IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 116/99

In the matter between:

SWAZILAND RANCHES LIMITED t/a

TABANKULU ESTATE APPLICANT

And

SWAZILAND AGRICULTURE AND PLANTATIONS

WORKERS UNION AND OTHERS RESPONDENT

CORAM;

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR THE APPLICANT : MUSA SIBANDZE

FOR THE RESPONDENT : PETER DUNSEITH

JUDGEMENT (14.10 .99)

The Applicant brought this urgent application on motion on the 28th May, 1999 seeking an order in the following terms :

1. " Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to heard as a matter of urgency.
2. That a rule nisi do issue, calling upon the respondents to show cause on a date to be appointed by the above Honourable Court, why an order in the following terms should not be made final:

2.1 An Order declaring the ban on overtime declared by the Respondents', unlawful and contrary to the Memorandum of Agreement entered into between applicant and 1st Respondent and signed on the 29th June, 1993 and the Recognition and Procedural Agreement entered into on the 8th July, 1992.

2.2 An Order declaring "overtime ban" to be a strike, not in conformity with the provisions of Part V111 of the Industrial Relations Act and accordingly unlawful.

2.3 An order Interdicting and Restraining the Respondents from authorising, causing, encouraging, supporting or sanctioning the ban on overtime.

2.4 Directing the Respondents to take all steps reasonably necessary to prevent the implementation or continuation of the said ban on overtime by its members and to report on Affidavit to this Honourable Court on the return day as to the steps taken by it in compliance with and pursuant to this Order.

2.5 Allowing service of this Order upon the 2nd and further Respondent's to be effected by service at

the premises of the 1st Respondent.

3. Granting further and/or alternative relief.

Upon hearing counsel for the parties and having read the papers filed of record, we issued a rule nisi in terms of prayers 2.3, 2.4 and 2.5 of the notice of motion to operate with immediate effect pending the determination of the matter.

For various reasons attributable to both parties this application was dilated and the same was not heard on the merits until the 17th September, 1999. Meanwhile two interlocutory applications were filed by the Applicant one of which was heard by the court and judgement delivered thereof. These applications are not relevant to the determination of this Application.
We will proceed to state that at the time arguments for interim relief were heard, the Respondent's Attorney had filed lengthy and very helpful heads of arguments in which he did not at all dispute that the affected cane cutters and fruit pickers did overtime in their day to day chores. In his arguments the issue as to whether the type of work arrangement that existed between the seasonal workers and the Applicant constitutes overtime was not addressed.

Indeed the overall impression created by both parties at that stage was that the affected employees did overtime and that the only issue to be determined by the court was whether or not the Applicant had a right to demand that the employees do "overtime" by virtue of an existing contractual obligation or custom at the undertaking.

Having said that, we will not comment at all on the submissions by Mr. Dunseith as to the virtues of not granting a rule nisi in matters of this nature during his submissions on the merits.

The 1st Respondent has since filed its Answering Affidavit deposed to by Mr. Phineas Lukhele the 2nd Respondent and has on the main denied that the employees alleged by the Applicant to be involved in an overtime ban "do overtime" at all in the first place.

To buttress this assertion he has annexed a copy of the Applicant's Cane Harvesting Conditions applicable at the undertaking. The document is marked "A". It was submitted that similar arrangement appertain to Fruit pickers.

The pith of Mr. Dunseith's submission on behalf of the Respondents is that a cane cutter is not paid any overtime for hours in excess of the normal working hours in the agricultural industry save in the case where he works on a holiday or a Sunday in which case he is paid double his normal daily rate.

That a cutter, just like a Fruit picker receives a bonus for lines cut or fruits picked over and above the daily basic task. To this extent he submitted time (our emphasis) is not a function at the undertaking of the Applicant as concerns all the seasonal employees, who constitute approximately ninety nine percent (99%) of the employees the subject of this Application.

According to Annexure "A", a daily basic task of a Cane Cutter is 24 units cut, Windrowed and topped. Every unit windrowed and topped over and above the daily basic task constitutes bonus units and is paid as bonus in terms of the Cane Harvesting Conditions, 1994.

For example a hard working Cane Cutter could complete his daily task in a few hours and then continue to work for bonus and if he so wishes stop cutting after completing his basic daily task. It was submitted that on completion of the daily task, there is no obligation whatsoever to stay on . In other words, they do not have a working day or working hours strictu sensu.

On this basis, it was submitted that the issue of "overtime ban" does not arise at all. Furthermore, the conditions of Cane Cutters, equally applied to the Fruit pickers. Their daily task constituted Picking 120 bags of grape fruit and any more fruits picked over and above that constitute bonus units.

In terms of these conditions applicable to the seasonal employees which have not been placed in dispute, it is apparent on the face of the document that there is no contractual obligation for the cane

cutters , and concomitably the fruit pickers to work over and above their daily task. It is also our inescapable conclusion from a reading of this document that time is not a factor in the whole arrangement.

What determines bonus pay is the effectiveness and efficiency of a particular worker irrespective of the period he/she has put as compared to his colleagues. This however is not the end of this matter.

The Applicant has referred the court to the Agreement "SP5" to the Application concluded between the Applicant and the 1 st respondent on the 29 June, 1993. It is disputed by the Respondent that this document was registered with this court in terms of the Industrial Relations Act and therefore it did not bind the members of the 1st Respondent. On the contrary, Applicant states irrespective of whether the Agreement was registered or not, it is binding interse, as between the Applicant and the 1st Respondent and the same binds all employees who constitute the bargaining unit at the Applicant's undertaking.

The Applicant submitted that whether or not the Agreement was registered, can not be put to issue now. That it is unconscionable for the Respondents to rely on this document over the years when it suited them and when it does not, they quickly denounce it as not binding.

It cannot be seriously disputed that the Applicant and the respondent have over the years entered into Collective Agreements pursuant to the recognition accorded to the 1st respondent by virtue of its Recognition Agreement. The 1st respondent no doubt would be estopped from denouncing the validity of such Agreements at this late hour.

This however leads us to the question as to whether Clause 12.2 of the Recognition Agreement is applicable in the circumstances of this case. The same reads as follows :

"12.2 The employer agrees to refrain from lock out and the union agrees to refrain from any go slow ban or overtime stoppage of work or restriction of production in respect of any matter which is the subject of a binding agreement or has not yet been taken through all the relevant steps outlined in Clause 11 hereof".

Furthermore, pursuant to the Recognition Agreement, the parties entered into the Agreement "SP5" we have earlier refered to which document is headed as follows:

"Agreement with the Union Applicable to Employees in the Bargaining Unit as defined in the Memorandum of Agreement of 3 July 1992".

Article 2 of this document is headed "Overtime" and Clause 2.2 thereof reads :

"It is agreed by both parties that overtime has become a normal feature of to-days undertaking. Where possible, a notice shall be given to the employees required to work overtime with the exception of emergencies when it is not possible to foresee the situation and it is necessary to work overtime at very short notice. Refusal to work overtime with the required notice is however not acceptable and constitute a breach of contract, for which disciplinary measures may be applied".

It also has a subheading that reads ; "Conditions of the Permanent Employees"

preceding the minor sub-headings such as hours of work, overtime, leave etc. The document on the face of it addresses working conditions of permanent employees. Indeed, Article 7 of the Agreement reads :

" 7 SEASONAL EMPLOYEES- It is agreed that this issue be negotiated separately but their agreement will be implemented simultaneously with the permanent employees agreement" It is also agreed that due to the difficulty of implementing an agreement for seasonals after the commencement of the season that negotiations for both agreements will be initiated in January each year with the objective of finalising them before April."

It is without a doubt therefore, that this agreement is not applicable to the seasonal cane cutters and fruit pickers who constitute ninety nine percent (99%) (as submitted by Mr. Dunsieth) of the employees the subject of this dispute. To this end, no agreement has been placed before the court that in any way obliges the seasonal workers to do overtime.

In any event, it is clearly stated that, agreements as to the seasonal conditions of service would be concluded on a annual basis on or before the month of April each year.

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Mr. Sibandze in the alternative submitted that the employees of the Applicant have a common law duty to work normally and not restrict their out-put, to obey reasonable instructions and to work reasonable overtime when instructed to do so. It is not disputed that the seasonal employees had collectively decided to restrict their work to their daily task as defined in the Cane Harvesting Conditions of 1994 to be 24 units of cane, cut, windrowed and topped daily, while the pickers only did 120 bags daily.

According to Annexure "SP2" to the application, a letter written by the The Respondent Joshua Ziyane to the Personnel Manager of the Applicant, the employees "resolved that they suspend overtime with effect from Monday 24th May, 1999".

The reason given for the decision was that the employees expected a wage increase in April every year but this had not been effected. He stated that the union thought it wise to inform the Applicant so that they could solve the Sections problems as they arose.

It is on the basis of this letter that the Applicant states that the employees of the 1st Respondent have engaged in an unlawful overtime ban.

It was submitted that the 'overtime ban' is unlawful because it falls within the meaning of a 'strike' in terms of Section 2 of the Industrial Relations Act of 1996 and therefore the 1st Respondent was statutory bound to follow and exhaust the procedures provided in Part V111 of the Industrial Relations Act and the Recognition Agreement prior to the commencement of the Industrial Action.

This contention was vehemently contested by Mr. Dunseith for the Respondents on the grounds that the employees were not engaged in any overtime ban at all as their daily tasks did not have any time element in them and secondly, work as is referred to in the definition of a strike means work that an employee is contractually obliged to perform. The seasonal employees were not contractually or otherwise bound to exceed the daily task of cutting 24 lines and picking 120 bags of grape fruit.

Mr. Dunseith added that the nearest allegation that may be made against the conduct of the employees was that they had engaged in an unfair labour practice which doctrine unfortunately is not part of Swaziland labour law as yet.

Contrary to the submissions by the applicant the respondents referred the court to the case of S.A. Breweries Ltd V FAWA and Others 1990 (I) SA 92 AD at 99 wherein, Smallberger J. A stated:

"under the common law no employee can be directly or indirectly compelled to perform work he is not contractually obliged to do no matter whether in refusing to do such work he acts individually or collectively with others and irrespective of the reason for or purpose of such refusal. The rights of workers to withhold labour they are not contractually obliged to perform is an important weapon they possess in the bargaining process that underlines the theory of modern Labour Law".

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We are, without reservation in agreement with this statement of law. We echo the words of Justice Saeed R. Cockar Judge of the Industrial Court of Kenya in his book "The Kenya Industrial Court - Origin Development and Practice" at pg. l as follows;

"..... It must be accepted that the staple of the trade union movement is the strike and when some

intrasgent employers refuse to understand any other language, it is seldom that they fail to understand a strike".

This statement cannot be more correct where non contractual labour is withheld for bargaining purposes.

The seasonal workers are under no obligation whatsoever to work for a bonus, after they have completed their daily task in our view. Indeed, the interim order was granted on the basis of the letter marked "SP2" to the Application written by the The Respondent which gave credence to the erroneous submissions that there was a 'time factor' in the daily chores by the seasonals at the Applicant's undertaking by his use of the words that the employees had ".....resolved that they suspend overtime with effect from Monday 24 May, 1999".

We are satisfied that since the union's members are exercising a common law right and that they are not raising a dispute or grievance , they are therefore not bound to follow the procedures contained in the Recognition Agreement.

The decision in SA Brewers Case (supra) to the effect that the collective refusal by employees to work overtime in order to induce or compel their employer to accept their employment demands where such employees were not contractually bound to work overtime does not amount to an unlawful strike, buttresses our findings in this case. See also the case of NUTW & OTHERS v JAGUAR SHOES (PTY) LTD (1986) 716 J 359 at 365 wherein it was held:

"In the absence of an express or implied contractual stipulation to the effect that overtime work was compulsory the court must assume that overtime was voluntary and that the Applicants could not be compelled to do overtime work if they did not wish to do so for any reason whatever" See further NAAWU v CHT MANUFACTURING CO. (PTY) LTD (1984) 5 ICJ 186.

The only other outstanding issue concerns the involvement of what the Applicant referred to in paragraph 20.3 of the Founding Affidavit as "other employees of the Applicant including tractor drivers".

It was submitted that they too had ceased to work overtime and were limiting output. Other than this bold statement by the Applicant there are no averments in the Applicant's papers how the actions of the other workers and tractor drivers has affected the operations at the undertaking to justify interim relief. The real problem evident from the papers and from the submissions by counsel is that there was a real danger that insufficient sugar cane would be cut to satisfy its daily quota at the sugar mills and that the citrus fruits were in danger of getting overripe yet approximately three quarters of the seasons crop was unpicked.

The case of the seasonals having fallen away, the Applicant has dismally failed to establish a clear right to entitle it to the final interdict it seeks. In the circumstances, the question of the balance of convenience is irrelevant.

The Applicant by way of a remedy may supplement its work force or negotiate a valid contract regarding overtime with its workers. See SA BREWERS CASE pg 100 (supra).

The Application is accordingly dismissed with no order as to costs. The members agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT