IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 423/06**

In the matter between:

THE SWAZILAND AGRICULTURAL PLANTATIONS WORKERS UNION **APPLICANT**

and

USUTU PULP COMPANY LTD T/A SAPPI **RESPONDENT**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**J. MAVUSO**
FOR RESPONDENT	**:**	**ADV. FYLNN**

J U D G E M E N T

[1] The Applicant has applied to the Industrial Court for a final order interdicting and restraining the Respondent from continued implementation of Random Alcohol testing at the workplace, and directing the parties to negotiate on the acceptance and implementation of the Random Alcohol Testing exercise.

[2] The Applicant's case, as set out in its founding affidavit and the

annexures thereto, may be summarized as follows

2.1 the applicant union is the recognized representative of all unionisable workers at the respondent's workplace;

2.2 there is a registered collective agreement between the parties which is binding upon the parties;

2.3 this collective agreement includes a disciplinary code and procedure which governs disciplinary issues involving the respondent's employees.

2.4 Clause 11.04 of the disciplinary code is headed "Proof of Drunkenness" , and provides as follows

"*In the case of suspected drunkenness*,

(a) *a positive reading of above 0.08% alcometer/breathalyzer reading duly confirmed by a security officer shall be regarded as evidence leading to proof of drunkenness;*

(b) *the actual results of the test shall be recorded in writing and be duly endorsed by the employee concerned in the presence of at least two witnesses;*

(c) *where the alleged offender has refused to take a breath test, management shall decide as they deem fit any appropriate disciplinary action, taking into account the employee's reasons for the refusal as well as the circumstances of the case;*

(d) *Statements from witnesses should be taken down to corroborate any other evidence of drunkenness*."

2.5 Clause 12 of the disciplinary code and procedure further prescribes as follows;

"This procedure is valid notwithstanding any collective agreement which may be in force between the union and the employer. Management endeavours to make any amendment to paragraphs 1 through to 11 inclusive of this procedure except that the employer will consult with the union in anticipation of any proposed amendment, deletion or addition to this procedure, its schedules and annexures or to make any arrangement for the giving effect generally to the purpose and provisions of this procedure."

2.6 On or about 4th May 2006, the Respondent gave notice to all employees , contractors and visitors that the computerized access control system at the main gate of the Mill had been programmed to randomly select a number of persons daily to undergo an

alcohol test. This testing would commence on 5th May 2006.

2.7 Prior to the introduction of Random Alcohol Testing (RAT) only workers who were suspected of being under the influence of alcohol could be called upon to submit to an alcohol test. The introduction of RAT required a worker who was randomly selected by the access control computer to submit to an alcohol test, without any evidence or suspicion of being under the influence.

2.8 The new random testing system was duly implemented on 5th May 2006. The Secretary of the Applicant union one Archie Sayed, was randomly selected to undergo an alcohol test whilst he was clocking out at the main gate of the Mill. He refused to submit to the test. He was thereafter denied access to the Mill until such time as he submitted to the test. In a letter written by the Human Resources Manager, Sayed was informed that he would be disciplined for refusing to submit to the random test.

2.9 "*The result of your absence from the workplace is as follows*:

- *You will not receive remuneration for the days that you did not report at the mill*

premises (clocked in). Your continued absence from the workplace could lead to you being absconded.

- *Refusing to take a Breathalyzer test is tantamount to admission of guilt and will be treated the same as when under the influence of alcohol. A final written warning will be issued in the event of being found guilty of refusal to undergo random alcohol test.*

- *You will also be charged for refusing to carry out a valid and reasonable instruction."*

2.10 The applicant complaints that the introduction of RAT and the disciplinary consequences described in the letter written to Sayed by the Human Resources Manager constitute an amendment of clause 11.04 of the disciplinary code, and that this has been unilaterally implemented "*much against the agreement between the parties".*

2.11 The applicant also complains that the Respondent has contravened the collective agreement subsisting between the parties. The applicant handed in a copy of the collective agreement and referred the court in particular to :

- the preamble, which sets out the purpose of the agreement as being that of maintaining "*harmonious and mutually beneficial relations between the company, the employees and the union, to set forth certain terms and condition of employment relating to remuneration, hours of work, employee benefits and general working conditions affecting employees covered by this agreement and to ensure that all reasonable measures are provided for the safety and occupational health of the employees".*

- Article 54.02, whereby the Respondent *"agrees that no condition of employment (written or practised) will be cancelled or amended by the company in such a way as to affect employees covered by this agreement, until such time as the union has been given a reasonable opportunity to consider and negotiate the company's proposal. .."*

2.12 The Applicant claims that, in its current form, RAT is inhumane, degrading and unreasonable. It is inhumane because it lacks subjectivity; degrading because it subjects people

who do not drink alcohol to alcohol testing; and unreasonable because it is not only carried out when one is clocking in but also when one is clocking out.

2.13 The Respondent has breached the collective agreement and the disciplinary code by introducing and implementing RAT without any negotiations having taken place.

2.14 The RAT exercise in its current form also violates the fundamental rights and freedoms of the workers, in particular the right to be protected against inhumane or degrading treatment and arbitrary search and entry, which rights are guaranteed by the Constitution of the Kingdom of Swaziland

3. The Respondent's response to these allegations and complaints may be summarized as follows:

3.1 the applicant is bound to comply with the company rules and procedures, in terms of his letter of appointment;

3.2 the respondent has an Alcohol Testing Policy & Procedure which forms part of the company's rules and procedures;

3.3 the objective of the policy is to ensure a safe

working environment and compliance with Health & Safety Legislation.

3.4 RAT was formally introduced into the Alcohol Testing Policy & Procedure on 30th April 2006, after consultation with the union.

3.5 The capacity of the computerized access control system to perform random selection for RAT was first discussed with the union in September 2004. Subsequently, at a management/union consultation meeting held on the 21st March 2006, there was a discussion about RAT. The union did not object at that meeting to random selection and testing. On the contrary the union was more concerned about possible discrimination due to non- random selection by the security guards.

3.6 Consultations about RAT took place at the meeting on the 21st March 2006, and again at a briefing meeting on 5th May 2006 after the new policy had been introduced.

3.7 The union objected to the implementation of RAT for the first time at a meeting held on 24th May 2006, demanding that the new system be suspended until the parties have negotiated and agreed on the new policy.

3.8 The Respondent's position is that it was not obliged to obtain the consent of the union and/or the workers to the introduction of RAT, since this is a policy and procedure falling under the exclusive prerogative of management. All the Respondent was required to do was consult with the union. It was not required to negotiate and conclude an agreement to govern the implementation of RAT.

3.9 The Collective Agreement relied upon by the Applicant has lapsed by effluxion of time. An extension agreement, in terms of which the parties agreed that the collective agreement would remain in force until a new agreement was registered with the Industrial Court, is itself of no force or effect. The validity of the collective agreement is an issue to be determined in a separate application before the Industrial Court under Case No, 384/2005

3.10 In so far as the collective agreement may be valid and its provisions be applicable to the present dispute, the respondent's counsel referred the court to various articles in the collective agreement and submitted that these articles indicate that the introduction or variation of a safety and health policy is a matter for consultation, not negotiation. Counsel likewise submitted that the provisions of the Recognition Agreement and the Disciplinary Code do not place any obligation on the

Respondent to have negotiated the terms and conditions of Random Alcohol Testing with the Applicant.

3.11 The Respondent also denies that RAT is inhumane and degrading, or that it infringes on the constitutional rights of employees. In this regard, Respondent's counsel described the manner in which RAT is administered, and emphasized the non-invasive nature of the process; the preservation of confidentiality and dignity; the distinction between random alcohol testing and random drug testing; and the deterrent effect of the procedure. He proceeded to argue that RAT does not infringe an employee's right to bodily privacy and constitutional protection against arbitrary search because RAT was introduced under the authority of the Occupational Health and Safety Act No. 9 of 2001, and is reasonably required for the purpose of promoting the rights or freedoms of other persons.

[4] In Case No. 433/06, the Applicant's Secretary Archie Sayed applied to the Industrial Court for an interim order staying the disciplinary action instituted by the Respondent against him arising from his refusal to submit to RAT, pending determination of the present application instituted by the Applicant against the Respondent.

[5] The adjudication of the interlocutory application in Case No. 433/06 required consideration and determination of the same issues that arise in the present application, subject to the distinction that the interlocutory application did not require a final determination of the rights of the parties, and the Applicant in the interlocutory application

had a less onerous burden of proof than the present Applicant.

[6] In its judgement in case No. 433/06, the court found that the Respondent's Alcohol Testing Policy and Procedure does not fall within the exclusive managerial prerogative of the Respondent, and it should have been negotiated between the parties.

[7] The Court also found that the discussion of RAT at the consultation meeting of 21st March 2006 was not sufficient to entitle the Respondent to unilaterally implement the new Random Alcohol Testing Policy and Procedure.

[8] The court did not make any firm finding on the constitutionality of RAT but expressed the view that:

8.1 RAT does not expose the Respondent's employees to inhumane or degrading treatment, nor is the breath test procedure unduly invasive, compromising or unhygienic;

8.2 nevertheless, RAT does constitute an infringement of worker's a fundamental rights to be protected from bodily search without his consent freely given, and the Respondent bears the onus of establishing that its RAT policy has been adopted under the authority of a law and is reasonably required for the purpose of promoting the rights or freedoms of other persons (see the limitation provisions under section 22 of the Constitution).

8.3 the court doubted that it could be said that RAT had

been implemented under the authority of a law, and the court considered that RAT was unjustified and unconstitutional at least in respect of employees who do not work in safety-sensitive jobs and areas.

8.4 The court found that the probabilities in respect of the constitutionality of RAT favoured the union, but it was not necessary for the court to make any final determination of this issue.

[9] The court issued an interim interdict stopping the disciplinary action against Archie Sayed pending the outcome of this application. The reasons for that order are fully set out in the judgement delivered on the 7th August 2006. Significant portions are reiterated herein.

[10] The Respondent denies the validity of the collective agreement dated 26th May 1995, and a dispute of fact arises as to whether the Applicant is entitled to rely on the provisions of such agreement. This dispute is yet to be determined by trial in Case No. 384/2005, and the court is unable to determine on the papers in the present application whether the agreement has force and effect as between the parties. The proper approach for the court to adopt in the circumstances is to ascertain whether the applicant has proved, without reliance on any contractual right arising from the collective agreement, that it is entitled to final relief.

[11] This is not to say that the court must ignore the provisions of the collective agreement entirely. Such provisions may be relevant to an examination of the issues which the parties have previously considered

to be negotiable.

[12] Furthermore, the terms and conditions of a registered collective agreement are deemed to be terms and conditions of the individual contracts of employment of all workers covered by the agreement – see section 57 of the Industrial Relations Act 2000 (as amended). It is common cause that no further collective agreements have been concluded since the alleged expiry of the collective agreement. The terms and conditions of such agreement have been incorporated into the individual contracts of employment, at least in respect of those workers covered by the agreement who were employed by the respondent during the currency of the collective agreement, and the expiry of the collective agreement by effluxion of time would have no effect on those provisions which had become terms and conditions of the individual contracts of employment.

[13] It is common cause that the respondent unilaterally implemented its new RAT policy and procedure without the consent of the Applicant.

The Respondent admits that it never negotiated the policy and procedure with the Applicant, but states that it was under no obligation to do so. It was only required to consult with the respondent prior to the implementation of the RAT policy and procedure, and it did so consult at the consultation meeting of the 21st March 2006.

[14] This court has to determine the following issues:

14.1 was the Respondent obliged by law to negotiate the terms and conditions of its new random alcohol testing policy with the Applicant

prior to implementation;

14.2 if not, were the discussions about RAT at the meeting of 21st March 2006 sufficient consultation to entitle the respondent to unilaterally implement the new random alcohol testing policy and procedure.

14.3 does the new policy and procedure infringe on the constitutional rights of employees, either because it is inhumane and degrading or because it constitutes an arbitrary bodily search.

[15] The Respondent's counsel argued at the hearing of the matter that the cause of action set out in the Applicant's founding affidavit is based solely on the allegation that the respondent failed to negotiate to agreement. Counsel submitted that the applicant must establish a duty to negotiate, failing which the application must fail.

[16] The court disagrees. Firstly, the Applicant's cause of action includes an allegation that the Respondent unilaterally amended Clause 11.04 of the disciplinary code "much against the agreement between the parties." If such agreement required consultation, and bona fide consultation did not take place, then the applicant will be entitled to an order stopping the RAT exercise. Secondly, the parties are not required to plead law. If the court should find that the respondent was required in law to consult and failed to do so adequately or at all, then the court in the exercise of its equitable discretion is entitled to make an order giving effect to the law.

The Industrial Court is not merely "an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done ." - per Curlewis J.A. in R v Hepworth 1928 AD 265 at 277.

In terms of Section 8 (4) of the Industrial Relations Act, the court may make any order it deems reasonable which will promote the purpose and objects of the Act, when deciding a matter

The purpose and objective of the Act is, *inter alia*, to:

- promote harmonious industrial relations;
- promote fairness and equity in labour relations;
- promote freedom of association and expression in labour relations;
- protect the right to collective bargaining;
- stimulate a self regulatory system of industrial and labour relations and self governance;
- ensure adherence to international labour standards.

[17] It is not necessary to describe the random alcohol testing procedure, since this is clearly set out in DK2, the Alcohol Testing Policy & Procedure. The following aspects may however be

highlighted:

17.1 the computerized access control system is programmed to randomly select a number of persons to be tested daily.

17.2 a person selected for testing undergoes a screen test, which merely requires blowing onto an instrument. If this test is failed, then a breathalyzer test is conducted in the presence of the person's representative and supervisor.

17.3 if the breathalyser shows a reading of between 0,021-0,080mg/100ml, the person is refused entry into the Mill and an incident report is circulated to the line manager to ensure that the person is counseled.

17.4 if the breathalyzer shows a reading of 0,080 mg /100ml or higher, the person is refused entry, and an incident report is circulated to line managers to ensure that appropriate disciplinary action will be taken.

17.5 should any person refuse to submit to an alcohol test he/she will be refused entry on the basis that his/her sobriety could not be confirmed. An incident report is also circulated to ensure appropriate disciplinary action in respect of the refusal.

[18] This Policy & Procedure does not apply only to employees working in safety- sensitive positions or areas. It applies to all employees entering the Mill, regardless of their occupation or work station.

[19] The Policy and Procedure refers to counseling for persons whose test readings indicate the presence of alcohol less that 0,080mg/100ml, but otherwise does not contain any provisions which indicate that the testing is part of a broader programme of medico-social assessment, monitoring and support.

[20] The revised Alcohol Testing Policy & Procedure introduces a number of significant changes to the Policy & Procedure which applied prior to 30th April 2006. Apart from the selection of persons to be tested on a random basis, as a supplement to the previous selection based on suspicion, the new Policy now provides that:

20.1 a person whose test reading is less than 0,080mg/100ml may be refused entry to the mill;

20.2 a randomly selected person who refuses to submit to testing will be refused entry and disciplined notwithstanding that there is no other evidence of insobriety.

20.3 a person refused entry is regarded as having absconded from work, he/she will not receive remuneration whilst refused entry, and he/ she may be disciplined for absconding from work.

20.4 refusing to take a random breathalyzer test is tantamount to an admission of guilt (of being under the influence of alcohol) and the person will be

treated the same as a person who has been proved to be under the influence of alcohol.

20.5 a person who refused to take a random test will apparently be charged for drunkenness and insubordination

[21] There is a fundamental difference between alcohol testing of a person suspected of being under the influence of alcohol (due to external physical signs of insobriety, for instance) and random testing of a person who is not suspected of having taken alcohol.

In the former case, a person who is manifesting signs of insobriety is required to take a test to confirm a pre-existing suspicion. Clause 11.04 of the disciplinary code permits this kind of "reasonable cause" testing, and was introduced with the consent of the union.

Random testing, on the other hand, involves the testing of a randomly selected person who is not suspected of taking alcohol. Such a person may feel offended about being tested for drunkenness, particularly if he/she does not drink alcohol or believes there is a stigma attached to being tested for alcohol consumption.

Random testing does not significantly contribute to the detection of alcohol-impairment. Its value lies in its deterrent effect. The union has not consented to random testing.

[22] The distinction between "reasonable cause" testing and random testing is reflected in our criminal law. Section 344 of the Criminal Procedure & Evidence Act 1938 empowers the Police to administer a

breathalyzer test on a person who is reasonably suspected of having alcohol in his body. The law does not permit the Police to administer alcohol testing to randomly-selected motorists, in the absence of a reasonable suspicion, without their consent.

[23] The Respondent's counsel made available to the court an Executive Summary of the Canadian Human Rights Commission Policy on Alcohol & Drug Testing. This Policy makes the following observations with regard to random alcohol testing;

> 23.1 Random Alcohol testing may be included in a workplace drug-and-alcohol-testing programme, but only if the employer can demonstrate that it is a bona fide occupational requirement.
>
> 23.2 Random alcohol testing can be regarded as a reasonable requirement (of a health and safety programme) because alcohol testing can indicate actual impairment of ability to perform or fulfill the essential duties or requirements of the job. (This is in contrast to random drug testing, which can only detect the presence of drugs and not if or when an employee may have been impaired by drug use).
>
> 23.3 Random alcohol testing must be confined to employees in safety- sensitive positions. Random testing of employees in non-safety sensitive positions is not acceptable.

(According to the Canadian National Policy, a safety- sensitive

job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, other employees, or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.)

23.4 The Canadian Policy emphasizes that testing policies must provide for medico-social support by way of counseling and treatment for employees who test positive, and policies that result in summary loss of employment for a failed test cannot be regarded as reasonable.

23.5 Finally it should be noted that the Canadian Human Rights Commission does not advocate drug and alcohol testing for dealing with employee impairment. The Commission lists awareness, education, rehabilitation and effective interventions such as enhanced supervision and peer monitoring as the most effective ways of ensuring that performance issues associated with alcohol and drug use are detected and resolved.

[24] The court is mindful of the difficulties that arise when comparing workplace policies and standards from other countries, particularly developed countries whose economies, legal framework and social

milieu may be far removed from that of Swaziland.

To seek a more universal approach to alcohol testing, the court also perused the International Labour Organization's 1996 Code of Practice on the Management of Alcohol-and drug-related problems in the workplace.

Section 4 (1) (j) of the Industrial Relations Act 2000 (as amended) requires the Industrial Court to ensure adherence to international labour standards, and such standards are laid down by the International Labour Organization.

[25] The ILO Code of Practice places great emphasis on the need for workers and their representatives to cooperate with employers in development of an alcohol and drug policy. The code prescribes that workers and their representatives should actively participate in the development of the policy through consultation and negotiation where required by law or collective agreement.

[26] Article 3.2 of the ILO Code of Practice recommends the contents of an alcohol and drug policy as follows:

"A policy for the management of alcohol drugs in the workplace should include information and procedures on:

(*a) measures to reduce alcohol- and drug-related problems in the workplace through proper personnel management, good employment practices, improved working conditions, proper arrangement of work, and consultation between management and workers and their representatives;*

(b) measures to prohibit or restrict the availability of alcohol and drugs in the workplace;

(c) prevention of alcohol-and drug-related problems in the workplace through information, education, training and any other relevant programmes;

(d) identification, assessment and referral of those who have alcohol- or drug-related problems;

(e) measures relating to intervention and treatment and rehabilitation of individuals with alcohol- or drug-related problems;

(f) *rules governing conduct in the workplace relating to alcohol and drugs, the violation of which could result in the invoking of disciplinary procedures up to and including dismissal;*

(g) equal opportunities for persons who have, or who have previously had, alcohol- and drug-related problems, in accordance with national laws and regulations."

[27] On the issue of testing, the ILO Code of Practice states that this involves moral, ethical and legal issues and should be undertaken in accordance with national laws and practice, which may vary considerably between member states. The ILO does however have "Guiding Principles on drug and alcohol testing in the workplace," adopted by the ILO Interregional Tripartite Experts Meeting on Drugs & Alcohol Testing in the Workplace in May 1993, to which member states are referred for guidance.

[28] The Guiding Principles emphasize that drug and alcohol testing must be placed within the larger context of the moral and ethical issues

of collective rights of society and enterprises, and of individual human rights. in other words, drug and alcohol testing goes beyond the employer/employee relationship and requires a much broader consideration of fundamental rights to privacy and confidentiality, autonomy, fairness and the integrity of the body, as seen in the framework of national and international laws and jurisprudence, norms and values.

[29] The ILO Guiding Principles on Drug & Alcohol testing also mention that;

29.1 the need for testing should be evaluated according to the nature of the jobs involved (e.g safety-sensitive jobs);

29.2 testing should be part of a systematic programme which includes provision for education, counseling, treatment and rehabilitation, with disciplinary action taken as a last resort;

29.3 drug and alcohol testing programmes should fit within existing arrangements for ensuring the quality of work life, workers rights, the safety and security of the workplace, and employer's rights and responsibilities;

29.4 any changes to the testing policy, because of new conditions or because other substances are being tested for, should only take place with the

agreement of all the social partners.

29.5 Workers should have the right to make informed decisions about whether or not to comply with requests for testing. Workers who refuse to be tested should not be presumed to be drug or alcohol users.

29.6 Alcohol testing by means of the breath is non-invasive and can determine actual impairment to the ability to perform work.

29.7 random alcohol testing has a valid deterrent function within the context of a comprehensive testing policy.

[30] The respondent has made provision in its Alcohol Testing Policy for :

30.1 the protection of the employee's right to representation;

the maintenance of confidentiality with regard to the test results;

30.2 the protection from discrimination or victimization;

30.3 the protection of the dignity of the employee.

However the applicant complains that in practice the testing is not carried out in observance of these policy principles. Workers are tested in a cubicle in the access control room, which is a thoroughfare for persons entering the Mill. The cubicle does not preserve the privacy

of the test. It is only 120 centimeters high, and opposite the main entry door. The security guards who administer the test are indiscreet and aggressive. The calibration of the breathalyzer is not regularly checked.

[31] These allegations were made for the first time in the applicant's replying affidavit, and the respondent had no opportunity to respond. If true, the allegations reveal serious shortcomings in the application of RAT. The Respondent never discussed the practical details of the new policy with the Applicant, so it is not surprising that there is disaffection with the manner in which the policy has been unilaterally implemented in practice

[32] The Respondent's revised Policy falls short of the Canadian Human Rights Commission standards and the ILO Guidelines in the following respects:

32.1 the Policy does not exclude employees in non-safety sensitive positions from random testing;

32.2 the Policy does not apparently include any comprehensive programme for education and training on the deleterious effects of alcohol use, both within and without the workplace, and for counseling, treatment and rehabilitation of alcohol-impaired employees.

32.3 the Policy, as read with Article 11.03 of the Disciplinary Code, prima facie discriminates against drivers, who are liable to be summarily dismissed for

a first offence of drunkenness, whereas other employees in safety-sensitive jobs receive a final warning for a first offence.

32.4 workers who refuse to be tested are presumed to be alcohol users;

32.5 the variation of the Policy by the introduction of RAT was not the product of any meaningful exchange between the Respondent and the Union. The only consultation that took place related to the concept of random selection at the point of access, and did not involve any discussion of the important policy and procedural matters outlined in Article 3.2 of the ILO Code of Practice (see paragraph 26 above) nor the practial details of implementation.

[33] Mr. Flynn for the Respondent argued that the Respondent is obliged in terms of Section 9 (3) of the Occupational Safety & Health Act, 2001 to “ensure that there exists a systematic way of identifying, evaluating and controlling hazards at the workplace and such systematic ways are functional at all times.” The Alcohol Testing Policy & Procedure is the Respondent’s systematic way of identifying and controlling the hazard of alcohol-impaired performance at the workplace.

[34] The Respondent’s reliance on Section 9 (3) of the said Act is a two-edged sword. The same Act requires the Respondent to establish a Safety & Health Committee, to serve as a forum for the discussion of matters affecting the health and safety of persons at the workplace.

This committee has an equal number of management and employee representatives, and has the power to make appropriate decisions binding on the employer in respect of safety and health issues at the workplace.

[35] In terms of section 15 of the Act, the safety and health representatives who serve on the Safety & Health Committee shall inter alia perform the following functions at the workplace.

35.1 identify potential hazards.

35.2 make recommendations to the employer in respect of safety and health matters affecting employees, through the safety and health committee.

[36] Section 16 (3) of the Act specifically provides that an employer shall not appoint a safety and health representative who shall not have power to bind the employer or make appropriate decisions in the Safety and Health Committee in respect of the operations of the workplace.

[37] The Act clearly envisages that safety and health policies and procedures at the workplace should be the product of meaningful discussion and dialogue between the social partners, and the safety and health committee is the primary forum for such discussion and dialogue.

[38] Assuming that the Respondent has established a safety and health committee at its workplace, as it is required to do by law, there is

nothing on the papers before court to suggest that such committee was ever involved in the formulation of the alcohol testing policy which the respondent characterizes as a "health and safety" policy. Since the respondent has expressly addressed the question of consultation over the adoption of RAT in its Answering Affidavit, it is safe to assume that it would have referred to deliberations between management and worker safety and health representatives if such deliberations had taken place.

[39] The Respondent's failure to involve its Safety and Health Committee detracts from the Respondent's argument that RAT was introduced under the authority of the Occupational Safety and Health Act, 2001, since the structures established by the Act for the formulation of policy appear to have been ignored.

[40] One of the objects of the Industrial Relations Act 2000 is to "protect the right to collective bargaining" (see section 4 (1) (e)).

This implies that there is a general duty to bargain. This accords with the evolution of our labour law, as expressed in **FAWU v Spekenham Supreme (1988) 9 ILJ 628 (IC) at 636:**

"*Having regard to the fact that fairness is now the overriding consideration in labour relations in South Africa, it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate with a representative trade union."*

[41] In the case of **NUM v East Rand Gold and Uranium Company Ltd (1991) 12 ILJ 1221 (A), Goldstone J.A**. stated:

"The fundamental philosophy of the Act is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes."

[42] It may be apposite at this stage for the court to distinguish between "negotiation" and "consultation" in the context of industrial relations.

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.

See R. Lewis: Labour Law in Britain (1986) 110.

Consultation, on the other hand, involves seeking information, or advice on, or reaction to, a proposed cause of action. It envisages giving the consulted party an opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented.

See **Hadebe & Others v Ramtex Industrials Ltd (1986) 7 ILJ 726 (IC) 735.**

[43] The duty to negotiate is more onerous than the duty to consult. Negotiation involves an attempt to reach consensus. Although consensus is the aim of negotiation, it is not essential that an agreement is reached. Recognition and collective agreements often provide dispute resolution procedures which kick-in when negotiations have failed. In the absence of agreed resolution procedures, the law also allows an employer who has bargained in good faith to an impasse to unilaterally implement its proposals.

(see **NUM v East Rand Gold & Uranium Company Ltd (1991) 12 ILJ 1221 (A)**

[44] While the basic duty to engage in collective bargaining can be regarded as established, it is not always easy to determine the scope of the bargaining agenda i.e. to distinguish between management issues which fall exclusively within the employer's prerogative to manage its business, and employment issues which affect the legitimate interests of employees.

[45] To assert that collective negotiation only applies to issues involving wages and conditions of work, and not to the management of the business, assumes that there is a clear boundary between employment issues and management issues. All decisions that affect the business also affect the workforce. Decisions about technology, means of production, health and safety, and personnel structures may affect the workforce more than any other decisions the employer makes. In fact, the decisions that employers reserve to themselves under the label "management prerogative" may often be the ones in which it is most important for the workers representatives to make their contribution.

(see **Rycroft: S.A. Labour Law (2nd Ed) at p. 134 – 135)**

[46] According to **Poolman: Principles of Unfair Labour Practice at 103,** collective bargaining is compulsory on "those interests which may, within the free market system, be fairly and reasonably included in the employment relationship."

Rycroft (op. cit) at 133 suggests that bargaining is compulsory "*where a party's refusal to negotiate can be said to be unfair in the light of the particular circumstances of the case."*

Neither of these guidelines is particularly helpful

[47] In **Davies & Freedland Labour Law: Text & Materials at** 112-3 (quoted with approval by Goldstone JA in the NUM case (supra)), one reads:

"*By collective bargaining we mean those social structures whereby employers (either alone or in coalition with other employers) bargain with the representatives of their employee about terms and conditions of employment, about rules governing the working environment (e.g. the ratio of apprentices to skilled men) and about the procedures that should govern the relations between union and employer."*

According to this definition, the scope of compulsory bargaining extends to:

- terms and conditions of employment;

rules governing the working environment;
procedures governing the relations between union and employer.

[48] An alcohol testing policy and procedure is certainly a component of a health and safety policy, but it also involves issues relating to discipline, conditions of work, ethical treatment of workers, and human rights which transcend the workplace.

[49] The court considers that the introduction of RAT involved a change in the rules governing the working environment. According to the

Davies & Freedland definition, such change required negotiation with the union.

[50] In an unreported case decided by the SA Labour Court, Revelas J. ruled that the unilateral introduction of a substance abuse policy, without the agreement of the union, constituted a unilateral change in employment conditions. See **METRORAIL v SATAWU (unreported Labour Court Case No. J4561/01).**

This judgement fortifies the view of this Court that the Alcohol Testing Policy & Procedure does not fall within the exclusive managerial prerogative of the Respondent.

[51] The court is also of the view that the introduction of random alcohol testing as part of the system of clocking in and clocking out affects interests which may be fairly and reasonably regarded as included in the employment relationship.

[52] As shall be discussed hereinafter, a person has a fundamental right to be protected from search of his person without his free consent first obtained. A worker does not leave his constitutional rights outside the gates of the workplace. Before the employer may override a fundamental right in order to promote health and safety at the workplace, it should at the least attempt to obtain the consent of the worker through negotiation with his workplace representative.

The refusal or failure to negotiate the implementation of a policy which compromises the fundamental rights of employees cannot be regarded as fair.

[53] Having regard to the ethical and human rights implications of RAT; the necessity that random testing be part of a systematic programme which includes provision for education and monitoring, and support of alcohol-impaired employees; and the valid requirement that RAT should apply only to employees in safety-sensitive jobs or areas, it is a matter for concern that the Respondent did not engage the union in meaningful dialogue in order to formulate a comprehensive and credible policy.

[54] The full implications of random testing do not appear to have been communicated to the union or the workers until the new Policy was published and implemented. This prompted confusion and protest, as appears from the minutes of the meetings held on 5th and 24th May 2006.

Workers who had never previously been required to submit to an alcohol test felt offended and/or fearful when randomly selected to take the test.

[55] In workplace parlance, there is a need for management to “sell” a new policy to the workers so that they “own” it, in the sense of understanding and accepting the policy and abiding by its rules. This did not happen with regard to RAT, to the extent that the Applicant, the Secretary of the union, has refused to cooperate with the policy and placed his employment in jeopardy on a matter of principle.

[56] There is no evidence to suggest that the union was not willing to participate in negotiations over the adoption of RAT. The minutes of the meeting of the 24th May 2006 record as follows:

"Mr Sithole invited the Union to support management as this company holds a good record on safety. He summarized by saying first there seemed to be no difference in both parties in terms of believing in safety, secondly, the union is not saying management should not conduct previously agreed or understood programmes and thirdly the Union is saying they have realized the discomfort of this system and has been approached by their constituents who have raised issues and fears in this matter thus the challenge is to engage the people until they see the system as something to give help. There is a need to talk about the issue and to address fears emerging to create trust."

[57] The court finds that the respondent had a duty to negotiate the implementation of RAT with the Applicant. It was not entitled to unilaterally implement the new policy and procedure without collective bargaining.

[58] In so far as the Respondent argues that it was not required to do more than consult with the union prior to the introduction of RAT, the court also finds that the brief discussion which occurred at the consultation meeting of 21st March 2006 cannot be regarded as reasonable or sufficient consultation.

No proposal or draft policy was presented by management for consideration and comment. It is not even clear from the minutes whether the union representatives understood that random selection for testing by the access computer would no longer be based on good cause (i.e. suspicion).

Furthermore, the minutes of the meeting indicate that the Respondent had already taken a decision to implement the new system, prior to

any consultation with the union.

[59] The court now turns to the constitutional issue, namely whether RAT infringes upon the employees' fundamental rights under Chapter 111 of the Constitution.

[60] If any question arises in the Industrial Court as to the contravention of any of the provisions of Chapter 111 of the Constitution (Protection and Promotion of Fundamental Rights and Freedoms), the court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court.

See Section 35 (3) of the Constitution.

[61] Neither of the parties requested the constitutional question to be referred to the High Court, nor has this court elected to do so. It is the view of this court that it is not precluded in the circumstances from making a finding as to whether the implementation of RAT by the Respondent contravenes any of the provisions of Chapter 111 of the Constitution.

[62] Section 14 (1) (e) declare and guarantee the fundamental right of an individual to be protected from inhuman or degrading treatment, and arbitrary search.

[63] Section 14 (2) states that the fundamental rights and freedoms enshrined in Chapter 111 shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural

and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution. (emphasis added).

[64] The emphasized words in paragraph 63 above make it clear that the fundamental rights and freedoms in Chapter 111 of the Constitution may be invoked not only against organs of Government but also by one private litigant against another. In the language of constitutional jurisprudence, Chapter 111 of the Swaziland Constitution has both "vertical" and "horizontal" application.

[65] This may be contrasted with the Constitutions of South Africa, United States of America, Canada and Germany, whose Bills of Rights operate vertically, to generally protect the individual against unconstitutional action by the organs of government only, and have no direct horizontal application to private disputes

- See **Du Plessis v De Klerk & Another 1996 (3) SA 850 CC**

[66] Section 14 (2) of the Swaziland Constitution appears to have been modeled on Article 5 of the Namibian Constitution, which in identical terms also extends fundamental rights and freedoms horizontally into the area of private law and disputes between private litigants.

[67] The Judiciary in Swaziland is thus empowered and required to enforce the guaranteed rights and freedoms in private law disputes and to interpret and apply the common law and the statute law in a manner which is consistent with Chapter 111 principles.

[68] Section 18 (I) of the Constitution provides that the dignity of every

person is inviolable

Section 18 (2) provides that a person shall not be subjected to torture or to inhuman or degrading treatment or punishment.

[69] The Respondent's formal policy makes provision for RAT to be carried out in private, and requires that the person to be tested is advised of his/her right to representation; is treated in a friendly and cordial manner; and that the test results are treated confidentially. The breath testing procedure is not unduly invasive, nor is it unhygienic.

[70] Provided that RAT is carried out strictly in accordance with the formal policy, with proper respect for privacy and confidentiality, in a courteous manner, the court considers that it would not unduly compromise the dignity of the individual being tested nor expose him/her to inhumane or degrading treatment.

[71] Section 22 (a) provides that a person shall not be subjected to the search of his person, except with the free consent of that person first obtained.

[72] Section 22 contains a clause limiting the fundamental protection against arbitrary search of the person as follows:

> "*22.2 Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question make provision that:*
>
> (a) *is reasonable required in the interests of defence, public safety, public order, public*

38 *morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit.*

(b) *is reasonable required for the purpose of promoting the rights or freedoms of other persons.*

(c) *authorized an officer or agent of the government or of a local government authority, or of a body corporate established by law for public purposes to enter on the premised of any person in order to inspect those premises or anything on those premised for the purposes of any tax, rate or due in due in order to carry out work connected with any property that is lawfully on those premised and that belongs to the Government, authority, or body corporate as the case may be;*

(d) *authorizes for the purposes of enforcing the judgement or order of a court in any civil*

39 *proceedings, the entry upon any premised by order of a court."*

[73] The fundamental right guaranteed by section 22 thus protects a person from an intrusion on his personal privacy and bodily integrity without his consent, unless reasonable justification authorized by a law can be shown for such intrusion.

[74] Privacy is a basic human right and the reasonable expectation of every person. It underpins human dignity and other fundamental rights such as freedom of association and freedom of expression. A free and democratic society requires respect for the autonomy of the individual and limits the power of the state and private organizations to intrude on that autonomy.

[75] The Fourth Amendment to the American Constitution provides that a person may not be subjected to an "unreasonable search". In dealing with drugs and alcohol testing in relation to Fourth Amendment rights, the American courts have consistently held that drug and alcohol testing constitutes a "search."

In **Skinner v Railway Labour Executives Association 489 US 602**, non-consensual blood test was held to be a search that infringed reasonable expectations of privacy.

In **Schmerber v California 384 US 757,** the US Supreme Court held that a compulsory blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."

[76] In both cases the drawing of blood was held to constitute reasonable

search only if supported by probable cause to suspect that the person has committed a criminal offence and the blood will reveal evidence relevant to that offence.

"Because the integrity of an individual's person is a cherished value in our society, searches that invade bodily integrity cannot be executed as mere fishing expeditions to acquire useful evidence. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." - **Schmerber at 769-770.**

[77] At the other end of the scale, the American Courts have held that Fourth Amendment rights do not protect what a person knowingly exposes to the public, such as his facial characteristics, voice, handwriting and fingerprints, compulsory disclosure of which "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search" - See **US v Dionisio 410 US 1 at 14-15.**

[78] Breath testing is minimally invasive and unlike blood testing it does not involve penetration beneath the skin. It is more akin to urine testing, though the compulsory excretion of breath involves less indignity and distaste than the compulsory excretion of urine.

Nevertheless, the testing of a person's breath does appear to be regarded as a "search".

In Michigan Department of State Police v Sit 496 US 444, the court was dealing with sobriety checkpoints set up by Police on public highways. The court referred t the well-settled law that motorists have a lessened expectation of privacy regarding stops and visual searches

of automobiles on the nation's roadways. Nevertheless the court held that the Police could not randomly conduct breath testing without prior individualized suspicion.

[79] In Canada, the Ontario Supreme Court has determined that in the absence of reasonable and probable grounds, the taking of a breath sample amounts to unreasonable search and seizure.

- per R v FRASR, cited in Search, Seizure, Arrest and detention under the Charted by Marilyn Pilon (Government of Canada Publication).

[80] The ordinary dictionary meaning of "search includes examination or investigation to find something (that has been concealed) [Concise Oxford Dictionary (9th Ed)].

[81] A breath test is a chemical search to investigate whether a person had alcohol within his/her body.

In the view of the court, the screening test and the alcometrer/breathalyzer tests which form part of the RAT procedure constitute a search within the meaning of section 22 of the Constitution.

[82] Section 22 of the Constitution confers a right on an individual to be protected from bodily search without his consent. Prior to the Constitution, the common law also conferred a right of absolute security of the person:

" Any bodily interference with or restraint of a man's body which is not justified in law, or consented to, is to wrong, and for that wrong the person whose body has been interfered with, has a right to claim such damage as he can prove he has suffered owing to that interference."

Staffberg v Elliot 1923 CPD 148.

Neethling et al (Law of Delict) at 95 state that generally it can be said that every violation of bodily integrity constituted an infringement of the right of personality of physical or bodily integrity and as such is unlawful.

[83] Not all invasions of privacy involving compulsory bodily search are necessarily unlawful. As set out above, the constitution expressly permits a compulsory search which is reasonably required in the interests of the public or for the purpose of promoting the rights or freedom of other persons.

[84] In paragraph 22 of this judgment the court refers to the power of the Police to administer breath and blood tests to confirm the presence of alcohol in a person who is suspected of driving under the influence of alcohol, and notes that this power does not extend to allow the Police to administer random tests without reasonable cause.

[85] The union has consented to suspicion-based alcohol testing at the workplace. This consent is reflected in Clause 11.04 of the Disciplinary Code and is binding on the union's bargaining unit.

The constitutional question which arises, is whether the Respondent can impose compulsory random alcohol testing on the union without infringing the fundamental rights of the workers to be protected against arbitrary search. In other words, does RAT contravene Section 14 of the constitution.

[86] In the **SATAWU/ Metrorail** case referred to above, the Labour Court held that compulsory alcohol drug testing imposed without the consent of the union invaded workers' common law and constitutional rights to privacy and to bodily and psychological integrity.

[87] It is common cause that the union and the workers have not consented to the implementation of RAT. Mr. Flynn for the Respondent has argued that such consent is not required, for the reason that RAT has been

imposed on the workers as a health and safety policy formulated under the authority of the Occupational Health & Safety Act No. 9 of 2001, and it is reasonably required for the purpose of promoting the rights or freedoms of other persons, in particular the Respondent and its employees.

[88] Clause 9 (2) of the Occupational Health & Safety Act provides that an employer shall as far as reasonably practicable ensure by effective supervision (my underlining) that work is performed in a safe manner and without risk to health or exposure to danger.

[89] Clause 3 (2) of the Act states that "the provisions of this Act shall be in addition to The Factories, Machinery and Construction Works Act, 1972 and any other related legislation."

[90] Clause 42 provides that "any act or regulations which relates to any matter falling under this Act and which is not inconsistent with this Act shall continue to be in force as if it was made under this Act".

[91] Regulation 152 (1) of the Factory, Machinery & Construction Works Act, 1972 provides that no manager shall allow a person who is, or appears to be, under the influence of alcohol or narcotic drugs, to enter a factory or place where machinery is used.

Regulation 152 (3) gives the manager or any person deputed by him the power to arrest any person whom he, on reasonable grounds, suspects of being under the influence of alcohol or drugs, if it is necessary to do so in the interests of the safety of other persons.

[92] Reading Section 9 of the Occupational Health & Safety Act together with the Regulations made under the Factory, Machinery & Construction Works Act, 1972, it appear to the court that the legislation neither expressly nor impliedly authorizes random testing for the purpose of excluding persons under the influence of alcohol from the workplace. On the contrary, the legislation expressly provides that *effective supervision* is the means whereby persons, who are suspected on reasonable grounds to be under the influence of alcohol,

should be refused entry, or apprehended and removed.

[93] Section 22 of the Constitution permits limitation of the fundamental right when it is done :

- under the authority of any law, and

to the extent that the law in question make provision that …….. is reasonably required for the purpose of promoting he rights or freedoms of other persons.

[94] The common law does not permit a person to be tested for alcohol without his consent, and without reasonable cause and in the view of the court random alcohol testing is not authorized by the Occupational health and Safety Act. The provisions of section 22 envisage a limitation prescribed expressly or by necessary implication by a law. The general authority of a law to formulate policy cannot be construed as carte blanche to include in such policy provisions which infringe a fundamental rights and freedoms. If fundamental rights and freedoms are not to be limited, this must be done by the lawmaker and have general application.

[95] The first question is whether RAT has been implemented under the authority of a law. Only if that question is answered in the affirmative does the enquiry arise whether the provisions of the law is reasonably required for the purpose of promoting the rights and freedoms of other persons.

[96] In the present case the constitutionality of RAT falls at the first hurdle, since it has not been authorized by any law.

[97] Assuming however that Section 9 (3) of the Occupational Health & Safety Act can be said to authorize the Respondent to implement RAT as part of “a systematic way of identifying, evaluating and controlling hazards at the workplace”, can it be said that RAT is reasonably required for the purpose of promoting the rights and freedoms of the Respondent and the other employees at the workplace?

[98] To answer this question, the Respondent bears the onus of

satisfying the court that RAT is a reasonably necessary component of a system introduced to “identify, evaluate and control” the hazard of alcohol impairment at the workplace.

See Minister for Home affairs v NICRO 2005 (3) SA 280 CC at 293-294.

[99] The court is also required to have regard to the extent to which the fundamental right (to be protected against arbitrary search) is infringed by the adoption of RAT, and to weigh the potential prejudice that might be suffered as a result of the infringement, against the potential prejudice to the Respondent and its employees should RAT not form part of the Respondent’s Alcohol Testing Policy & Procedure.

[100] It is immediately apparent that the Respondent’s adoption of RAT as part of its policy cannot be justified with respect to employees who do not work in safety- sensitive jobs and areas. To that extent, and in respect of such employees, the Policy is clearly unconstitutional.

[101] With regard to safety- sensitive employees, RAT does not significantly contribute to the detection of employees under the influence of alcohol. Its sale merit appears to lie in its deterrent effect. Whether this deterrent cannot equally be achieved by better awareness programmes, peer monitoring and more efficient supervision, has not been thoroughly canvassed on the papers.

[102] The Respondent alleges and it is undoubtedly the case, that introduction at the Respondent’s premises constituted a very serious danger to any intorucated employee himself and to other employees and company assets. Random alcohol testing is intended to discourage drinking on the premises, and in the interests of workplace safety.

[103] The Respondent alleges that there has been a decrease in alcohol related incidents since the introduction of RAT. In annexure DK9 dated the 22 June 2006 the Respondent stated that during the month of May 2006 and the latter part of April 2006, no alcohol related incidents from company employees

have been reported. Only one incident was reported in June 2006.

[104] This kind of evidence carries little statistical weight, since it is based on a test period of only six weeks during which the attention of the workforce was unusually focused on alcohol policy due to the present dispute. Nevertheless, the court is prepared to accept that RAT has a deterrent effect which maybe a useful component of the Respondent's alcohol testing policy.

[105] An analysis whether the limitation of fundamental rights is justified ultimately involves the balancing of means and ends.

Ghashalson CJ in the NICRO case (supra) quoted the following at page 294:

> "This entails an analysis of all relevant considerations to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provisions, taking into account the availability of less restrictive means available to achieve that purpose."

[106] Balancing the minimal infringement of the rights of privacy and to be protected against arbitrary search, on the one hand, against the advantage of the deterrent effect of random testing in a safety and health policy, the scales do appear to tip in favour of RAT, subject are one very important qualification: the Respondent should have utilized the machinery of collective bargaining to endeavour to procure the consent of the affected employees. Overriding the fundamental rights of workers in the interested of safety could only be regarded as "reasonably required" after all reasonable efforts have been made to obtain their consent.

[107] It is satisfying to observe that the labour law analysis and the constitutional analysis reach the same conclusion; the material implementation of RAT was unreasonable and unjustified because the Respondent failed to engage the union in negotiation with a view to obtaining the consent of the employees to

the new policy.

[108] The findings of the court may be summarized as follows

108.1 The Respondent had a duty to negotiate the implementation of random alcohol testing with the applicant. it was not entitled t unilaterally implement the new policy and procedure without collective bargaining.

108.2 The implementation of random alcohol testing at the workplace contravenes the employees' constitutional rights be:

108.2.1 the random testing constitutes a search within the meaning of section 22 of the constitution;

108.2.2 the free consent of the employees was not first obtained;

108.2.3 the random testing was not implemented under the authority of any law;

108.2.4 an employment policy which infringes the fundamental rights of workers cannot be regarded as

reasonably required where no attempt to obtain consent through collective bargaining has been made.

[109] In the premises, the application of the Applicant succeeds, and an order is granted in terms of prayers 1, 2, and 3 of the Notice of Application.

The members agree.

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P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT