IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.3/2020

In the matter between

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION **APPELLANT**

AND

MONDELEZ INTERNATIONAL SWAZILAND **1ST RESPONDENT**

SWAZILAND TRANSPORT AND ALLIED WORKERS UNION **2ND RESPONDENT**

Neutral Citation: *Swaziland Manufacturing and Allied Workers Union Vs Mondelez International Swaziland and another (13/2020) [2020] SZHC (14 October 2020)*

Coram: Hlophe AJA; Mlangeni AJA; Fakudze AJA

For the Appellant: Mr S. Simelane

For the 1st Respondent: Mr K.J. Motsa

For the 2nd Respondent: Mr A. Fakudze

Date heard: 15th September 2020

Date Judgement Handed Down: 14th October 2020

Summary

Labour Law – Appeal against decision of the Industrial Court granting 1st Respondent's Counter application derecognizing the Appellant as a majority union in 1st Respondent's undertaking – Whether 1st Respondent entitled to the order concerned in the circumstances of the matter.

JUDGMENT

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[1] The appellant noted an appeal against a judgement of the Industrial Court handed down on the 11th March 2020 in which the said court dismissed the Appellant's application for a declaratory order and related reliefs whilst granting a counter application brought by the First Respondent against the current appellant who was then the applicant.

[2] I have read my brother Fakudze AJA's judgment and confirm that I have arrived at the same conclusion with regards the fate of the counter application although I have done so for different reasons which I respectfully set out herein below.

[3] . The Appellant and Second Respondent are unions established in terms of the Industrial Relations Act 2000 as amended, whilst the First Respondent is a company duly established in terms of the company Laws of this country. Whereas the First Respondent company has employed in its undertaking employees who are members of either the appellant or the Second Respondent, there cropped up a dispute with regards the recognition of the said unions by the First Respondent on the basis of each such Union claiming to have been recognized as the one having a majority of members from among the First Respondent's employees in the latter's undertaking.

[4] The common cause facts of the matter are set out in full in the Judgement of the court a quo. I will only have to set out a summary in this text so as to lay a basis for the decision to which I have come. It is not in dispute that the Appellant was recognized as a majority union in the First Respondent's undertaking in March 2013. This relationship was confirmed in a written recognition agreement. The terms of this agreement entailed how the recognition of the applicant was to be withdrawn in the event of a need arising. This was to follow a procedure in terms of which inter alia, the First Respondent was going to issue various monthly notices to the Applicant for it to be cautious that its membership was declining and had gone below 50% of

the employer's workforce. The withdrawal itself was going to be at the instance of the First Respondent as the employer, who was going to seek an order of court granting such withdrawal. The Industrial Relations Act says as much about the withdrawal of recognition in the case of a union whose membership has declined to below 50% of the workforce. Again, such withdrawal has to be through an order of court and at the instance of the employer.

[5] Owing to the fact that one of the themes of this matter is the recognition, withdrawal of recognition and the effect of a union as a majority union in an undertaking, it would be crucial for me to capture the clauses of the recognition agreement this matter is about as having been concluded between the Appellant and the First Respondent as well as the relevant section of the Industrial Relations Act 2000 as amended. These clauses of the recognition agreement are 3.6, 3.7 and 6.1 and the section of the Act is section 42 (11).

Clauses 3.6 and 3.7 read as follows:-

> *"3.6 The union accepts that its recognition by the Company shall depend upon its continued representation in terms of this Agreement. Where the number of Union members from amongst the total*

number of eligible employees of the Company decreases to less than fifty percent (50%), then the Company shall inform the Union, in writing, of this fact;

3.7 The Company shall give ninety (90) days written notice to the union from the date of posting to rectify matter (as per 4.6), failure of which shall result in the company withdrawing the its recognition;"

Section 42 (11) reads as follows:-

(11) An employer may make an application to the Industrial Court for *the withdrawal of recognition if –*

(a) *If the organization's representativeness falls below the representativeness contemplate in subsection (5)(a) for a continuous period of more than three months; or*

(b) *The organization has materially breached its obligations under a recognition agreement or an award of recognition under subsection (9)''.*

[6] A necessary inference from the agreement, if not an express one, was that during its tenancy there was not going to be another union recognized on the basis of its being a majority union. In fact, the recognition agreement had described the appellant as the sole collective bargaining employee representative in the First Respondent's undertaking. This is also in-keeping with simple logic which is that there cannot be two unions recognized on the basis of each being a majority union in one undertaking as there can only be one majority union membership at a time. This in my view is one of the reasons for withdrawing recognition of a union that has lost majority status in an undertaking.

[7] The parties are agreed that sometime in 2016, several unions in the country purported to amalgamate and form one union called the Amalgamated Trade Unions of Swaziland (ATUSWA). The appellant joined the said amalgamation and for a number of years ATUSWA was taken to be the employee representative in the First Respondent's undertaking and it assumed all the recognition rights hitherto enjoyed by the Swaziland Manufacturing and Allied Workers Union (SMAWU), the appellant herein. There however cropped up a dispute between the constituent members of ATUSWA; with SMAWU claiming to be independent of ATUSWA and also claiming its

entitlement to continue to conduct its affairs as it did prior to the purported amalgamation. A matter launched at the Industrial Court by SMAWU claiming the unbundling of the two was dismissed by the said Court. SMAWU then noted an appeal to the Industrial Court of Appeal.

[8] With the rivalry raging between the constituent members of ATUSWA referred to above, it would appear that a huge number of SMAWU's members employed at the First Respondent's undertaking, defected en masse to join the union known as the Swaziland Transport and Allied Workers Union (STRAWU), the Second Respondent herein.

[9] Whilst the appeal hearing by SMAWU was awaited on the judgement refusing its unbundling with ATUSWA so as to allow it to revert to the position it was in before the amalgamation, the Second Respondent applied to the First Respondent for recognition as a majority union, claiming to have garnered more than 50% membership in the latter's undertaking. The First Respondent refused this application clarifying that it had already recognized the Appellant as the majority union and could therefore not recognize another one on the same basis. This prompted the Second Respondent to report a dispute with

the Conciliation Mediation and Arbitration Commission (CMAC), claiming that the First Respondent was unjustifiably refusing to recognize it notwithstanding that it had since garnered more than 50% membership in the First Respondents' undertaking.

10] Whatever happened at CMAC, there was subsequently a recognition of the 2nd Respondent as the majority union in the First Respondents undertaking despite its having initially noted it could not recognize another union on such a basis without having withdrawn the recognition of the earlier union through an order of court. In short the First Respondent was now recognizing two unions: each as a majority one which was not tenable. Worse still, this was done behind the Appellant's back who was not part of Second Respondents recognition exercise at CMAC. In its papers the First Respondent wants to make it look like it was forced by CMAC to conclude this recognition agreement with the Second Respondent. I must say from the onset that I cannot accept this. Firstly CMAC, which was sitting as a conciliator had no power to do so as it could not in law force anyone to conclude a recognition agreement whilst acting in its capacity as a conciliator. Secondly the First Respondent had itself earlier acknowledged that it was inappropriate for it to conclude such a recognition agreement with the appellant still recognized by

it on the same basis. Further, the First Respondent was aware that its agreement had envisaged that happening after it would have been derecognized or after its recognition agreement would have been withdrawn through a court order, which had not happened. I therefore find the First Respondent's claim that it was forced by CMAC to conclude the recognition agreement with the Second Respondent to be disingenuous. There can be no doubt that the First Respondent was actuated by some calculated benefit it stood to gain from this recognition which was known only to itself and possibly the Second Respondent when it concluded that particular recognition agreement. This recognition it is common cause was concluded on the 23rd August 2018.

[11] Given that the Judgement of the Industrial Court, the appeal against which was at the time pending before the Industrial Court of Appeal, had refused the unbundling of ATUSWA and SMAWU, the former (ATUSWA) who hitherto exercised the rights and duties of SMAWU in the recognition agreement, between the applicant and the First Respondent, moved an application challenging the then recent recognition of STRAWU as a majority union in the undertaking on top of SMAWU, contrary to the recognition agreement

between the two of them as well as contrary to section 42(11) of the Industrial Relations Act 2000 as amended.

[12] Before the application by ATUSWA challenging the recognition of STRAWU as a majority union could be determined in court, the Industrial Court of Appeal handed down its judgment in terms of which it allowed the unbundling of SMAWU and ATUSWA with the result that the former resumed its rights and duties flowing from its recognition agreement with First Respondent. This judgment of the Industrial Court of Appeal was handed down on the 23rd October 2020.

[13] It flowed from this development that the challenge to the recognition of STRAWU by the First Respondent hitherto pending at the Industrial Court was withdrawn by ATUSWA presumably because it had become academic for it. As the launch and withdrawal of that application had been at the instance of ATUSWA the Appellant contended that this conduct should not be held against it.

[14]The appellant is shown as having first made a move in the enforcement of whatever rights it had against the First Respondent arising from their recognition agreement post the Industrial Court of Appeal Judgement, in

January 2019 when it wrote to the latter asking for a meeting to discuss collective bargaining issues including grading methods and the election of shop stewards. In its response First Respondent advised Appellant that it could not meet it because of the infighting within its (Appellant's) ranks which allegedly made it difficult for it to know which faction was the authentic SMAWU. First Respondent further advised the applicant that it had already recognized the Second Respondent as a majority union which had garnered more than 50 plus 1% in its undertaking and that the latter was now the union with the right to negotiate terms on behalf of all employees within the bargaining unit in the First Respondent's employ.

[15] The Appellant responded thereto by launching the application, a judgement arising from which is the subject of this appeal. In the said application the appellant had sought the following reliefs:-

1. *Declaring the applicant (SMAWU) to be a legally recognized trade union in the First Respondent in terms of a written recognition agreement dated and signed by the applicant and first Respondent on the 20th March 2013. (Annexure SMAWU 1 hereto).*

2. *Declaring that the applicant is the only trade union that has sole collective bargaining rights for employees and/or its members in the first Respondent in terms of the Recognition agreement entered into and signed by the parties (applicant and first respondent) on the 20th March 2013. (Annexure SMAWU 1 hereto).*

3. *Declaring the purported Recognition Agreement entered into by and between the First Respondent and the Second Respondent on 23rd August 2018, annexed and marked SMAWU 2 hereto, to be invalid, null and void and of no legal force and effect on the grounds that the purported Recognition of Second Respondent by First Respondent was a direct violation of clause 3 of the Recognition Agreement between applicant and First Respondent.*

4. *An order setting aside the purported Recognition Agreement between the First Respondent and the Second Respondent (annexure SMAWU 2).*

5. *Directing the First Respondent to fully cooperate with the Applicant in respect of all or any collective bargaining matters including convening of wages and conditions of employment negotiations*

of the Applicant's members in the employ of the First Respondent for the financial year 2019 – 2020.

6. Costs of this application

7. Further and/or alternative relief.

[16] After the matter had been argued before the court a quo V.Z.Dlamini AJ, who was sitting with two members of the Industrial Court, dismissed prayers 3 and 4 of applicant's application whilst upholding prayers 1, 2, and 5 thereof. This it said it was doing pending determination of the counter application filed by the First Respondent in the same proceedings. I mention in passing that the counter Application in question sought an order effectively correcting what the First Respondent had done outside the provisions of the recognition agreement signed between it and the Appellant as well as contrary to the Industrial Relations Act which effectively provided for the de- recognition of the Appellant first before there was recognition of another majority union like the Second Respondent. I will revert to this point later when assessing if in law it was open to the First Respondent to move an application effectively regularizing what it had done outside the law and in that manner.

[17] With regards prayers 3 and 4, which were about the appellant seeking an order declaring the recognition agreement concluded by and between the First and Second Respondents a nullity or put differently declaring it invalid, null and void on the grounds that same had violated clause 3 of the recognition agreement, the court a quo had found that those prayers could not succeed. This it had done on two main grounds; that is by upholding the point *in limine* on the appellant having had no locus standi *in judicio* to allegedly ask court to withdraw the recognition agreement between the two Respondents as well as in the merits of the matter.

[18] In prayer 4 the appellant had sought an order setting aside the recognition agreement concluded between the First and Second Respondents. Like prayer 3, this prayer had also not been granted by the court a quo on the same grounds.

[19] Although the dismissal of prayers 3 and 4 had formed part of the appellant's appeal, the appeal against the decision on these prayers was eventually withdrawn or not pursued on the day of the hearing. This means that this court can no longer entertain them on an appellate basis. I however find it

appropriate to mention in passing that in so far as the court a quo had found that it had no locus standi to determine the said prayers because according to it recognition could only be withdrawn by an employer, such was in my view a misdirection. I say so because the section relied upon, that is Section 42(11) of the Industrial Relations Act 2000 as amended, was not providing for a situation such as that of the relief sought by the Appellant. The Appellant had actually sought a declaratory order that the recognition agreement between the First and Second Respondents be declared a nullity because its conclusion had disregarded certain preliminary steps including the provisions of section 42(11) of the Act. It was not asking for an order withdrawing a recognition which is a different relief altogether. The latter sought an order declaring the purported recognition a nullity. The withdrawal of recognition presupposes the undoing of an existing recognition whilst the declarator of a recognition as a nullity presupposes that the said recognition was one concluded outside law and was a non-starter therefore. Had this simple fact been appreciated there was no way the Court a quo would have come to the conclusion it did.

[20] In my view equating the nullity sought to a withdrawal is a misnomer. Anyone aggrieved by a recognition agreement that is a nullity because it

would have been concluded contrary to law or outside other agreements on how or when it should be concluded, should be entitled to have it declared a nullity because it would never have been in lawful existence. There is no rationale why that should be done by an employer only, when such an employer is not likely to do it anyway if that employer, in so concluding it, had found such agreement to be beneficial to it, albeit concluded unlawfully. The recognition agreement that the Act directed be withdrawn by the employer is in my view the one that had been properly concluded but had since been violated or there has occurred a breach to its terms. A recognition agreement concluded contrary to the Industrial Relations Act and other existing agreements on what should happen prior to the conclusion of a new one, should be capable of being challenged by an aggrieved party and even be declared null and void at that party's instance.

[21] Certainly, the refusal to declare such a recognition a nullity on the grounds that it can only be withdrawn by the employer is a clear misdirection because what was there sought was not a withdrawal of a proper recognition but a declarator of it as a nullity because it had not been concluded lawfully.

[22] It should therefore follow that in so far as the second Respondent was recognized as a majority union outside the agreement the First Respondent had with the Appellant and contrary to the provisions of section 42 (11) of the Act, then that purported recognition had to be declared a nullity. There is nothing however preventing the recognition of such a union as a minority union in that undertaking. The recognition of a union as a majority one on top of an established one should therefore be set aside in order to avoid confusing the law on the subject as well as causing disharmony in the work place.

[23] There would be nothing wrong with the First Respondent recognizing any further union it felt the need to recognize (including the Second Respondent),as one of the minority unions, provided that the terms of such a recognition would be covered in the reply to the application conveying such a recognition as envisaged by the Industrial Relations Act 2000(as amended) and as per Section 42 (4) of the Industrial Relations Act. See **Zheng Yong Swaziland (PTY) LTD Vs Swaziland Processing Refining and Allied Workers Union (206/2006) 2007 SZIC 6.**

[24] A lot was said by the First Respondent on why it failed to follow the Recognition agreement between it and the Appellant regarding the withdrawal

of recognition on the basis that the Appellant's members had fallen below 50% in the manner provided for in the Act and in the recognition agreement between them. First Respondent averred that it could not derecognize or withdraw the recognition in question because there was infighting within the Appellant's executive.

[25] Whilst it could be true that there may have been such in fighting, this court does not agree that same would have prevented the First Respondent from instituting proceedings for the withdrawal of the recognition agreement. Those proceedings would not be directed at a faction but to SMAWU as an organization through complying with the Rules of Court in terms of which the application would have been served on the appellant at its registered office as a union or if that was impossible by seeking a directive from the court on how to effect proper service on SMAWU as the Respondent. The Rules provide how proper service suitable in such circumstances should be effected. It is therefore disingenuous for the First Respondent to raise the infighting as a bar to its seeking the withdrawal of the recognition agreement it had concluded with the Appellant if the requirements were met. It may well be that there would not have been any meaningful opposition to that relief as sought if the First Respondent is to be believed and it would therefore have withdrawn the recognition and then freely recognized the Second Respondent.

[26] I agree that there was no reason why prayers 1, 2 and 5 should not have been granted. The view I take is that the grant of these prayers would have to remain in place until such time that the recognition of the Appellant by the First Respondent as a sole representative of all employees within the bargaining unit, would be lawfully withdrawn. This I say foreshadowing the view I have taken of the counter application, taking into account that the initial grant of the above stated prayers had been rendered academic by the counter application's subsequent grant.

[27] In its counter application the First Respondent had sought an order effectively withdrawing the recognition of the Appellant by the First Respondent as the sole representative of all the latter's employees found within the bargaining unit. This withdrawal of recognition has also been referred to as the derecognition of the appellant by the Respondent. The First Respondent's counsel admitted during his submission that this application for the derecognition of the Appellant was not properly made and that it should have been done prior to the recognition of the Second Respondent by the First

Respondent, which confirmed that the recognition of the second respondent as a majority union on top of another majority union was irregular.

[28] Whereas the First Respondent's Counsel's submission is that they could not derecognize the appellant because of the infighting within is executive ranks, I have already indicated that this reason is not acceptable. It is actually defeated by the very fact that after the Appellant had instituted these proceedings in the court a quo, the difficulty raised by the First Respondent was no longer there when it applied and was granted an order derecognizing the same Appellant by means of the counter application it instituted. The first Respondent is suggesting that the infighting was no longer a barrier when it sought the counter application.

[29] It seems to me that there are various difficulties with the counter application standing as a relief in the circumstances as well as with the order granting it. The relief sought via the counter application was sought in the backdrop of the First Respondent having first unlawfully appropriated to itself that which upon its being challenged it now seeks to legitimize by means of a court order. That is to say it had, whilst acting contrary to the agreement it had with the

Appellant as well as the letter and spirit of the Industrial Relations Act per Section 42 (11), gone on to recognize the Second Respondent as a majority union and even as a sole representative of employees within the bargaining unit which are the same terms the applicant had been recognized upon and remained in place for as long as the recognition agreement had not been withdrawn. In that sense the First Respondent was approaching the court with dirty hands in seeking the very same relief that it had long appropriated to itself unlawfully.

[30] The policy of the courts the world over, is that a party who approaches the court with dirty hands is not suited for the relief he seeks. He must first purge his having had to treat the law with contempt before he requires it to protect his interests. In other words, he cannot use the law to clothe his otherwise unlawful or unacceptable conduct with authority. Restating this principle, Nathan CJ, had the following to say in **Photo Agencies (PTY) LTD V The Commissioner of The Swaziland Royal Police and The Government of Swaziland 1970 – 76 SLR 398 at page 407 C – D;**

"The nearest analogy I have been able to find is that of the fugitive offender who, in the cases of ***Mulligan V Mulligan 1925***

WLD 164 and S V Nkosi 1963 (4) SA 87 (T) *was held to have forfeited the right to seek assistance of the court. In Nkosi's case Hill J (later the Chief Justice of this court), Vieyra AJ concurring quoted from the judgement in Mulligan's case, where it was said at PP167 – 168, " Before a person seeks to establish his rights in a Court of Law he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the process of the Court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests... were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets the law and order in defiance."* (Underlining mine)

[31] Equating the reasoning behind the clean hands doctrine to that of the *exceptio doli defence*, the learned Chief Justice said, the following in page 407 E – G, whilst referring to the words of Tindall JA in Zuurbekom LTD V Union Corporation LTD 1947 (1) SA 514 A at PP 535 – 536:-

"So that a person should not by reason of the subtlety of the Civil Law, and contrary to the dictates of Natural justice, derive advantage from his own bad faith." And, at P536, he said that the defence was available "not only where the Plaintiff by taking legal proceedings was acting maliciously, but also wherever, as it was said, ipsa res in se dolum habet...i.e wherever the raising of the action constituted objectively a breach of good faith." (underlining added)

[32] It is clear that in the present matter the First Respondent had, in order to derive its objective of having the union it preferred to work with, chosen to ignore the provisions or processes it needed to comply with in having the union it had earlier recognized on the same basis as the recent one derecognized properly before it recognizing another one in the same stead. It had failed to observe the processes set out in the recognition agreement and in section 42 (11) of the Industrial Relations Act as amended. Upon realizing that its aforesaid conduct was being challenged, it sought an order of court under the counter application it has instituted to legitimize its actions. In doing this the First Respondent is obviously trying to derive a benefit from its own bad faith; particularly taking into account what was said in the above extract that the

dirty hands principle just like the exception doli, does not only avail one where he or she would have acted maliciously but wherever by his conduct he can objectively be said to have acted in bad faith. It seems to me that by acting in the manner it did, the First Respondent acted in bad faith towards the appellant and therefore acted with dirty hands. Whenever one is found to have so acted, the position of the law is that he cannot ask the court to set its machinery in motion to protect his civil rights and interests. The counter application should be dismissed on this ground alone. It is dismissed in order to maintain respect for law and to promote confidence in the administration of justice so as to preserve the judicial process from contamination.

[33] There is even a more fundamental ground in my view why the counter application should not have been granted. This was because in so far as it was purportedly granted because the Appellant had its membership in the First Respondent diminished to below 50% whilst that of the Second Respondent had allegedly gone beyond that, this finding of the court a quo is not informed by the realities on the ground, at least when considering what was pleaded in the papers before court.

[34] There are in my view apparent disputes of fact in this regard. In paragraph 15.1 of its replying affidavit, which was effectively answering the counter application initiated through First Respondent's answering affidavit, the appellant disputes that the First Respondent, who sought the derecognition of the appellant contending that its membership had fallen below 50% of the First Respondent's unionizable employees, had its membership diminished below 50% as at the time the counter application was instituted. The Appellant went on to contend that as a matter of fact, as at the time of the determination of the counter application its membership made 51.9% in the First Respondent's undertaking. This percentage was allegedly extracted from the allegation that its members were 92 out of 177 employers in the said undertaking. Since its membership had breached the 50 plus 1% threshold it allegedly had to follow, that the Second Applicant could not have another 50+1% percent in the same undertaking.

[35] The Appellant further contended that it had some 24 unionazable members in the First Respondent's undertaking, who had allegedly signed the stop order forms to enable it effect monthly deductions as union fees from the said employees' salaries. These are the employees who made part of the 92 who were allegedly making the 51.9% membership, in favour of the Appelant. The

First Respondent's Human Resources Manager identified as Penelope Mkhwanazi, was alleged to have refused to accept these signed stop orders which are in law conclusive proof of the union membership in a particular undertaking. I can only say that if this happened, it was an act of unlawful interference in union activities by an employer or by one acting on its behalf. The significance of this aspect of the matter is the crystallization of a dispute of fact making it all the necessary that the court a quo should not have granted the counter application without a proper and objective verification count being conducted.

[36] The Appellant prayed that at least there be some verification count by means of a secret ballot so that the matter can be put to rest once and for all.

[37] In its response the First Respondent denied that the Appellant had such a membership in its undertaking. It insisted that the Second Respondent had the majority Membership in the First Respondent's undertaking. It in fact claimed that its members totaled 59.8% because they were in reality 106 out of 177 which translated to the said percentage. On the refusal to accept the 24 members who allegedly took the Appellants membership to the alleged

51.8%, it was contended by Mr Motsa during the hearing of the matter, that the members allegedly associated with the 24 stop orders had filed affidavits in terms of which they confirmed that they were members of the Second Respondent and not those of the Appellant. It was contended that this affidavit was the proof that the said employees were members of the Second Respondent.

[38] I find it to have been unsafe for the court a quo to have, in the face of an apparent dispute of fact, chosen to accept the version of the Second Respondent over that of the Appellant. Firstly, it was the Appellant who may be taken to have been standing on stronger ground in claiming that the twenty four members who had allegedly signed the stop order forms are its own, given that such conduct is taken to be conclusive in terms of the Act. Ofcourse, I should not be understood to be saying that the disputes raised by the First and Second Respondents with regards such employees having prepared certain affidavits to reassert their position be ignored. The point being made is simply that there was a material dispute of fact which went to the heart of the matter and which could satisfactorily be resolved through a verification count held under the auspices of CMAC.

[39] In its decision the court a quo said the following at Paragraph 77 of its judgement:-

> *"The Applicant never challenged the validity of the August 2019 payroll and payslips. It only applied for a recount or fresh verification of the twenty – four by CMAC; this was opposed by the Respondents. In light of the further affidavits that were not rebutted, the court would not exercise its discretion in favour of the Applicant." (Underlining added).*

[40] I cannot agree that the court a quo had any discretion to accept the version of one party over that of the other in the face of so vexed a dispute. A solution lied in the tried and tested method of resolving dispute which in the circumstances of this dispute was the conduct of a verification count through a secret ballot. In fact, the affidavits disputing that the signatories were members of the appellant did not avail the court a quo any discretion to exercise than it crystalized the dispute so much so that the only way to resolve it was through the verification count referred to above. I would add that in a case where the employer appears to be having some interests which would

make the employees uncomfortable in conducting a normal verification, it makes perfect sense for such a verification to be conducted through a secret ballot.

[41] Now that I have touched on the First Respondent as an employer exhibiting unadulterated interests on which union it would prefer to work with to the extent of taking sides and defending the recognition of the Second Respondent over the Appellant, including its having had to file a counter application in court having to derecognize the appellant whilst recognizing the Second Respondent, I am of the view that a comment is merited, namely that the employers in the position of the First Respondent should avoid taking sides on who to recognize or derecognize among unions haggling over who attains majority status in the undertaking so that it works well with whichever union whilst not confounding the intended purpose of the law regarding the recognition of unions in the first place, namely to advance the interests of the employees within the full ambit of the law.

[42] Having said all I have above, I have come to the conclusion that the appellant's appeal succeeds and I accordingly make the following orders;

42.1 Prayers 1, 2 and 5 of the Appellant's notice of motion be and are hereby upheld and they are to remain in operation until the appellant's recognition shall have been lawfully withdrawn or terminated.

42.2 In order not to create confusion in the First Respondent's undertaking the recognition of the Second Respondent as a majority union is set aside pending a proper verification on who between the two unions has a majority membership, after which, depending on the outcome of the verification exercise, the deserving party shall be recognized as a majority union. Provided that this shall be after a proper withdrawal of the recognition of the Appellant shall have been made unless a different approach shall have been agreed upon between all the concerned parties.

42.3 The First Respondent's counter application is dismissed with the result that its purported derecognition of the appellant shall be set aside.

42.4 The dispute between the parties (concerning who has majority membership) is, subject to orders 40.1 and 40.2 herein above, sent back to CMAC for verification through a secret ballot carried out under its auspices by an independent and neutral commissioner.

42.5 Each party shall bear its own costs.

N. J. HLOPHE AJA