justice Tebbutt** at page 11 of the **Takhona Dlamini** case (supra) stated the following:

> "It is quite clear from the aforegoing that the legislature was conscious of the difference between an appeal and a review and although it created an Industrial Court of Appeal it confined its jurisdiction to hear appeals from the Industrial Court to questions of law only and specifically retained by section 11 (5) the jurisdiction of the High Court to review decisions of the Industrial Court on common law grounds. Those grounds embrace *inter alia* the fact that the decision in question was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the court misconceived its functions or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter .... Those grounds are, however, not, exhaustive. It may also be that an error of law may give rise to a good ground for review."

[38] The First Respondent argued that the present application is not properly before this court; and that the applicants should have brought an appeal before the Industrial Court of Appeal and not review proceedings before the High Court. In so far as this court is called upon to determine the proper forum, the issue for the decision of this court relates to an error of law. The Appeal Court of Swaziland, as it then was, in the Takhona Dlamini case decided authoritatively that the legislature retained by section 11 (5) the jurisdiction of the High Court to review decisions of the Industrial Court on Common Law grounds and that the said grounds include error of law.

[39] The court *a quo* committed an error of law when making a finding that the introduction of the four shift system was a matter for negotiation and not consultation. The issue of a new four shift system is not amongst the subjects for negotiation as reflected in Article 7 of the Recognition Agreement; it does not relate to hours of work, or rates of pay, and it does not affect the conditions of service agreed between the parties.

[40] "Working Hours" refers to the normal hours of work agreed between the employer and the employee. According to **John Grogan, Workplace Law, seventh edition, Juta & Co. Ltd,** 2003 Publication at page 63, the learned author states the following:

> "The Common Law leaves the parties free to regulate working hours. If their agreement makes no provision for maximum hours of work, the time during which the employee is obliged to render service is regulated by practice and custom.
>
> When maximum hours of work are stipulated in the contract or collective agreement, the employer may require the employee to work additional hours when circumstances so require. Although employees do not strictly speaking, breach the contract if they refuse to perform non-contractual overtime, it has been held that employers may dismiss workers who persistently and unreasonably refuse to work overtime."

- See also the case of **Steel Engineering & Allied Workers Union of South Africa & Others v. Trident Steel (PTY) Ltd (1986) 7 ILJ 86 (IC)**

40.1 At page 63-64, the learned author states that all work beyond the normal working hours is overtime, which can be worked only with the employee's consent.

40.2 Paragraph 1 of the Terms of Reference of the Arbitrator which was made an order of court on the 28th April 2005 provides as follows:

> **"The normal working week for officers of the Fire and Emergency Service engaged in shift work will on average be forty eight hours per week calculated over three weeks on the basis of the three shift system/'**

40.3 Paragraph 2 of the Award provides as follows:

> **"Overtime will be paid for any period in excess of the forty eight hours mentioned in paragraph 1 above, based on the existing provisions of General Orders."**

40.4 The Terms of Reference further provide that in the arbitrator's award dated 8th August 2004 the arbitrator amended the agreement between the parties dated 13th July 1994. However, the entitlement to the Extended Duty Allowance was not affected. Similarly the lump sum amount payable in lieu of all overtime worked in previous years was not affected. According to the Agreement of the 13th July 1994, the

normal working week was on average fifty six hours per week calculated over three weeks on the basis of a three shift system; and, that overtime will be paid for any period in excess of the fifty six hours based on the existing provisions of the General Orders.

40.5 It is apparent from the pleadings that in terms of the four shift system, employees are expected to work the normal eight hours a day. What the new system does is to remove working overtime; it is against this background that Article 7 of the Recognition Agreement does not come into play because the normal working hours are not affected.

40.6 According to the Terms of Reference of the Arbitrator, the normal working week is forty eight hours over six days; this clearly means that the normal working hours per day is eight hours. Furthermore, the Award does not give the workers the right to work overtime, and they cannot demand to work overtime.

40.7 It is worth-mentioning that since its inception, in 1976 the members of the First Respondent were working on the three shift system. This system did attract overtime; however, the workers were not paid for overtime. It was not until the Agreement on the 13th July 1994 that overtime hours became payable. In 2004 the Arbitrator worked on the basis of the three shift system which was in existence at the time and awarded entitlements in accordance with that system. The Arbitrator did not introduce the three shift system as alleged by the First Respondent. Furthermore, the three shift system is not a

product of Negotiations as alleged by the First Respondent; the three shift system was in place and operational since the inception of the Swaziland National Fire and Emergency Department in 1976.

40.8 **John Grogan** in his work entitled Workplace Law (supra) at pages 64-65 states the following:

"Although overtime is voluntary, the BASIC conditions of Employment Act does not affect the employer's right to call in overtime in terms of the contract of employment or collective agreement. Refusal by an employee to perform contractual overtime may constitute a disciplinary offence. If contracts, collective agreements or wage determinations limit overtime to a certain number of hours, this does not mean that employers may compel their employees to work the overtime provided for; the employee's consent is still required before any overtime is worked. Employees are generally obliged to work overtime during emergencies, provided that the emergency is genuine.

> As a general rule employers may not compel their employees to perform non-contractual Voluntary-overtime work. Nor are employees obliged to work overtime for periods exceeding those prescribed by the Act or a collective agreement."

- **Masengane v. Speed box (PTY) Ltd SA (1991) 12 ILJ 879 (IC)**
- **Dlamini v. Cargo Carriers (Natal) (PTY) Ltd (1985) 6 ILJ 42 (IC)**
- **Tiger Bakeries LTD V. Food Allied Workers Union & Others 1988) 9 ILJ 82 (W)**

- **Natural Automobile & Allied Workers Union v. CHT Manufacturing Co. (PTY) Ltd (1984) 5 ILJ 186 (IC)**
- **Natural Union of Textile Workers & Others v. Jaguar Shoes (PTY) Ltd (1) (1985) 6 ILJ92 (IC)**

[41] The four shift system does not deal or relate to the normal rate of pay of Members of the First Respondent; the wages of the workers are not affected by the new shift system. Furthermore, the rate of pay of overtime remains unchanged; it is still regulated in terms of the 2004 Award by the arbitrator. Furthermore, the terms and conditions of employment of the employees are not affected by the new four shift system; their normal hours of work as well as their wages remain unchanged.

[42] The introduction of the four shift system is a work practice that falls within Managerial Prerogative; and, the First Respondent has conceded to this fact at paragraph 9 of its Supplementary Affidavit and Replying Affidavit where they stated:

> **"9.1 Whilst accepting that the issue of the shift System might fall within managerial prerogative, any changes thereto and that affect our members that does not exonerate of the Respondent of the duty to consult us."**

[43] The Applicants as the employer have the prerogative to formulate policy position, improvement of efficiency and increased productivity as well as the reduction of operational costs. Such issues are not subject to the Arbitrator's Award or the Recognition Agreement. The applicants as employer is not expected to negotiate with the First Respondent on issues relating to Managerial Prerogative. Johan Grogan in his work entitled Workplace Law (supra) at pages 35-37 said the following:

> **"At Common Law, an employer cannot in the absence of agreement be compelled to vary a contract of employment in a manner more favourable to the employee.... conversely an employer cannot unilaterally alter the terms or conditions of a current employment contract, even if the change is to the employee's advantage.... An employer may change working practices, provided that such changes do not alter the employee's contractual rights.... The Contract is varied if the change involves work of a nature not initially contemplated by the parties, or a reduction in salary or status."**

[44] In the case of **A Mauchle (PTY) Ltd t/a Precision Tools v. NUMSA & Others** (1995) 16 ILJ 349 (LAC), the Labour Appeal Court ruled that an employer's instruction to its employees to operate two machines instead of one did not constitute a unilateral variation of contractual provisions. The court observed:

> "A description of the work to be performed as that of "operator" should not ... be construed inflexibly provided that the fundamental nature of the work to be performed is not altered .... Employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if the changes are so dramatic that the employee undertakes on entirely different job that there is a right to refuse to do the job in the required manner."

[45] Issues falling within Managerial prerogative include plans to restructure the workplace, the introduction of new technology and work methods, changes in the organization of work, partial or total plant closures, mergers and transfers of ownership, product development plans and export promotion. The common law requires of the employer to consult the Employees' Representatives the purpose of which is to provide them with the opportunity to be informed about, and possibly make suggestions and representations. The learned author John Grogan (supra) at page 296 continues and states the following:

> "Consultation is to be distinguished both from joint decisionmaking and collective bargaining. It requires the employer to do no more than notify the forum of any proposal, and in good faith to consider any suggestions it may make. The obligation to consult arises only when the employer makes a proposal to change an existing policy; the workplace forum cannot itself initiate the process. Furthermore, the change proposed must obviously be significant if it is to give rise to an obligation to consult. It would clearly not be in the interests of

efficiency if management had to consult extensively over routine decisions."

45.1. In the cases of **Morester Bande (PTY) Ltd v. National Union of Metal Workers of South Africa & Others** (1990) 11 ILJ 687 (LAC) at 688-9 as well as in the case of **Transport General Workers Union v. City Council of Durban** (1991) 12 ILJ 156 (IC) at 159 C it was held that decisions taken by a company aimed at cutting losses or improving profits relate to Managerial Prerogative; and, that the employer has a right to implement its decision unilaterally after the process of consultation has been exhausted.

[46] It is evident that under the Common Law, there is a clear distinction between consultation and negotiation. In the case **of Metal & Allied Workers Union v. Hart LTD** (1985) 6 ILJ 478 (IC) the court states the following:

"There is distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement."

[47] In the case of **Swaziland National Association of Civil Servants (SNACS) and Two Others v. Swaziland Government** case No. 331/02 (IC) the Court held as follows at page 6:

> "The distinguishing mark between the t,wo terms is that, in negotiations the parties work towards an agreement or compromise whereas in consultation though advice, permission or approval is sought to, parties need not agree or reach compromise."

[48] In terms of the Common Law, after the consultation process has been completed, the employer has the right to implement its decision unilaterally:

- **John Grogan, workplace law (supra) at page 209**
- **Morester Bande (PTY) Ltd v. National Union of Metal Workers of SA & Other (1990) 11 ILJ 687 (LAC) at 688-9**
- **Transport General Workers Union v. City Council of Durban (1991) 12 ILJ 156 (IC) at 159 C**

[49] In Swaziland unlike in South Africa, matters relating to Managerial Prerogative are still governed by the Common Law; in South Africa, they are now governed by the Labour Relations Act. Even the definitions of Negotiation and consultation have been incorporated into the Act; this includes the manner, the extent as well as the requirements of consultation and negotiation.

[50] It is apparent from the pleadings that the main purpose behind the introduction of the new four shift system is to reduce losses and cut costs. The applicants argued that the costs of overtime payment has escalated and that due to limited resources, they are unable to meet the costs of the overtime. They argue that overtime in the organization has become a norm and has been institutionalized. The effect of the new four shift system would reduce costs since the First Applicant would pay workers the ordinary salaries; in addition, the workers would work the ordinary eight hours a day with a reduced overtime. The applicants at paragraph 6 of their Supplementary Affidavit before the court *a quo* stated the following:

> **"What the Respondents seek to do is to rationalize its operations by eradicating the costly and ineffective overtime that is being worked by the employees. For this reason, and an order to improve productivity, reduce costs, minimize inefficiencies and optimise the utilization of the available resources, the Respondents have decided to introduce a four shift system and also engage additional personnel."**

[51] **Andrew Levy's Labour Law in Practice, A guide for South African Employers Andrew Levy et al, Book (PTY) Ltd Publishers 2010** at pages 46-47 states the following:

> "When the employer and the employee reach an agreement, . they do so for specific hours. They are known as contractual hours of work, or more generally, the ordinary hours of work. Once the employee has delivered the hours as contracted on any one day or in total in any one week, then there is no compulsion to work any additional hours unless agreed. When there is such an agreement, the employer is required to pay a premium for these hours to compensate the employee for working in their own time. Put another way, if the employer wants more work time than it bargained for, then it must pay a higher price.
>
> > Overtime starts once an employee has completed the ordinary hours of work.... An employer cannot force an employee to work overtime, nor may it allow the employee to do so."

[52] From the aforegoing, it is clear that the Applicant was not obliged to negotiate with the First Respondent on the introduction of the four shift system; it was merely obliged to consult with them. The assertion by the applicants that they consulted with the First Respondent since 21st January 2010 is inappropriate and incorrect. Annexures "AG1", "AG2" and "AG3" relate to meetings held between the Service Management and the Service Union Executive with regard to the introduction of the new four shift system; however, such meetings are inadequate for purposes of the required consultation in the light of the existence of the Recognition Agreement between the Applicant and the First Respondent. It is only consultation between the Applicants and First Respondent that is legally required.

[53] It is common cause that on the 22nd and 25th October 2010 there was consultation between the Applicant and First Respondent with regard to the introduction of the new four shift system. Paragraphs 7 - 11 of the minutes of the meeting of the 22nd October 2010 provided as follows:

> **"6. The Chairman mentioned that as this was the first meeting there were no Minutes to adopt. He advised that the meeting was a follow up on the Industrial Court decision that referred the parties to discuss certain issues and report back compliance to the Industrial Court on the 29th October 2010.**

7. **He indicated that the MOHUD had engaged at shop steward level on the substantive agenda item wherein the Fire Emergency Services Department's Management and employees were represented. He further stated the the Recognition Agreement between the Government and SNACS required that the parties engage as far as terms and conditions were concerned and hence the need for the GNT to consult the Association on the developments on the review of the current shift system.**

8. **He added that the parties were aware that there were concerns surrounding the current three shift system and thus the need, to consult, discuss, suggestions to address the issues. He further highlighted that the employer has**

come up with the proposal having looked at the concerns and the challenges involved and had come with proposed changes for consideration by the parties.

9. The GNT welcomed the opportunity to meet. They stated that it was within the mandate of the employer, tasked with the responsibility to diligently oversee the work operations, to ensure
that costs were kept at a minimum, that efficiency was at its best and that the welfare of the employees was at its best iii compliance to the country's relative labour' laws. They elaborated that the need to review the current shift system had followed the observation that
Government continued to pay huge amounts to run the operations of the Department and that the employees were subjected to unmanageable working conditions which were in excess of the
stipulated number of hours that an employee need to work in a month. Moreover, they argued that it was recognized that the number of hours that are worked by the Fire personnel are also
detrimental to their own health, social welfare and furthermore Government expenditure on overtime and extended duty allowances had reached an unsustainable level for the Government purse.

10. The GNT also submitted that following the consultations at shop steward level the employer had deemed it appropriate to review the work system to address this detrimental scenario to the employees, escalating wage bill and non-compliance to the country's relative labour laws and Government General Orders. To this end they had come to consult the Association on how best the changes could be effected.

11. The GNT further explained that operating the current shift system was a challenge as it had been observed that Government continued not to comply with the government General Orders in terms of the number of hours that an employee needs to work in a month plus indications from the Ministry Central Agencies of the need to examine available options that can be employed in rationalizing the situation with particular focus on curbing the exorbitant amounts that government is paying as overtime."

[54] At paragraph 9, the Government Negotiating Team highlighted correctly that it was within: the mandate of the employer, "tasked with the responsibility to diligently oversee the work operations to ensure^ that costs were kept at a minimum, that efficiency was at its best and that the welfare of the employees was at its best in compliance to the country's relative labour laws". They continued to motivate the introduction of the four shift system in the same paragraph by stating that "the need to review the current shift system has followed the

observation that Government continues to pay huge amounts to run the operations of the Department and that the employees are subjected to unmanageable working conditions which were in excess of the stipulated number of hours that an employee needs to work in a month. Moreover they argued that it was recognized that the number of hours that are worked by the Fire Personnel are also detrimental to their health, social welfare and furthermore, government expenditure on overtime and extended duty allowance had reached an unsustainable level for the government purse".

[55] It is common cause that during that meeting the First Respondent had demanded a written presentation by the Applicants' Team; this was done after a short adjournment, and the First Respondent was given time to read the document for further discussions. After the short break the First Respondent, "affirmed their commitment to genuine negotiations and requested a longer adjournment for them to consult and prepare a written response". The meeting was adjourned till the 25th October 2010 to allow the First Respondent to consult and prepare a written response. From the minutes of the 22nd October 2010, it is apparent that all the parties inclusive of the chairman failed to appreciate the distinction between consultation and negotiation; furthermore, the chairman at paragraph 7 failed to appreciate that the matter of the new four shift system does not fall within the subjects for negotiation covered in Article 7 of the Recognition Agreement; furthermore, he failed to appreciate that the introduction of the four shift system was a Managerial Prerogative which is not part of the terms and conditions of service to the employees.

[56] During the meeting of the 25th October 2010, the Applicants' Team received a written response from the First Respondent; and the latter were given an opportunity to present their response. The written response by the First Respondent was that the issue of the four shift system relate to Article 7 (c), (e) and (k) of the Recognition Agreement; they further argued that the three shift system was a product of the Arbitrator's Award where issues of Extended Duty allowance as well as normal working hours were dealt with. As stated in the preceding paragraphs, this argument is incorrect; furthermore, the court a quo committed an error of law when it came to a finding that the Award required the Applicants to negotiate a change in the shift system. The Award was an agreement on a service allowance and relate to an agreement in the following: the normal working hours for employees engaged in the shift system, and set out an average on the number of hours per week when calculated on a three shift system; the mode of calculation of the overtime, the introduction of an extended duty allowance and the categories of employees entitled to receive such extended duty allowance; and the payment of a lump sum of all employees engaged in shift work and the qualifying ranks in lieu of all overtime worked in previous years. It is legally incorrect as well that the three shift system was a product of the Award as stated in the preceding paragraphs, the system was operational since the inception of the Fire Department in 1976; all that the Award did was to introduce payment of overtime and extended duty allowance, and aligned the working hours to the General Orders as well as authorized payment of overtime worked prior to the Award in respect of certain categories of employees engaged in shift work.

[57] The First Respondent in paragraph 21 of the Minutes of the meeting of the 25th October 2010 stated that "the Association commits itself in partnering with the employers in so far as resolving all work related problems including curbing the huge costs related to the overtime claims but in the process would not forgo its right or that of its members unnecessarily". The First Respondent in the same paragraph further called for the reduction of the number of hours from 56 to 48 hours per week as per the Award. The Applicants' Team argued correctly that the new four shift system was intended to reduce the number of working hours per week to the acceptable standard and terms of the Award.

[58] At paragraphs 28, 35 and 36 of the Minutes of the meeting held on the 25th October 2010, following is stated:

> **"28. The GNT concurred with the Chairman and further appreciated SNACS for their presentation. They explained that it was the employer's prerogative to oversee work efficiencies and operations in terms of the time and type of service rendered to the public. They advised that they have been monitoring the shortcomings of the operations at the Fire Services and Emergency Department for some time and as per the employers mandate the Government had deemed it appropriate to review the work system to address this detrimental scenario to the employees, escalating wage bill and non-compliance to the**

country's relative labour laws and Government General Orders by changing the shift system by increasing the number of shifts from three to four.

35. The Chairman further explained that the GNT has constituted and commissioned a study team to address the introduction of the 48 hours per week system and they identified deficiencies in using the current 3 shift system such as shortages in accommodation close to the fire stations which would enable reduction of the number of working hours to 48 within the 3 shift system whereby the first shift would be from 8 am to 4 pm, the next shift starting at 4 pm to 12 midnight whilst the final shift would be from 12 midnight to 8 am but still the off duty hours have not been factored in.

36. The Chairman elaborated that the four shift system was such that, an officer works the stipulated standard hours and the overtime hours will be paid but will be reduced on aggregate of over a month. The officers will also be entitled to off duty in a working week and whilst the services are rendered 24 hours as required."

[59] In Conclusion the applicants' team after analyzing the written and oral submissions by the First Respondent submitted at paragraph 42 that, in view of the ailing economy there was need to undertake measures to curb the costs and the parties should be seen committed

to take corrective measures based on the situation of the economy of the country". In paragraph 74 the First Respondent stated that their members were used to working 24 hours as their normal working hours, that any change would work against their members. The chairman, in the next paragraph clarified "that monthly salary was constituted by basic salary and that an overtime was conditional depending on the need to work extra hours from time to time".

[60] The First Respondent concluded in paragraph 79 that "the normal practice was that if the parties' deadlock there were processes that they would embark on to try and resolve the matter". The issue of a deadlock does not arise in consultations but only in negotiations. In the light of the definition of consultation referred to above, the parties need not agree or reach compromise; all that is required of an employer is to notify the forum of any proposal and to consider any suggestions made. Furthermore, the need to consult only arises where the employer makes a proposal to change an existing policy, as in the present case. Once consultation has taken place, the employer takes a final decision on the implementation of the change of policy.

[61] It is apparent that in the present case two meetings were held between the applicants and the First Respondent on the 22nd and 25th October 2010 with regard to the introduction of the four shift system; it is further apparent that the applicants as demanded by the First Respondent did furnish a written submission on the proposed changes and the underlying reasons. The First Respondent was given an opportunity to present a written response on the proposed changes.

Both parties were allowed to motivate their positions; and, further discussions were done on the positions by the parties. At the end of the second meeting, the Applicants took the decision to embark on the new four shift system.

[62] in the case of **South African Police Union & Another v. National Commissioner of the South African Police Service and Another** (2005) 26 ILJ 2403 (LC), the applicant Unions, SAPU and POPCRU sought an order interdicting the First Respondent from introducing an eight-hour shift system for members of the South African Police in line activity duties throughout the country. The applicants contended that the decision to introduce the eight-hour shift was a unilateral amendment to the terms and conditions of their contracts of employment of their members. The Respondents contended that the decision was merely an alteration of a work practice. The Respondent Commissioner of Police had already made the decision without prior consultations on the belief that he was under no duty to consult. **Murphy AJ** at paragraph 84 stated the following:

> "...it was not a term of the contract of employment that employees working 12 hours ...would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not have a vested right to preserve their working times unchanged for all time. The alteration of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in the timing does not amount to a

change in the nature of the job. The shift system was accordingly merely a work practice not a term of employment."

The Court concluded that the Respondents were not under any obligation to consult the Applicants before changing the work practice; the court considered the change to be a routine decision not requiring any consultation. The court was of the view that only significant changes give rise to consultation; and that it would not be in the interests of efficiency if management had to consult over routine decisions.

In the circumstances the decision of the Industrial Court of Swaziland in case No. 494 /2010 and delivered on the 18th October 2010 is hereby set aside.

There is no order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT