

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE

NO. 447.07

In the matter between:

**SWAZILAND MANUFACTURING &
ALLIED WORKERS UNION
APPLICANT**

And

**SWAZILAND UNITED BAKERIES
(PTY) LTD**

CORAM:

NKOSINATHI NKONYANE

:

JUDGE

DAN MANGO

:

MEMBER

GILBERT NDZINISA

:

MEMBER

**FOR APPLICANT
C.Z. DLAMINI**

:

FOR RESPONDENT

:

J.N. HLOPHE

RULING 04.02.08

[1] This is an urgent application brought by the applicant against the respondent for an order in the following terms:-

“1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency

2. Ordering that a **Rule Nisi** be issued calling upon the respondent to appear and show cause, if any, on a date to be determined by this Honourable Court why an Order in the following terms should not be made final:

2.1 Interdicting and restraining the respondent from proceeding to lock out and/or dismissing members of the applicant from its employ for their refusal to sign one-month temporary labour contracts without involving and/or consulting the applicants with regards to the contracts.

2.2 Declaring all dismissals and lock out that has

resulted from such refusal to sign such contracts **null and void** and of no force and effect owing to their departure from the provisions of the Recognition Agreement.

- 2.3 Directing the respondent to consult with the applicant on the issue of the intended implementation of the one month temporal contracts prior to effecting same in accordance with the Recognition Agreement.
 - 2.4 Declaring all consultations already made with individual members of the applicant null and void and of no force and effect owing to their departure from the provisions of the Recognition Agreement.
 - 2.5 Directing the respondent to pay costs of this application in the event that the same is opposed.
3. Directing that the rule nisi referred to in paragraph 2 above operate with immediate effect pending the outcome of these proceedings.
 4. Granting the applicant further and/or alternative relief as the above Honourable Court may deem fit.”

[2] When the matter first appeared before the court on the 5th October 2007, and interim order in terms of prayers 2.1 and 2.3 was issued by consent of the parties.

[3] Thereafter followed numerous postponements until the 14th December 2007 when points of law raised by the respondent were argued.

[4] The respondent raised the following points of law which the court will deal with ad seriatim;

4.1 The respondent argued that the matter was not properly before the court as the applicant had failed to comply with Rule 11 of the Recognition Agreement between the parties. The respondent applied that the application be dismissed. The Recognition agreement was annexed to the applicant's papers and marked "SMAWU 1." Rule 11 is a section that deals with dispute settlement procedures.

4.2 The applicant argued to the contrary that the provisions of Rule 11 of the Recognition Agreement were complied with and that the matter was reported to the Conciliation Mediation and Arbitration Commission ("CMAC"). Indeed Rule 11.1.3 states that if the parties fail to settle

the dispute, they may agree to refer the dispute to Mediation and/or Arbitration. Before the court theno was evidence that the dispute was referred to CMAC. There was no evidence that the respondent raised any objection at CMAC that the dispute was not properly before it because Rule 11 of the Recognition Agreement had not been complied with. This point is accordingly dismissed.

- 4.3 The respondent also argued that the applicant has failed to establish urgency. The evidence indeed revealed that the dispute between the parties has been ongoing for some time.
- 4.4 When dealing with the question of urgency, the position of the law is that each case must be dealt with in accordance with its own peculiar circumstances. Further, the position of the law is that an employee should not be punished for first engaging his employer before coming to court.

**SEE: VUSI GAMEDZE V. MANANGA COLLEGE
(IC) CASE NO. 267/2006**

- 4.5 In the present case, taking into account all the surrounding circumstances of the case, the court will hold

that the applicant was entitled to approach the court on a certificate of urgency especially for an order in terms of prayers 2.1 and 2.2 which are for an interdict.

- 4.6 On this point of urgency, the respondent argued in the alternative that the applicant cannot seek prayers 2.2 and 2.4 on the basis of an urgency as that is merely an attempt to short circuit an application for determination of an unresolved dispute.
- 4.7 Indeed the evidence revealed that the matter was reported to CMAC and a certificate of unresolved dispute issued. If some members of the applicant have since been dismissed because they refused to sign short term contracts, prima facie, that amounts to unfair dismissal.
- 4.8 The court is unable to appreciate why this matter should take precedence over other matters of unfair dismissal pending before it. There were no exceptional circumstances shown by the applicant to warrant the alleged unfair dismissal of the applicant's members to be heard by the court ahead of other unfair dismissal cases pending before the court. The second part of the argument on urgency will therefore be upheld by the court.

**SEE: FOOD AND ALLIED WORKERS UNION V.
NATIONAL CO-OPERATIVE DAIRIES LTD (2)
(1989) 9 ILJ 1033 (IC)**

4.9 The respondent also argued that the applicant has no *locus standi* to bring the application as the remedies sought can be enforced by the employees on their own. We do not agree with the respondent.

The crux of the application is that the respondent acted unlawfully by consulting the employees individually, bypassing the union. There was no dispute that there is a union at the work place and that the union is recognized by the respondent. The applicant is therefore enforcing its right in terms of the Recognition Agreement between the parties. This point is accordingly dismissed.

4.9 During the argument the parties were able to traverse all the issues raised in the papers. There will be no need therefore to refer the matter to further argument. The court, having taken into account the submissions and all the circumstances of the case, will make the following order;

1. **That the respondent is directed to comply with the terms of the Recognition Agreement and in particular the right of the Union to represent its**

members in terms of Rule 1.6

2. **That the application is dismissed but the applicant's members who believe that they were unfairly dismissed by the respondent are at liberty to pursue their claims.**

3. **That there is no order as to costs.**

The members agree.

NKOSINATHI NKONYANE

JUDGE - INDUSTRIAL COURT