IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 245/2002
In the matter between:	
KENNETH MANYATHI	APPLICANT
and	
USUTHU PULP COMPANY (PTY) LTD	1ST RESPONDENT
SWAZILAND PLANTATIONS & ALLIED	
WORKERS UNION (SAPAWU)	
(USUTHU BRANCH)	2nd RESPONDENT
CORAM:	
NDERINDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANT:	M.MABILA
FOR RESPONDENT:	A.LUKHELE

JUDGEMENT

20.11.02

The Applicant, an employee of the 1st Respondent company and ex member of the 2nd Respondent union approached the court on a certificate of urgency seeking for an order couched in the following terms:

1. Dispensing with the usual time limits, procedures and manner of service set out in the Rules of Court and hearing this matter as one of urgency.

2. Condoning the applicant for non compliance with the said Rules of Court.

3. Declaring the Agreement between the Respondents null and void and of no force and effect.

4. Interdicting and restraining the 1st Respondent from varying the Applicant's terms of employment without consultation with him.

5. Costs in the event Application is opposed.

The Application was filed on the 13th September, 2002 and the Applicant notified the Respondents if they intended to oppose the same to notify the Applicant's Attorney in writing on or before 4.00p.m. on the same day and thereafter file Answering Affidavits, if any, by 9.00a.m. on the 16th September, 2002 failing which the matter will be heard on the said date at 9.30a.m. The Application is founded on the Affidavit of

the Applicant Kenneth Manyathi who states the cause of action therein as follows:

Para 4: On or about July 2002 he discovered that the 1st respondent, his employer had varied his employment contract by withdrawing the electricity subsidy without consulting him.

Para 5: He was informed by Mr. R. Kunst, Human Resources Manager that this was done upon consultation with the 2nd Respondent.

Para 6: That the withdrawal is both unlawful and wrongful in that the 2nd Respondent had no mandate and/or authority to negotiate variation of his employment contract as he is not a member of the 2nd Respondent and in the alternative at the time the agreement between the Respondent was entered into the Recognition Agreement between them was ineffective as it had lapsed in 1997 and was never extended nor renewed, hence the agreement to vary his term was null and void and of no force and effect.

The Applicant further outlines the reasons for urgency as follows:

Para 7: That he was suffering great financial prejudice because the action of the Respondents has the effect of diminishing his monthly income.

Para 8: That many other employees as found in annexure "KM1" to the application had suffered the same fate and also felt aggrieved.

Para 9: That he was suffering irreparable harm as he was now to pay electricity bill monthly and the only remedy was to interdict the Respondents and that the balance of convenience was in favour of stopping the subsidy withdrawal.

and lastly:

Para 10: That his next salary was due on the 20th September 2002 and it would be without the subsidy if no interdict is granted.

Both Respondents have filed Answering Affidavits. The 2nd Respondent raised objections in limine that may be summarized as follows:

1. That the application is not urgent and ought not to be entertained by the court as such.

2. That the Applicant has also failed to report a dispute in terms of Part V111 of the Industrial Relations Act 2000.

3. The relief sought would affect more than four hundred workers who are not party to these proceedings.

The Applicant has replied to the Answering Affidavit and as it were pleadings were closed before the hearing of the matter on the 15th October, 2002.

Mr. Dunseith for the 2nd Respondent told the court that although he did not wish to press the issue of urgency because all the papers were before court, the dispute was not reported to the Labour Commissioner and therefore was not conciliated upon. If the matter is not admitted on an urgent basis, then in terms of Rule 3 (2) of the Industrial Court Rules, the court lacks jurisdiction to entertain it and same should be dismissed.

He added that all the employees who would be affected by the order sought by the Applicant i.e. to annul the collective agreement, ought to have been joined to these proceedings because they may be required

to refund a salary increment of 3.25% paid to them for the last few months and as such are interested parties.

If the agreement was set aside, it would have far reaching consequences at the undertaking.

Mr. Mabila for the Applicant countered the objection in limine as follows:

That non-joinder was not an issue since the employees representative, that is, the 2nd Respondent represents all its members who may be affected by the order of the court.

On the issue of urgency, he stated that the current application was in the nature of spoliation application as it seeks recovery of alienated rights that were lawfully vested in the Applicant but had been unlawfully taken away from him. He added that spoliation applications are urgent in their very nature and this application ought to be heard and determined as such.

Mr. Dunseith disagreed with this argument stating that spoliation proceedings dealt with deprivation of possession of property and the order sought in those matters seeks restoration of status quo ante.

In this matter, he said, the Applicant claims that his contractual financial benefits have been withdrawn, and that the court has time and again held that financial difficulty is not a ground for urgency and that such disputes ought to be conciliated upon in terms of Part VIII of the Industrial Relations Act No. 1 of 2000.

Mr. Jele for the 1st Respondent told the court that the issue of the electricity benefits was only a symptom of a larger problem which emanated from a resignation of a large number of the employees of the 1st Respondent from the membership of the 2nd Respondent. Indeed a list of 64 such employees is annexed to the application.

The said employees have since joined a rival union which has been duly registered in terms of the Industrial Relations Act No. 1 of 2000 which seeks to represent shift workers at the mill of the 1st Respondent.

The simmering conflict between the unions is exacerbated by the fact that the 2nd Respondent is recognized as the sole representative of all unionized workers at the undertaking in terms of the 1996 Act which did not permit more than one union in an undertaking.

As we stated in the Industrial Court of Swaziland Case No. 6/2002 between Swaziland Allied Workers Union and Usuthu Pulp Company Ltd and Another, the Industrial Relations Act No. 1 of 2000 has now permitted Recognition of more than one union in an undertaking but has not provided a

mechanism for the entry of a newly registered union in an undertaking where there is an existing recognized union.

This scenario at the 1st Respondent's undertaking is what underlies the conflict the cause of action in this matter and it was submitted by Mr. Jele for the 1st Respondent that it was in the interest of justice and a lasting solution, that the court adjudicates on the validity of the recognition agreement between the 1st and 2nd Respondent's herein.

The court has identified the issues for determination at this stage as follows:

1. whether the application ought to be dealt with on an urgent basis.

2. whether all members of 2nd Respondent ought to be joined to the proceedings.

3. whether the matter should be referred to the Commissioner of Labour for conciliation.

It is common cause that the Act complained of was a result of an agreement between the 1st and 2nd Respondents on the 2nd August, 2002 and the application was lodged promptly on the 13th September 2002 before the payment of the September salary which was due on the 20th September, 2002.

It was however not possible to hear the Applicant before then and no rule nisi was sought by the Applicant in the interim.

The reason for the urgency is stated in paragraph 10 of the Founding Affidavit as follows:

" .....the matter is urgent by reason of the fact that the 1st Respondent is obliged and/or expected to pay my salary on Friday the 2th September 2002 and if there is no interdict, the salary will be without the subsidy. "

The subsidy referred to is for lesser payment of electricity bills for housed employees, including the Applicant. The loss contemplated by the Applicant is the employer's contribution towards the payment of his electricity bill which had been withdrawn in terms of the agreement and in lieu thereof, he had been awarded a 3.25% salary increment.

It is therefore clear that the nature of prejudice contemplated is of a financial nature that maybe remedied in due course by way of reimbursement and/or damages. The Applicant has other satisfactory alternative remedy if the interdict is not granted.

In the Industrial Court of Swaziland Case No. 79/98 between Swaziland Agriculture and Plantation Workers Union and United Plantations (Swaziland) Ltd; Justice C. Parker as he then was, followed South African Court decision in Nationale Bierbrouerv (Edms) BPK v John Noren Andere 1991 (1) SA 85 (TPD) and Ford Allied Workers Union v National Cooperative Diaries Ltd (2) (1989) 9 ILJ 1033 9IC) as follows:

"..... the loss of income is a normal consequence of every dismissal and could therefore not be regarded as an exceptional circumstance to warrant urgent interim relief."

In the present case, a final interdict is sought on the basis that the Applicant will suffer loss of income in respect of electricity subsidy if the interdict is not granted. Though the cases cited above dealt with dismissal matters, the rationale of the refusal to treat the cases as urgent was that loss of income cannot be a basis of jumping the queue and treating an application on urgent basis.

In the matter of Phineas Vilakati and J. D. group (Pty) Ltd, Industrial Court Case No. 41/97 at p.2 Banda P, said as follows, following the Nationale Beirbrouery Case and the Food and Allied Workers Union Case:

"..... If we were to order that this matter be treated as urgent on the grounds now advanced then every case now pending before court would qualify to be treated as urgent. "

It is our view that this argument applies in respect of the present application.

I upheld the Phineas Vilakati case in the Industrial Court Case No. 221/2000 between Swaziland Manufacturing and Allied Workers Union and Swaziland United Bakeries (Pty) Ltd at p. 3 as follows:

"many matters before us arise from an alleged breach of Recognition Agreement and violation of the provisions of the Employment Act. With respect, the present matter does not wear different colouration from the

plethora of disputes yet to be determined and the parties await patiently for their turn on the roll. "

This dispute is no different from the many matters awaiting determination before us, where the parties have followed the dispute resolution procedures contained under Part VIII of the Industrial Relations Act No. 1 of 2000. This is the route that ought to have been taken by the Applicant in this case.

In a recent case between Phylyp Nhlengethwa and Six Others v Swaziland Electricity Board. Case No. 272/2002. in refusing to entertain the application as one of urgency, I said the following at pg.10 of the ruling following the dicta of Hannah CJ in Swaziland Fruit Canners (Pty) Ltd v Phillip Vilakati & Another. Industrial Court of Appeal Case No. 2/87:

" it is most desirable that industrial disputes be settled if possible by means of conciliation rather than determined in more formal surrounds of a court and no doubt the existence of a statutory conciliation procedure saves the Industrial Court from hearing many time consuming cases which are capable of resolution with the assistance of a neutral and expert third party. The importance of the Labour Commissioner's role is such that the duties imposed upon him by Part VIII of the Industrial Relations Act should in my view be strictly observed."

We added that the creation of CMAC (Conciliation Mediation and Arbitration Commission) under Section 62 (1) of the 2000 Act has created even a greater need for the Industrial Court to enforce the observance of these procedures by the parties coming before it.

For these reasons, the Application is dismissed.

The court has however been persuaded that it is necessary to pronounce the present status of the relationship between the 1st Respondent and the 2nd Respondent in view of the averments by Mr. Reginald Kunst, the Human Resources Manager of the 1st Respondent in paragraphs 3.2, 3.3 and 3.4 of his Opposing Affidavit as follows:

3.2 In their wisdom, the parties i.e. Usuthu and SAPWU inserted a clause in the Recognition Agreement which pertained to the duration of the agreement.

3.3 The relevant clause 13.1 of the Recognition Agreement reads as follows:

"13.1 Duration of Agreement:

'This agreement shall come into operation on the date of execution hereof and shall remain in force for not less than one (1) year thereafter except that the first agreement should be effective until 31st March, 1997."

3.4 There has never been to my knowledge an extension or renewal of this recognition agreement. Since March 1997 Usuthu and SAPWU have continued to conduct their affairs based on the provisions of this agreement, however and recently there has been a challenge to the validity of this agreement given the interpretation that it lapsed on the 31st march, 1997.

This issue has become a source of discontent and potential conflict between SAPWU and a newly registered union SPPMAWU which seeks to be recognized by the 1st Respondent as the sole representative of shift workers at the mill.

The dispute has become a thorn in the flesh of all the parties at the undertaking with the potential of disrupting the smooth operations of the undertaking.

It is in recognition of this that in terms of Section 4 (1) of the Industrial Relations Act 2000 as read with Section 8 (4) thereof, the court wishes to make a pronouncement on the matter as presented in the papers before us and from the submission by counsel for the parties.

The Recognition Agreement between SAPWU and Usuthu Pulp was concluded on the 26th May 1995 and was expressly said to remain in force for not less than one year thereafter but the first agreement was to be effective until 31st March, 1997.

This means that the agreement could not be determined by either party within the first one year, but it was to remain valid up to 31st March 1997, unless curtailed by the parties. Therefore, in terms of the express words of the Agreement, the recognition was to be valid up to the said date.

The parties however did not terminate their recognition relationship upon expiry of the written agreement. What is the effect of the continued relationship? Was the Recognition Agreement renewed by the conduct of the parties? If so, what is the duration of the agreement so renewed?

Another issue for consideration is that, unions are creatures of statute and recognition of the union is governed by the Industrial Relations Act. The recognition agreement in question was in terms of Section 43 of the Industrial Relations Act 1996 and the provision of Section 42 of the 2000 Act are similar in many respects to those of its precursor. In particular the section dealing with the duration of recognition agreements is Section 42 (8) of the 2000 Act, which is on fours with the previous provision as follows:

"where for a continuous period of more than three months in any calendar year, the percentage of fully paid up members of an organization which has been granted recognition under sub section (5) falls below fifty percent of the employees concerned, the employer or organization may apply to the court for the withdrawal of such recognition and the court may:

(a) make such order as it deems fit including an order containing terms of such withdrawal;

(b) adjudicate on the validity and duration of any collective agreement between the employer and the organization affected by such withdrawal.

In terms of both the 1996 Act, and the 2000 Act, a Recognition Agreement is for an indefinite period and it may only be terminated in terms of the aforesaid provisions.

The Recognition Agreement in casu has lasted for over seven (7) years. The parties have continued to conclude collective agreements during this period, notwithstanding expiry of the written agreement on the 31st March 1997. There has not arisen a need to review this relationship until recently due to the events narrated here before.

In terms of Section 42 (2) of the Industrial Relations Act, 2000 a trade union or staff association that has been issued with a certificate under Section 27 of the Act, may apply in writing to an employee for recognition as the employee representative for such categories of employees as are named in

the application concerning all terms and conditions of employment including wages and hours of work.

If not less than 50% of the employees in respect of which the trade union or staff association seeks recognition are fully paid up members of the organization concerned, the employer is bound under Section 42 (5) within thirty days of receipt of the application and in writing, to grant recognition to the organization. Section 43 (1) and 43 (5) of the 1996 Act are exactly the same as Section 42 (1) and 42 (5) of the current Act. In both, an agreement for recognition is required to be in writing.

Once the employee association has satisfied the preliquisites stated therein and has applied in writing for recognition and its membership is more than 50% of the employees sought to be represented, the employer is bound to grant the recognition and such recognition can only lapse in the manner provided in Section 43 (8) of the 1996 Act and Section 42 (6) of the 2000 Act.

There is no room for the parties to contract out of the provisions aforesaid because the object of Section 42 (2) 6 is one of general policy governing employer and employee representatives relationship in the Kingdom of Swaziland.

The question whether the contract may be varied by waiver or contracting out of the statutory right, where the Industrial Relations Act has conferred a statutory right to a union to be recognized for an indefinite period may be answered by applying the principle restated by Kotze JA in Bezuidenhout VAA Mutual Insurance Association Ltd 1978 ISA 703 (A) 710 A - D:

"even a preemptory statutory provision may be renounced by a person whose benefit it has been introduced. The scope of the rule is stated as follows by Craises on Salute Law 7th Ed, p. 269:

'if the object of the statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable. This rule is expressed by the maxim, quilibet potest renuntiare juri prose introducto:

In Ritch and Byat v Union Government 1912 AP 719 at pp 734 - 5. Innes ACJ points out that the rule of our common law is to the same effect:

"the maxim of the civil law (C2329) thai every man is able to renounce a right conferred by law for his own benefit was fully recognized by the Law of Holland. But it was subject to certain exceptions of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interest of the public as well (Grot 3246 n 16; Schorer N423;Schrassert Icl n 3 etc); Schrassert in the passage referred to by Innes ACJ; indicates that, while everyone is entitled to renounce a right introduced for his benefit, that right ceases when a law prohibits the renunciation, especially when the prohibition is based not only on the debtor's right but also on public interest, for the agreements of private individuals cannot derogate from public laws. "

Section 43, Industrial Relations Act, 1996 and Section 42, Industrial Relations Act 2002 do not expressly prohibit parties to conclude Recognition Agreements for specific periods but have expressly provided the only manner in which Recognition Agreements may be terminated. Both statutes made it mandatory for an employer to recognize an employee association provided 50% of the employees represented by the Association remain members of the Association. This provision is made in my view for the benefit of the contracting employers and employees and for the benefit of the public at large to foster good industrial relations environment and to provide continued and proper employee representation and conclusion of Collective Agreements without having to renegotiate recognition. In this way the law guarantees an employee association, security of tenure to enhance its bargaining ability in circumstances which often are tilted in favour of the employer as the ultimate controller of the resources of the enterprise.

The short title of the 2000 Act reads as follows:

"Act to provide for the collective negotiation of terms and conditions of employment and for the provision of dispute resolution mechanisms and for matters incidental thereto. " The 1996 Act, short title was as follows: "an Act to provide for the collective negotiation of terms and conditions of employment and for the establishment of an Industrial Court and an Industrial Court of Appeal."

The Recognition Agreement in question was concluded in terms of the 1996 Act, The determination of this matter however is in terms of the 2000 Act.

The common denominator in both short titles is the 'provision for collective negotiation of terms and conditions of employment.'

Section 42 and 43 referred to earlier are key to this general purpose of both Acts, because they provide for recognition of an association with who the employer is to conduct collective negotiations, not only for the employees who are members of the contracting union but also for the benefit of all employees covered by the Recognition Agreement whether or not they are fully paid up members of the union. See Section 42 (9) 2000 Act and 43 (9) 1996 Act.

For the aforesaid reason, SAPWU could not waive its rights to be recognized in terms of the 1996 Act. The Recognition Agreement cannot be construed therefore to have been for a definite period expiring on the 21st March, 1997.

Even if this was to be the case, both parties have waived the right to terminate the Recognition Agreement, other than in terms of section 42 (6) of Act 2000 by their own conduct. The employer has continued to recognize the union and to conduct collective negotiations and conclude, collective agreements notwithstanding the wording of the Recognition Agreement. The intention of the parties has been clearly to maintain the relationship which relationship finds support also from the provisions of the Industrial Relations Act.

It is only when the Recognition has been terminated in terms of the Act, that a new player may enter the arena.

There will be no order as to costs.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT