IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 113/89

In the matter between:

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION — Applicant

VERSUS

SWAZILAND BREWERS LIMITED — Respondent

C O R A M: J.A. HASSANALI — President

MR MOTSA for — Applicant

MR KEYTER for — Respondent

MR MOKGOKONG & MR MATSEBULA — Assessors.

ORDER (Delivered 15th March, 1990)

HASSANALI, P.

This is an application brought by the Applicant on a Notice of Motion for an Order on the following terms –

(a) that the rules relating to service, time limits and forms be and are hereby dispensed with, non-compliance with the rules be hereby condoned, and the matter be regarded as one of Urgency.

(b) that the Court Orders the Respondent to re-instate all the locked out-workers immediately and unconditionally.

(c) Any other competent relief.

The Respondent through Mr Johan Andre Steyn filed an answering Affidavit and has raised the following as preliminary objections –

(l) "that the application has advanced no grounds for the application being heard as a matter of urgency. The application was served on the Respondent's Attorneys at 11.30 a.m. on Friday 8th December 1989, which left the Respondent with just half a working day to prepare the necessary papers.

(2) Any Urgency that exists has been created by the Applicant itself as, if this was a bona fide application (which I deny), it should have been brought four weeks ago.

(3) this application constitutes an abuse of the process of this Honourable Court as it has been deliberately set down by the Applicant on the shortest possible Notice to cause the maximum inconvenience and prejudice to the Respondents."

When the Case was taken up for Inquiry, Mr Keyter, representing the Respondent Company intimated that he was not pursuing with his preliminary objections, and was therefore withdrawing them.

I wish to briefly outline the events which eventually led the applicant Union to make this application.

The Respondent is Swaziland Brewers, a Company carrying on business at Matsapa with a fairly large workforce. In 1979 trouble started to brew at the Packaging Department of the Company between the workers and one Mr Madonsela, the Manager, on account of his relationship with the workers. The workers demanded his removal forthwith from the Department which the Management refused. The outcome of this was that the Applicant Union on or about 25/9/89 reported the refusal as a dispute to the Labour Commissioner who attempted to conciliate but failed to secure any settlement. He then issued the Certificate of Unresolved Dispute to the Parties. With this Certificate the Branch Committee of the Union on 8/11/89 gave notice to the Respondent Company that it would be taking strike action on 10/11/89 (Ex.A). The Respondent acted quickly and on the following day (9/11/89) made an application under Sec.58(2) of the Industrial Relations Act under Case No. 95/89 requesting the Court to resolve the issues that were h dispute between the parties. The Notice was accordingly issued on the Union to appear in Court on

13/11/89.

Meanwhile the Company on the same day (9/11/89) forwarded a Notice to the Branch Committee and the Applicant's members. The said Notice read as –

"You are advised that the proposed strike on 10 November 1989 of which Management received Notice on 8 November 1989 will not be lawful In terms of Industrial Relations Act 4 of 1980."

A further Notice (JS) was posted on the Notice Board informing all the workers in clear terms that the contemplated strike action fixed for 10/11/89 would be illegal. The Union then called off the strike but later gave fresh strike notice for 14/11/89. Meanwhile on 13/11/89 the Union apppeared in Court and filed its objection to the applicant's application in Case No. 95/89. This Case was called again on 15/11/89 and was fixed for Inquiry on 17/11/89.
However on 13/11/89 after the appearance of the Union in Court, the Respondent Company issued a further Notice to its employees which reads as follows –

"You are advised that the Management of Swaziland Brewers Limited will apply the laws of Swaziland, should any unlawful strike action take place at Swaziland

Brewers Limited at any time whatsoever,"

We again draw your attention to section 62(l9(b) and (c) of the Industrial Relations Act which states as follows –

"(b) an industry Union or staff Association taking strike action shall be guilty of an offence and in addition to any other penalty under Section 2, the Court may order the cancellation or suspension of its registration.

(c) Where an employee takes part in such strike action the employer may treat such action as a breach of contract and may terminate his services summarily."

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The Management of Swaziland Brewers Limited urges the members of Swaziland Manufacturing and Allied Workers Union to consider the position carefully before partaking in any strike action which could be unlawful."

According to Mr. Steyn this Notice was especially read over to some of the Senior Officials of the Union.

Despite these warnings on 14/11/89 a number of workers who were members of the Union went on strike and at this period, the Company issued yet another Notice which reads as follows –

"Your decision to take industrial action this morning at 07h 00 is in contravention of Section 64(1) of the Industrial Relations Act."

"No party to a dispute may continue or take strike action or institute a lockout while proceedings in relation to a dispute to which that action relates are pending before the Court."

I must point out at this stage that the Union took strike action despite the fact that the issues in dispute between the parties were before the Industrial Court.
The Company continued with their efforts to get the striking workers back to work. A further notice was issued which read as follows –

The Management of Swaziland Brewers Limited regret to inform you that unless you report at your work station for work by 15h 00 (3 O'clock), on Tuesday 14th November, your services will automatically be terminated at that time. You will be paid for work done up to and including 13/11/1989 and outstanding leave pay due as at 13/11/1989. You will not receive any other termination benefits."

In response to this Notice, some workers returned to work, but the majority of them ignored the warning and continued with the strike action. The

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Company then prepared individual letter confirming the dismissal of striking employees and attached them to their final pay packets. The letters read as follows –

"As you know your services with Swaziland Brewers Limited were terminated on the 14th November, 1989 in terms of the Industrial Relations Act, as you had failed to comply with the Management's request to cease your unlawful strike action and return to work by 15h00 on that date. Attached yo will find the wages due to you up to and including 13th November, 1989 including any leave pay due."

From the above it seems to me that all the striking workers were dismissed and new persons employed in their places.

The question to be decided on now is whether on 15/11/89, the Respondent Company locked out the workers as alleged by the Applicant Union.

In order to decide this issue it is necessary for me to refer to the Industrial Court Case No. 95/89 where the Court was required by the Company to resolve the disputes that existed between the Company and the Union. The application was made under Sec. 58(2) of the Industrial Act which reads as follows –

"If the unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his employment or the dismissal, employment, re-employment or re-instatement of any employee, either party to such a dispute may make application to, or the Labour Commissioner may refer the matter to the Court for the determination of the dispute."

Mr Motsa representing the Union argued that the aforesaid section did not apply to application of this nature, it applied only to matters related to dismissal, employment, re-employment or re-instatement. The main issue he said was the removal of Mr Madonsela from the Packaging Department.

Therefore the proper section under which this application should have been brought was under Sec. 58(3)(a) and since this had not been done, Sec.64(l) would not therefore apply to this matter. Hence he said that his application should be allowed and the locked out workers should be re-instated immediately and unconditionally.

Mr Keyter on the other hand maintained that this application had been made under the correct section. This section not only applied to dismissal, employment, re-employment or re-instatement, but also existing terms and conditions or the denial of any right of an employee in respect of his employment. Mr Keyter further maintained that if the Company removed Mr Madonsela from the Packaging Department it would amount to the interference of the existing terms and conditions of his employment.

It is clear that the dispute revolved round the removal of Mr Madonsela, an employee of the Company. The Union wanted him removed to which the Management refused and referred the matter to Court for determination. In my view the question of the removal of Mr Madonsela concerns his existing terms and conditions of employment. Therefore the Company was justified in making this application under Sec.58(2) of the Act.

I now turn to the next question as to whether the applicant had acted contrary to law when it took out its members on strike on 14/11/89. In this connection I wish to refer to Sec.64(l)

"No party to a dispute may continue, or take strike action or institute a lock-out while proceedings, in relation to a dispute to whch that action relates are pending before the Court."

It is common cause that the application in Case No. 95/89 was filed on 9/11/89 after the Union had given strike notice on 8/11/89, that it would be taking out its members on strike on 10/11/89. The Notice of this

Application was served on the Union on the same day. The Union then called off the strike but later gave fresh strike notice for 14/11/89. The applicant Union however appeared in Court on 13/11/89 and filed its objection to the issues raised in the said application and the matter was fixed for Inquiry on 17/11/89. Meanwhile on 14/11/89, the workers belonging to the Applicant Union went on strike.

Therefore on 13/11/89 the Union was fully aware that there was a case pending against it in Court, brought by the Company, for determination on the matters related to the disputes. Despite this on 14/11/89 the Union took out its members on strike, thereby contravening the provisions of Sec. 64(1). As such the Court has no other alternative but to hold that the strike action on 14/11/89 was unlawful.

The Company then terminated the striking workers on 14/11/89 under Sec.62(c) and in my view the Management was justified in its action.

The Union however took up the point that the workers were locked out on 15/11/89. The Company on the other hand maintained that the workers who went on strike were already dismissed on 14/11, Having perused the documents and listened to the submissions of the Representatives, I have come to the conclusion that the services of the striking workers were terminated on 14/11/89 and therefore there was no question of a lock-out as alleged by the Applicant Union.

Therefore taking the above into consideration, I have come to the conclusion that the application in terms of paragraph (b) of the Notice of Motion dated 7/12/89 should be refused.

In the circumstances, the application is dismissed. My Assessors agree with my decision.

J.A. HASSANAU. PRESIDENT