IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 331/2002
In the matter between:	
SWAZILAND ASSOCIATION OF	
CIVIL SERVANTS (SNACS)	1ST APPLICANT
SWAZILAND NURSING ASSOCIATION (SNA)	2ND APPLICANT
SWAZILAND NATIONAL ASSOCIATION	
OF TEACHERS (SNAT)	3RD APPLICANT
and	
SWAZILAND GOVERNMENT	1ST RESPONDENT
HILDA FUTHIE KUHLASE	2ND RESPONDENT
THE ATTORNEY GENERAL	3RD RESPONDENT
CORAM:	
NDERI NDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANTS:	T. R. MASEKO
FOR RESPONDENTS:	M. SIBANDZE

RULING

03/12/02

The three Applicant unions Swaziland Association of Civil Servants

(SNACS), Swaziland Nursing Association (SNA) and Swaziland National Association of Teachers (SNAT) have brought an urgent application seeking an order in the following terms:

1. Waiving the usual requirements of the rules of this Honourable Court regarding notice, form of service and time limits of applications, and hearing this matter as one of urgency.

2. Calling upon the Respondents to show cause if any on a date to be fixed by this Honourable Court, why:

2.1. They should not be ordered to return to the negotiation table to continue with negotiations on salary adjustments for the 2002/3, in the event the parties do not agree, sign a deadlock agreement in terms of the Recognition Agreement entered into by and between the parties.

3. Directing and ordering the 2nd Respondent to convene a meeting of the Joint Negotiations Team within five (5) days, for the continuation of negotiations to finality, in good faith and with expedition.

4. Interdicting and restraining the Respondents from distributing the sum of Fifty-Eight Million (E58 million) in terms of the Dupuis Report which has not been agreed by and between the parties.

5. That paragraph 2 and 4 above operate as an interim order to operate with immediate effect pending the return date.

6. Further or alternative relief.

The Application was filed on the 27th November 2002 and it called upon the Respondents to notify the Applicant's Attorney of their intention to oppose the same on or before 1300hrs on the same date and file an Answering Affidavit by 1630hrs, on the same day if the Respondents wish to oppose the Application.

The Application is supported by an unusual affidavit that is deposed to by the three Secretary Generals of the Applicants, Queenton Dlamini, Thabsile Dlamini and Dominic Nxumalo.

Though the three deponents have appended their signatures to the Affidavit, the ultimate clause reads as follows:

"Thus sworn to and signed before me at Mbabane on this 26th day of November 2002, deponent having acknowledged that he knows and understands the contents of this affidavit."

The normal way would have been for one of the Applicants to depose to a Founding affidavit and the other two to make Confirmatory Affidavits.

As it is now, though there are three deponents to the Founding Affidavit, it appears on the face of the document only one of them has attested to the

knowledge and understanding of the contents thereof. We will discuss the implications of this at a later stage if need be.

The Respondent has filed an Answering Affidavit deposed to by the Principal Secretary, Ministry of Public Service and Information wherein has been raised objections in limine that may be summarized as follows:

1. The reason relied on as basis for urgency in paragraphs 20.1, 20.2 and 20.3 do not disclose sufficient grounds to found urgency and do not sufficiently put reasons before the court why the matter cannot follow the normal dispute procedures presented by the Industrial Relations Act or why it would not follow any other procedures for the solution of disputes agreed between the parties.

2. The prerequisites for granting interim relief which comprise a prima facie/clear right; apprehension of irreparable harm; balance of convenience and lack of alternative remedies have not been satisfied.

3. The Founding Affidavit is a nullity because according to the attestation, only one deponent out of the three purported deponents has sworn to the contents thereof.

4. The Applicant has not complied with the time limits set out by Rule 6 (26) of the Rules of the High Court as read with Rule 6 (10) nor have the Applicant's sought special exemption from the court from complying thereof.

Mr. Musa Sibandze for the respondent ably motivated the objections aforesaid, and while Mr. Maseko

replied to the submissions by Mr. Sibandze, it became clear as stated in paragraph 20.3 of the Founding Affidavit, that the Applicants were of the mistaken belief that they could not unilaterally refer the dispute to conciliation based on their interpretation of Article 12.5 of the Recognition Agreements.

This from Mr. Maseko's submission was the reason why they did not follow that route but instead lodged the urgent application which inter alia seeks the court to order the Respondents to return to the negotiation table on the salary adjustment for the year 2002/3.

Section 76 of the Industrial Relations Act No. 1 of 2000 is titled; Reporting Disputes; and subsection 76 (1) authorizes an organization which has been recognized in accordance with Section 42 to report a dispute only subject to Section 76 (2) which provides that the Commissioner of Labour may reject a

report which he deems, frivolous, vexatious or time wasting and advise the parties accordingly, and if one of the parties is not satisfied, he may appeal to the Commission whose decision shall be final.

In terms of Section 78, the Commissioner of Labour is within 10 days mandated to forward the dispute to the Commission and the commission in terms of Section 80 (1) is to appoint a Commissioner to attempt to resolve the dispute through conciliation. If the dispute remains unresolved after conciliation, in terms of Section 80 (3), the commissioner shall arbitrate the dispute, if the Act requires arbitration, or if the parties to the dispute agree that the dispute be resolved through arbitration.

There is no requirement whatsoever for consensus of the parties, for a dispute to be referred to conciliation. If clause 12.5 of the Recognition Agreements in casu, require such agreement, then on the authority of the Industrial Court of Swaziland Case No. 245/2002 between Kenneth Manyathi and Usuthu Pulp Company Limited and Another, the clause is null and void to the extent that it seeks to rob the parties of a right conferred on them for the benefit not of themselves only, but for the benefit of the public at large.

In that case, I cited the Case of Ritch and Byat v Union Government 1912 AP 719 at pp 734 -5, wherein Innes ACJ points out that the rule of Dutch Roman Law as follows:

"the maxim of the Civil Law (C2329) that every man is able to renounce a right conferred by law for his own benefit was fully recognized by the Law of Holland. But it was subject to certain exceptions of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interest of the public as well. "

The Industrial Relations Act has guaranteed access to the commissioner of Labour and the commission (CMAC) for conciliation to foster good industrial relations for the benefits of the parties and all the stake holders at large. Therefore a party cannot denounce such accessibility.

It is clear that the application is based on a misconception that there was no immediate alternative remedy available to the Applicants which is not the case. Lack of alternative remedy is a prerequisite for seeking an interim interdict.

The cardinal requirement however is that of a prima facie right to the relief sought. The Applicants claim a right to negotiations based on an agreement between them and the government on the 28th May 2002 which interalia states in clause land 2 as follows:

"1. That an interim award of 11.4% across the board be paid to all public servants from the budgeted E164m, with effect from April 2002.

2. Further adjustments resulting from a salary restructuring exercise will be implemented within the

budgeted E164m to effect the job categorization. This adjustment will be implemented for the financial year beginning 1st April 2002 following consultations with the Associations and other relevant stake holders. These consultations are expected to be completed in three months time."

From Annexure 'A' to the Answering Affidavit, it is clear, consultations took place in a series of meetings held on the 10th May 2002, 4th July 2002,18th July 2002, 26th July 2002, 31st July 2002, 8th August 2002, 12th August 2002, 11th September 2002, 19th September 2002, 29th September 2002 and finally 14th October 2002, wherein the parties disagreed completely on the interpretation of the Agreement. Annexure 2 referred to the Respondent taking the position that it was only bound to consult with the Applicant, a process it had already undertaken, but not to enter into negotiations on the issue of job categorization. The Respondent further refused to sign a deadlock on the interpretation of the Collective Agreement of the 28th May 2002 aforesaid, alleging that same was clear that only consultation was required but not negotiations.

The parties have not met since until this Application was lodged approximately one month and two weeks later.

In this respect, I have had regard to annexure 'A', a document headed "Memorandum - Proposals Regarding Negotiations Policy and Structure". This sets out clear guidelines on the negotiation process between the Applicants and the Respondent. Annexure 'B' also refers to a negotiation process, whereas, document 'C' seems to be an agreement to specifically consult in contra-distinction to negotiation.

It was argued that since the Applicants in terms of prayer 2.1 seeks the court to order the Respondents to return to the negotiation table, to continue with negotiations on salary adjustments, it has failed to establish a prima facie right to the relief sought since only consultation was agreed to but not negotiation.

There is a clear difference between the two terms, in their ordinary meaning and apparently as they were used and applied by the parties herein.

The Oxford Dictionary meaning of the term negotiate is :

"1. confer with others in order to reach a compromise or agreement. 2. arrange (a matter) or bring about (a result) by negotiating (negotiated settlement).

Whereas consultation is defined in the same dictionary as follows:

"1. Seek information or advice from (a person, book, watch etc) 2. Refer to a person for advice, an opinion. 3. Seek permission or approval from (a person) for a proposed action 4. Take into account; consider (feelings, interests, etc). '

The distinguishing mark between the two terms is that, in negotiations the parties work towards an agreement or compromise, whereas in consultation, though advice, permission or approval is sought, parties need not agree or reach compromise.

The same meaning is applied to the two terms in collective bargaining since clearly matters that are negotiable, are distinct and separated from those matters on which parties need only consult.

From a reading of the agreement dated the 28th May 2002, the parties had clearly agreed to consult in contra-distinction to negotiations. To this end, the Applicants have failed to prove on a balance of probabilities a clear right to the relief sought in prayer 2.1.

The Applicants have further failed to establish that they lack alternative remedy from a reading of paragraph 20.3 which clearly shows a desire for the parties to seek conciliation, a remedy, they had erroneously thought was not readily available.

As to the issue of urgency, going by the plethora of authorities by the Industrial Court cited in the matter of Kenneth Manyathi (supra), loss of income cannot be a basis of dispensing with the usual time limits, procedures and manner of service set out in the Rules of Court, to hear a matter as one of urgency. If this were to be so, every matter now pending before court would qualify to be treated as urgent. The only exception so far recognized by the Industrial Court to this rule, is where an Applicant has been denied his entire salary and/or a substantial portion thereof, in circumstances that indicate a denial of a means of livelihood. This is definitely not such a case. The Applicants have therefore also failed to establish why they cannot be afforded relief in due course like other litigants who patiently wait for their turn in the queue.

I must hasten to add that it is desirable that matters of this nature need to be settled, whenever possible, by way of alternative dispute resolution which provides, a friendlier, informal, expeditious and less expensive environment provided by the parties themselves and in the alternative, by Part VIII of the Industrial Relations Act, 2000, rather than be determined in more formal surrounds of a court. The importance of the Labour Commissioner's role and that of the Commission for Conciliation," Mediation and Arbitration (CMAC) is such that these provisions should be strictly observed.

I find it unnecessary to deal with the questions of validity of the Founding Affidavit and the Rule 6 (26) Notice.

For these reasons, the Application is dismissed in its entirety.

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT