IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 206/06**

In the matter between:

ZHENG YONG SWAZILAND (PTY) LIMITED **APPLICANT**

and

SWAZILAND PROCESSING REFINING AND ALLIED WORKERS UNION **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE : ACTING JUDGE
DAN MANGO : MEMBER
GILBERT NDZINISA : MEMBER

FOR APPLICANT : N. J. HLOPHE

FOR RESPONDENT : E. DLAMINI

J U D G E M E N T

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[1] This is an application brought before the court by the Applicant against the Respondent on a certificate of urgency on the 12th May 2006.

[2] The Applicant is seeking an order in the following terms:

> "*1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.*
>
> *2. Interdicting and restraining the Respondent and those acting at its behest from inciting and/or encouraging its members to participate in the strike action currently obtaining at Applicant's premises*.
>
> *3. Interdicting and /or restraining the Respondents members and those acting at its behest from participating and/or acting in furtherance of the strike action currently obtaining at Applicant's undertaking.*
>
> *4. Declaring the strike currently obtaining at the Applicant's undertaking illegal and not in conformity with the provisions of the Industrial Relations Act.*
>
> *5. Declaring that the relationship between the Applicant and the Respondent is governed by the Terms and Conditions currently obtaining at Applicant's undertaking as agreed with the Swaziland Manufacturing and allied workers Union.*
>
> *6. Alternatively interdicting and restraining those employees partaking in the strike from coming within a 100 metres radius from Applicant's undertaking.*
>
> *7. Directing that prayers 2, 3, 4, 5 and 6 operate with*

immediate and interim effect pending the outcome of this matter.

8. Granting the costs of this application.

9. Granting applicant any further or alternative relief."

[3] The application is opposed by the Respondent. An Opposing Affidavit was accordingly filed by the respondent. The Applicant thereafter filed its replying affidavit.

[4] The court on the 12th May 2006 when the matter first appeared before it, granted an interim relief in terms of paragraphs 1 -7 of the Notice of Motion.

[5] The court on several occasions and for various reasons was unable to form the quorum. The parties agreed in terms of Section 6 (7) of the Industrial Relations Act No. 1 of 200, to have the judge hear the dispute sitting alone.

[6] The brief history behind this application is as follows: The Applicant granted recognition two unions to operate at its undertaking. These unions are the respondent union and another one by the name of Swaziland Manufacturing and Allied Workers Union (hereinafter referred to as SMAWU).

[7] Both unions were granted recognition to be the collective representatives of the same workforce at the Applicant's undertaking. The Respondent union then approached the Applicant and asked it to sign a collective agreement with it. The Applicant refused to do that and argued that there was already in place a memorandum of agreement between it and SMAWU, and further that, as the Respondent was recognized at the discretion of the Applicant, the Applicant had the right to choose what

terms and conditions would be applicable between it and the Respondent union. The Respondent union them reported a dispute with the Conciliation mediation and Arbitration Commission (hereinafter referred to as “CMAC”). CMAC was unable to resolve the dispute, and accordingly issued a certificate of unresolved dispute.

[8] After the certificate of unresolved dispute was issued, the Respondent was served with a strike notice and thereafter its members engaged in a strike action. The Applicant ran to court to seek its intervention and especially declaring that the strike action was unlawful for reasons of not being in conformity with the provisions of the Industrial Relations Act.

[9] The first enquiry that the court will get into is which of the two unions was first recognized by the Applicant. In the Founding Affidavit the deponent thereof stated in paragraph 6.2 that the Applicant had already recognized another trade union, SMAWU, when it granted recognition to the Respondent. The deponent further stated in that paragraph that the Respondent was granted recognition at the discretion of the employer in terms of Section 42 (3) of the Industrial relations Act of 2000. The letter of recognition was annexed and marked “ZY1”.

[10] The Respondent in its opposing affidavit denied that SMAWU was granted recognition before it. It was stated in paragraph 10 of the opposing affidavit that the Applicant granted recognition to both trade unions by a letter dated 18th September 2002.

[11] The Applicant did not annex the recognition agreements of the unions. I asked the Applicant’s attorney to submit the recognition agreement of SMAWU and also to serve the Respondent with a copy of the Respondent with a copy. The court was however served with a Memorandum of

Understanding between the Applicant and SMAWU. This document is dated 23rd September 2002.

[12] The burden of proof that SMAWU was recognized earlier than the Respondent tested on the Applicant. The Applicant failed to bring any documentary evidence to that effect. The court will therefore accept the evidence by the Respondent that both unions were granted recognition by the Applicant on the same day on the 18th September 2002.

[13] There was no evidence or indication as to what category of employee at the workplace each union was representing. At this point the observation made by this court in the case of Swaziland Pulp and Paper Manufacturing and Allied workers union v Usuthu Pulp Company Limited, 1st Respondent and Swaziland Agriculture and Plantation Workers Union, 2nd Respondent Industrial Court Case No. 6/200 is apposite.

[14] At page 3 of the judgement the Learned President observed that;

"The trade union as defined in the 2000 Act has revoked the restriction imposed by the definition of an industry union in the 1996 Act. The consequences of the lifting of this restriction is that a trade union mat represent any category of employee under one employer provided that the employees fall within a clear classification or division, whether or not that are engaged in similar service or produce a similar product/s".

The Learned former president pointed out further on the same page that:

"The current Act, it would appear made room for a multiplicity of unions in an undertaking but did not provide for a mechanism for the entry of a new union

where there is an existing recognized union."

[15] In the present case the two unions were granted recognition on the same day. There was no demarcation as to which category of employees each union would represent. This was clearly a recipe for chaos and confusion/

[16] The issues giving rise to this case were clearly not properly handled by the Applicant. The evidence revealed that before inviting the letters of recognition to both unions on the 18th September 2002, there was an informal employer and union relationship between the Applicant and SMAWU. That was why the Applicant was arguing that SMAWU was recognized earlier than the Respondent.

[17] The next inquiry that the court will make is the status of a union that is granted recognition at the employer's discretion. The position of the law is that if the union is unable to achieve the required percentage of fully paid up members, its recognition will be at the employer's discretion.

[18] In that regard Section 42 (40 of the Industrial Relations Act states that :-

"Where an employer decides to recognize a trade union or staff association in terms of subsection (3), the conditions under which the employer agrees to recognize the organization shall form part of the reply to be given to the organization".

[19] The provisions of this section are peremptory. The conditions of the recognition shall form part of the reply to the union. The conditions under which the respondent was recognized were not made available to the court. There is no indication from the Act that a union that is recognized at the employer's discretion, has a lesser status than a union recognized

by the employer because it has achieved the required percentage of fully paid up members.

[20] The next question that must be answered is who were supposed to vote. As already pointed out, there was no indication to which category of employees each of the union was going to represent. The Applicant's argument was that the respondent was representing the minority workers. The basis of this argument was not clear. If it is accepted for a moment that the Respondent represented the minority workers, there was no evidence as to how many were these workers. There was no evidence that a majority of them did not vote in favour of the strike.

[21] The onus was on the Applicant to show that the majority of the Respondent's members did not vote in favour of the strike action. The Applicant clearly failed to discharge that onus.

[22] The other argument raised by the Applicant was that the strike was illegal because no sufficient notice of the strike action was given by the Respondent to the Applicant. The Applicant argued that it was given less than forty eight hours as required by the Act.

[23] The evidence revealed that the notice to go on strike was given to the Applicant on Friday 5th May 2006. The Applicant received the notice at 15:15 hours. The Respondent said the strike action was going to commence on Tuesday 9th May 2006 at 07.30 hours. Clearly that was short notice as the fifty eight hours period was going to end at 15:15 hours on that day.

[24] The strike did not however commence on the said time and date. The evidence revealed that Applicant objected to the short notice and also to

the inclusion of Saturday. The Respondent responded to that objection by the letter dated 8th May 2006 marked "ZY8". In that letter the respondent told the Applicant that Saturday was a working day at its undertaking. In that letter the Respondent agreed to extend the date of commencement of the strike to Wednesday 10th May 2006.

[25] That letter states in part as follows:

> "*3. Again kindly appreciate that Saturday is a working day in your undertaking hence we have given you proper notice in terms of the Act.*
>
> 4. *However in recognition of your proposal for an urgent meeting you are hereby advised that the commencement date of the intended strike shall be the 10th May 2006 at 0.700 hrs if no solution is found on the meetings of the 9th instant."*

[26] This letter of 8th May 2006, was clearly not a second strike notice. The Respondent was extending the commencement date of the strike action in view of the meeting to be held by the parties on the 9th May 2006. The Respondent having extended the commencement date of the strike action. The argument that the Respondent did not comply with the provisions of the Act in giving the strike notice, will therefore be dismissed.

[27] The last issue that the court will address is that of the hundred metres radius that must be maintained by the workers engaged in the strike. An employee has a right to engage in a lawful strike action. During the strike the employees have a right to lawfully express their demands to the employer. In order for the workers to effectively express themselves, they

are entitled, if they are not violent, to be within a reasonable distance of the employer's premises, a distance of hundred metres would not be reasonable, especially if the employees are not violent or threatening violence.

[28] The court was also asked to make an order declaring that the relationship between the Applicant and the Respondent was governed by the terms and conditions currently obtaining at the Applicant's undertaking as agreed upon with SMAWU. There was no sufficient material placed before the court to enable it to make an order in this regard. The purpose of this application was simply for the court to make a determination on the legality or otherwise of the strike action. The applicant is at liberty to bring a proper application before the court supporting it with the necessary documents.

[29] Taking into account all the afore-mentioned observations, the court will make the following order:

1. **That the rule nisi is discharged.**

That the parties are to agree on a reasonable distance to be maintained by the striking workers.

2. **That the costs will follow the results.**

NKOSINATHI NKONYANE

ACTING JUDGE – INDUSTRIAL COURT