IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE CASE NO. 76/99
In the matter between:
NGWANE MILLS (PTY) LIMITED APPLICANT
and
SWAZILAND MANUFACTURING AND ALLIED
WORKERS UNION (S. M. A. W. U.) RESPONDENT
CORAM:
NDERI NDUMA : PRESIDENT
JOSIAH YENDE : MEMBER
NICHOLAS MANANA ; MEMBER
FOR THE APPLICANT: MR. ZWELI JELE
FOR THE RESPONDENT: MR. ALEX SHABANGU
JUDGEMENT
(06/05/99)

The Applicant has brought this application seeking an order in the following terms:

1. Waving the usual requirements of the rules of court regarding form, notice and service of the application in view of the urgency of the matter.

2, That a rule nisi do issue, returnable on a date to be fixed by this Honourable Court, calling upon the Respondent to show cause why the following Orders should not be made final:

(a) Interdicting and restraining the Respondent from proceeding with the mediation process commenced under Section 65 (4) of the Industrial Relations Act.

(b) Directing that the dispute between the parties be referred to the above Honourable Court for determination in accordance with Section 53 (1) of the Industrial Relations Act.

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Alternatively:

© Directing that the dispute be referred to the above Honourable Court for determination in accordance with Section 65 (2) of the Industrial Relations Act.

(d) That a Rule Nisi in (b) above operate with immediate effect pending the finalisation of this matter.

(e) Further and/or alternative relief.

The application is supported by the Affidavit of ANTHONY DAVID PITTS. When the matter was first called on the 6th April, 1999 by consent of both parties the mediation process the subject of the dispute herein was suspended by an order of the court pending the determination of the application on the merits. The consent order precluded any arguments as to whether this matter ought in the first place to have been brought on the basis of urgency. It wont be necessary therefore for us to dwell on that aspect of the application.

The Respondent union has filed its answering affidavit deponed to by its President MR. JABULANE JONGA.

The gravamen of this dispute is whether or not the parties agreed to do a job grade review as opposed to a wage review. The contentious agreement is contained in Clause 25 of a Collective Agreement dated the 22nd September, 1997.

The said Clause reads as follows :

" 25 Ngwane Mills undertake to do a job grade review by 31 January, 1998".

The Respondent contends that in terms of this clause, the Applicant was not only obliged to conduct a job grade review but that this also entailed a review of the salaries of the affected employees.

Accordingly on or about the 26th June, 1998 the Respondent lodged a dispute with the Commissioner of Labour in accordance with Section 57 and 58 of the Industrial Relations Act of 1996. The Labour Commissioner was unable to resolve the dispute and he issued a certificate of unresolved dispute a copy of which is annexed to the application and marked "NM2".

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It is not in dispute that pursuant to the certification of the dispute as being unresolved, the Respondent caused a notice to be served on the Applicant advising it that it had appointed a mediator in accordance with Section 65 (4) of the Act. The notice is annexure "NM3" to the application.

The Applicant seeks the court to restrain the Respondent from proceeding with the intended mediation on grounds that the dispute is not one that ought to be resolved by mediation but rather one to be dealt with by this court in accordance with Section 65 (2) or alternatively with Section 53 (1) of the Act.

The question that immediately arises, is whether or not a party has exclusive freedom to choose how to resolve its own dispute provided the mode chosen is not contrary to any law or any previously agreed to dispute resolution procedure.

The Applicant insists that the Collective Agreement is an accurate and correct reflection of what transpired at the negotiations and that if the Respondent is of the contrary view, the appropriate relief would be to have the Collective Agreement amended in terms of Section 53 (1) of the Act. Furthermore the dispute between the

parties is not one competent to be dealt with in terms of Section 65 (4) of the Act as it relates to a matter of law, MR. JELE argued. According to him the issue to be determined is whether or not the parties can negotiate on a matter that clearly is not contained in the Collective Agreement covering the material period.
The Applicant argued further that if the matter is allowed to proceed in accordance with Section 65 (4) then it will create prejudice in that the forum in which it is sought to have the matter concluded is incorrect and will not be able to resolve the dispute. That the matter should be dealt with in accordance with Section 65 (2).
The Applicant also expressed fears that where mediation has been unsuccessful or has not taken place a party has a right to invoke the provisions of Section 65 (3) and issue a strike notice. They submitted that the Applicant intended to refer the matter to a strike action since mediation cannot resolve the matter at hand.
On the contrary MR. SHABANGU for the Respondent submitted that though it is not explicit on the Collective Agreement it was agreed by both parties that a regrading or review of the grading system upon which the pay structure was based be reviewed before the end of January, 1998. That the understanding was that a new grading of the jobs would be proposed by the Applicant, discussed and agreed upon which would have the effect of having the jobs currently on lower grades placed at higher grades with the concomitary result of the reviewed grade standing at a higher level on the corresponding wages structure at the Applicant's undertaking.
Furthermore, the Respondent stated that the parties had agreed that the reviewed jobs be awarded 0.89 cents across the board on condition or the understanding that there will be in any event an upward movement in the
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grading of jobs when the job review would be undertaken in January, 1998 and this would automatically result in further wage increase.
This in brief is the dispute that the Respondent has elected to refer to mediation. The Applicant seeks relief by way of an interdict. The preconditions of granting such relief are well stated in the Swaziland High Court case of SWAZILAND DAIRIES (PTY) LTD v MEYER 1970 -1976 SLR 91 at 92 where Pike CJ said ;
"To entitle the Applicant to the exercise by the Court of its discretion to grant an interim interdict it is clear from the authorities that he must show (a) that the right which is the subject-matter of the main action and which he seeks to protect by means of an interim relief is clear or, if not clear, is prima facie established though open to some doubt; (b) that, if the right is only prima facie established there is well grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; © that the balance of convenience favours the granting of interim relief; and (d) that the Applicant has no other satisfactory remedy. See L.F. BOSHOFF INVESTMENTS (PTY) LTD v CAPE TOWN MUNICIPALITY 1969 (2) SA 256 © at p. 267.
This case was cited with approval by Judge C. Parker in Swaziland Agriculture and Plantations Workers Union v UNITED PLANTATIONS (SWAZILAND) LTD. CASE NO. 79/98 (urept).
The interdict sought in this case is a final one and therefore the Applicant should on a balance of probabilities establish a clear right to the relief sought.
The issue of irreparable harm falls away since the right must be clearly established for the final relief to be granted. The balance of convenience similarly ceases to be of any significant importance once the Applicant has clearly proved his right to the relief sought.
As concerns the present case the Applicant seeks to stop the Respondent from proceeding with mediation in terms of Section 65 (4) to resolve the issue in dispute between them, preferring that the matter be resolved by way of reference to this court in terms of Section 53 (1) or under Section 65 (2) of the Act.
There is no legal provision to our knowledge that debars the Respondent to proceed in the manner they have chosen. The Applicant has not shown that there is in existence any agreement that precludes the Respondent from proceeding to mediation as they have now done.
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We should observe that it is presumptuous of the Applicant to allege that the Respondent has taken this step only as a pre-step to calling an industrial action in terms of Section 65 (3) (c). No evidence has been introduced to substantiate this bald allegation.
It is note worthy that Section 65 (4) offers alternative progression to resolve the matter in the event the mediation process is not successful. In particular Section 65 (f) states as follows :
"(f) the decision or determination of the mediators shall not bind the parties to the dispute and after such determination or decision, the parties may take action by way of a strike or lock out, or refer the dispute to the court for determination in accordance with sub-section (3) (a), or request that the matter be referred to arbitration in accordance with sub-section (3) (b)".
Clearly, the Respondent may choose either of the three options provided thereof. There is no justification to conclude that their sole intention is to resort to industrial action in the event the mediation process fails.

Accordingly, the Applicant has failed entirely to establish a clear right to warrant this court to issue an interdict as prayed. This being so, it is not opportune for us to determine whether or not mediation is a suitable option to resolve the dispute as opposed to the options preferred by the Applicant.

The application is dismissed with no order as to costs.
NDERI NDUMA PRESIDENT OF THE INDUSTRIAL COURT