IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 433/06**

In the matter between:

ARCHIE SAYED **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 – 13/07/06

1. The Applicant is an employee of the Respondent and the Secretary of the Swaziland Agriculture & Plantation Workers Union ("The Union").

2. The Respondent has given notice to the Applicant in terms of the Company's Disciplinary Code and Procedure to attend a disciplinary hearing on the 13th July 2006 at 10.00 a.m.

3. In terms of the disciplinary charge sheet, the Applicant is charged with.

3.1 disobedience, in that he refused to submit to a random alcohol test; and

3.2 unauthorized absence from work.

4. The Applicant has instituted an urgent application supported by affidavit, in which he seeks an order:

1. Dispensing with the forms and service provided for in the Rules of Court and disposing of the matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the Court or Judge, as the case maybe, seem fit.

2. That a rule nisi do issue calling upon the Respondent to show cause on a date to be fixed by the above Honourable Court, why:

a) *It should not be interdicted and restrained from conducting the disciplinary enquiry against the Applicant, Scheduled for the 13th July 2006, at the Respondent's Small Board Room inside the Mill (Respondent's premises).*

b) Directing the Respondent to pay costs of this application, in the event it opposes same.

3. That paragraph 2 (a) above operate with immediate effect pending the finalization of the Industrial Court Case No.

423/2006.

5. The application was duly served on the Respondent, but due to the short notice given the Respondent was not able to file any opposing papers. It did however appear through counsel at the hearing to oppose the granting of the relief sought by the Applicant, on the basis that the founding affidavit does not disclose a prima facie case.

6. The applicant is seeking an interim interdict staying the disciplinary enquiry pending finalization of Industrial Court Case No. 423/06. In order to obtain interim relief, he must establish the following requirements.

6.1 That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

6.2 that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

6.3 that the balance of convenience favours the granting of interim relief; and

6.4 that the Applicant has no other satisfactory remedy

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7. Where the Respondent has not filed any opposing papers, the proper manner of approach is to take the facts as set out by the Applicant in the founding affidavit and to consider whether, having regard to the inherent probabilities, the Applicant could on those facts obtain relief at the final hearing

SEE RAWJEE BROS V DE VEGA & ANOTHER SLR 1997 – 1981 PAGE 125 AT 132.

8. Counsel for the applicant informed the court from the bar that the Applicant relied not only on the allegations contained in his founding affidavit, but also on the founding affidavit filed by the union in Industrial Court Case No. 423/2006.

Where evidence contained in a separate application is relied upon, it is not sufficient to simply place the other file before the court. Specific reference should be made in the founding affidavit to the portions of the evidence to be relied upon, or there should be an explicit allegation that the applicant incorporates the papers in the other matter into the current application.

9. In the interest of justice, however, and since the matter is urgent and the court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings, the court will have regard to the contents of the affidavits filed of record by the union in case No. 423/06.

10. In Case No. 423/06, the union has applied to the Industrial Court for a final order interdicting the Respondent from implementing Random Alcohol Testing and directing the Respondent to negotiate the

implementation of such testing. The Respondent is opposing such application, but has not yet filed any opposing affidavits.

11. In its founding affidavits, the union alleges inter alia that:

11. 1 it is the recognized representative of the respondent's employees;

11.2 there is a registered collective agreement which is binding on the parties.

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

11.4 Clause 11.04 of the disciplinary code deals with proof of drunkenness.

This clause provides for alcohol testing by means of an alcometer/breathalyzer in the case of suspected drunkenness, and further provides that "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."

11.5 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."

11.6 Article 54.02 of the collective agreement itself states that the Respondent: *"agrees that no condition of employment (written or practiced) will be cancelled 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."*

11.7 On or about 4th May 2006 the Respondent introduced Random Alcohol Testing (hereinafter referred to as 'RAT"). The computerized access control system at the Respondent's main gate has been programmed to randomly select employees, contractors and visitors, who upon selection must undergo an alcohol test by alcometer/breathalyser. Selected persons who refuse to submit to the alcohol test are automatically denied access to the company premises until they have taken the test.

11.8 RAT was unilaterally introduced and implemented by the Respondent without any prior consultation or negotiation with the union and without the consent of the union. By doing so the respondent has breached the collective agreement and the disciplinary code and procedure.

11.9 RAT is inhumane, degrading and unreasonable :

- inhumane because it lacks subjectivity;

degrading because it subjects people who do not drink alcohol to the test;

- unreasonable because it is not only carried out when one is clocking in but also when one is clocking out.

11.10 In a letter addressed to the present applicant Archie Sayed, the Human Resources Manager states that an employee who refuses to undergo RAT will inter alia:

- Not receive remuneration for the period he is excluded from the work place.
- Be treated as admitting guilt of being under the influence of alcohol.

Be given a final written warning for refusing to take the test.

- Be charged for refusing to carry out a valid and reasonable instruction.

12. On the basis of these currently unchallenged allegations of the union, and the contents of the letter written by the Human Resources Manager to the applicant, the union has prima facie established a clear right to the interdict it is seeking in case No. 423/06.

13. There is a significant 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 persons who are not suspected of having taken alcohol.

14. In this regard the court notes that Section 344 of the Criminal procedure and evidence Act 1938 only empowers the Police to administer a breathalyser test on a person who is reasonably suspected of having alcohol in his body.

15. The law does not permit the Police to subject a citizen of Swaziland to random alcohol testing, for the simple reason that this would constitute an invasion of the citizen's bodily privacy.

16. In the context of workplace safety, as in the context of policing and crime detection, there may be good reasons to introduce random alcohol and drug testing. At the workplace it is in the interest not only of management but also of the workers that an alcohol-free environment is maintained, and random monitoring may be one of the means by which this can be achieved; but it must be implemented with the consent of the affected workers, whether such consent is established by means of a personal contract of employment, or a collective agreement, or by a tacit acceptance of an established policy and procedure.

17. According to the Applicant he personally never consented to RAT, and when he was randomly selected he refused to undergo a breath test. Prima facie, on the basis of the allegations contained in the Applicant's affidavit read, together with the union's affidavit, he was entitled so to refuse. He was not suspected of being under the influence of alcohol. He was selected randomly by the computerized access control system. In the absence of his consent, or any contractual submission to RAT, he could not be compelled to submit to an invasion of his bodily privacy, any more than the respondent could compel him for instance, to undergo an HIV test.

18. It must be emphasized that the views of the court, as expressed above, are prima facie at this stage, and advanced in the absence of any evidence adduced by the Respondent solely in the process of determining whether the Applicant has established " that the right which is the subject matter of the main action, and which he seeks to protect by means of interim relief, is clear or, if not clear, is prima facie established, though open to some

doubt" (see supra).

19. If the Applicant was not obliged to submit to a random alcohol test, then it would be a grossly unfair labour practice for the Respondent to lock him out of the workplace, threaten to deprive him of his remuneration, and institute disciplinary proceedings against him based solely on his refusal to submit.

20. According to the Applicant, this is precisely what the respondent has done. With regard to the disciplinary enquiry, this is due to take place today. The charge of disobedience refers to the Applicant's refusal to submit to RAT. The charge of unauthorized absence refers to the Applicant's absence from work during the period that he was denied access to the workplace. It also refers to the Applicant's alleged absence from work without unauthorized leave on 1st and 25th May 2006, that is prior to the alleged lock out.

21. Applicant's counsel urged the court to stay the disciplinary enquiry because of his client's fear that he would be denied access to the workplace and thereby prevented from attending his disciplinary hearing. This fear does not appear reasonable to the court, and the court would certainly not grant an interim interdict based on this issue. Firstly, there is no reason to believe that the Respondent would deliberately undermine its own disciplinary enquiry.

Secondly, in case No. 423/06, the affidavits reveal that Applicant's fellow employee, Winile Mlotsa, who was also denied access due to her refusal to submit to RAT, was given a visitors pass to enable her to attend a meeting with management.

Thirdly, the Respondent's counsel gave an assurance in court that the Applicant would be granted access to enable him to attend the enquiry.

22. Mr. Mavuso for the Applicant also argued that the notice of the hearing is too short to enable his client to prepare his defence. This issue likewise would not justify an interdict, since the Applicant has another and more obvious remedy, namely to apply at the hearing for a postponement.

23. The third argument raised by Mr. Mavuso has more substance. If the hearing proceeds before the Industrial Court has finally pronounced upon the legality of RAT, he submits, his client will in all likelihood be dismissed. If the court eventually holds that RAT is illegal because neither the Applicant not the union consented to its implementation, his client will have been dismissed for no good reason.

24. In response to this argument, Mr. Flynn for the Respondent made three ripostes:

    24.1 The Applicant can argue the legality of RAT at the disciplinary hearing, which is the proper forum in which the applicant should raise his defence;

    24.2 The Human Resources Manager has indicated in his letter to the Applicant that a final written warning will be given for the refusal to submit to RAT; and

    24.3 The Applicant will not be immediately prejudiced, even if he is dismissed, because he can claim reinstatement for unfair dismissal in due course if the union's application establishes that RAT is illegal or unfair.

25. It is well established law that a court will not normally usurp the functions of an internal disciplinary enquiry. In Ndlovu v Transnet t/a Portnet 1997 ILJ 1031 (LC)) the court refused to interdict a disciplinary enquiry into alleged misconduct, and held that a court will rarely, if ever, intervene to prevent an employer from holding a disciplinary enquiry.

26. In SA Commercial Catering & Allied Workers Union v Truworths 1999 (20 ILJ 639 LC the SA Labour court said that it is for the employer, not the court, to decide whether the employee is guilty of misconduct. The court said it would only intervene in circumstances "rare and exceptional" such as where the disciplinary enquiry constitutes an interference with the activities of a trade union.

27. In Police & Prisons Civil Rights Union v Minister of Correctional Services & Others 1999 (20) ILJ 2416 (LC) the SA Labour Court referred to a principle laid down in the case of Wahlhaus v Additional Magistrate (Johannesburg) 1959 (3) SA 113 9A), which dealt with the power of a superior court to intervene in proceedings in an inferior court, and held that this principle also extends to the labour law field. The principle is expressed as follows:

"This however, is a power to be exercised sparingly. It is impracticable to attempt any precise definition of the ambit of this power, for each case must depend upon its own circumstances……[(The court will grant relief by way of interdict)] in rare cases where grave injustice might otherwise result or where justice might not by other means be attained."

28. It is the view of this court that this is one of the rare cases where the Industrial Court may intervene to prevent a grave injustice. Having found that on the papers before court the applicant has prima facie established a clear right to refuse to submit to the RAT, it follows that the subsequent lock-out of the Applicant and institution of disciplinary action against him is prima facie unfair and illegal.

29. The outcome of Case No. 423/2006 will finally determine whether the RAT is unfair and/ or illegal, and consequently whether the disciplinary hearing itself should proceed. The issue to be determined is one of law, and is reasonable complex. Considering the best means by which justice may be attained for both the parties, the court is of the view that it would not be fair to subject the applicant to a disciplinary hearing when the very foundation of the disciplinary charges is challenged and yet to be determined by the court.

30. The court is also not convinced that the applicant is not in jeopardy of being dismissed if the enquiry proceeds. The charges are not confined to a refusal to submit to RAT. They have been expanded to embrace *"failure to report for duty for working days amounting to more than a month"*, which is a dismissible offence in terms of Section 36 of the Employment Act 1980. In our view there is a reasonable apprehension that the Applicant may be dismissed.

31. Where the court is satisfied on the papers before it that the Applicant has made out a clear right, there is no need to find that the applicant will be irreparably injured should the interdict not be granted. It is accordingly not necessary for the court to decide whether the applicant could obtain adequate relief by instituting legal

proceedings were he to be dismissed and case no. 423/06 thereafter decided in his favour.

32. The balance of convenience favours preserving the status quo pending the determination of Case No. 423/06. The potential prejudice to the Applicant should he be unfairly dismissed outweighs the Respondent's wish to finalize the disciplinary proceeds. Hopefully, the application in case No. 423/200 shall be swiftly determined.

33. The court has already remarked that one of the disciplinary charges relates to unauthorized absence from work on 1st and 25th May 2006. This charge has nothing to do with RAT, apparently, and there is no reason why the respondent should not proceed with a disciplinary enquiry in respect of this charge.

34. The court makes the following order;

34.1 A rule nisi issues, returnable on a date to be fixed immediately after delivery of this judgement, calling upon the Respondent to show cause why:

34.1.1 The disciplinary enquiry against the applicant (save for the charge of unauthorized absence on 1st and 25th May 2006) should not be stayed pending finalization of the application in case No. 423/06.

34.1.2 The Respondent should not pay the costs

of this application.

34.2 Pending final determination of this application, the Respondent is interdicted and restrained from preceding with the disciplinary enquiry against the Applicant, save in respect of the charge of unauthorized absence on 1st and 25th May 2006.

34.3 If the Respondent wishes to hold a disciplinary enquiry against the Applicant in respect of the charge of unauthorized absence on 1st and 25th May 2006, it shall convene such enquiry afresh on at least three working days notice to the Applicant.

The members agree.

PETER DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT