IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 497/2007**

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF GOVERNMENT ACCOUNTING **APPLICANT**

and

SWAZILAND GOVERNMENT **RESPONDENT**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**C. Z. DLAMINI**
FOR RESPONDENT	**:**	**M. SIBANDZE**

J U D G E M E N T – 5/11/07

1. The Applicant is a registered trade union that has been recognized by the Respondent as the Collective bargaining agent for government employees in the Accounting and Stores Cadres.

2. The Applicant is part of the Joint Negotiation Team of Government Unions that engages in collective bargaining with the Respondent at the Joint Negotiation table ("JNT").

3. One of the issues under discussion at the Joint Negotiation Table was a salary restructuring exercise commenced in 2002, and the appeals

process following on the restructuring exercise. The Applicant alleges that a key issue in many appeals lodged by members of its bargaining unit related to the Schemes of Services applicable to the Accounting and Stores Cadres. The Applicant alleges that it was expressly and unanimously agreed at the JNT that these Schemes of Service would be revised through a process of bilateral negotiation between the Applicant and the relevant line Ministry of the Respondent, namely the Ministry for Finance.

4. The Applicant alleges that bilateral negotiations ensued and after extensive deliberations-between July 2006 and July 2007 - in which the Accountant - General as Head of Cadre was actively involved as an adviser - the parties reached a final consensus on the Schemes of Service for the Accounting and Stores Cadres respectively. These Schemes were then forwarded to the Ministry of Public Service and Information for implementation.

5. According to the Applicant, the Ministry of Public Service and Information thereafter unilaterally amended the Schemes by making alterations and insertions of a material nature which operate to the disadvantage of certain members of the Cadres in question. The Applicant complains that these amendments were effected without prior discussions with the Applicant and without its consent. Copies of correspondence produced before court indicate that not only the Applicant but also the Accountant - General as Head of Cadre raised their concerns with the Public Service Ministry that the negotiated Schemes of Service had been amended to the extent that anomalies and distortions to the grading structure would result.

6. It is alleged that the Respondent has ignored all reasonable

persuasion and protest and on the 18th October 2007 it proceeded to issue Establishment Circular No. 4 of 2007, in terms of which the amended Schemes of Service are to be implemented, backdated to the 1st July 2007.

7. The Applicant has applied to court as a matter of urgency for a rule nisi, calling upon the Respondent to show cause why a final order should not be granted:

7.1 Directing the Respondent to immediately implement the Schemes of Service Report for the Accountancy and Stores Cadres as it was agreed by the parties in July 2007 during their negotiations in line with the Recognition Agreement that exist between the parties.

7.2 Interdicting and restraining the Respondent from proceeding to effect payment of the Accountancy and Stores Cadres in terms of Circular No. 4 of 2007, on the Schemes of Service for the Accountancy and Stores Cadres as it does not reflect the true results of the negotiated and agreed Schemes of Service layout for the Applicant's members.

7.3 Interdicting the Respondent from unfairly discriminating the Applicant's members from other Government employees affected by the job restructuring process in so far as implementing the

KPMG Appeals Report is concerned.

7.3.1 Directing that the implementation of the Applicant's members Appeals also be backdated to 1st April 2005 in line with the Implementation of the KPMG Appeals report.

7.4 Directing the Respondent to comply in full with the provisions and spirit of the Joint negotiation Policy and Recognition Agreement that is binding between the parties.

8. The Applicant also prays for an interim order in terms of paragraphs 7.1 to 7.4, to operate with immediate effect pending the outcome of these proceedings.

9. When the matter came before the court, the Respondent appeared and raised two points in limine, namely that:

9.1 the Applicant has failed to establish that its members will be prejudiced if the matter is not dealt with by way of urgency; and

9.2 the Applicant can obtain adequate redress in some alternative form of relief without coming to court by way of urgency.

10. On the question of the circumstances that render the matter urgent , the Applicant points out that the implementation of Circular No. 4 of

2007 will be effected when the November 2007 salary entries are run on the 6th November 2007 and the Schemes of Service grading structures are fed into the payroll system.

11. The Applicant alleges that the Schemes of Service published under Circular No. 4 of 2007 do not represent the Schemes that were negotiated and agreed in accordance with the mandate issued by the Joint Negotiations Table. By implementing its own Schemes of Service, the Respondent is not only breaching the JNT agreement but also gaining an unfair advantage for itself. The new salary and grading structures and job descriptions laid down in the unilateral Schemes of Service will become operational and apply to the members of the Accounting and Stores Cadres, notwithstanding that they do not represent what was negotiated and agreed.

12. The Respondent's counsel argues that the Applicant has not shown any prejudice that its members will sustain in their status or remuneration which warrants the present application being heard as a matter of urgency. He argues that the Applicant should permit the new Schemes of Service to become operational, and simply follow the normal procedures for reporting a grievance or a dispute to CMAC for conciliation and thereafter approach the court for a remedy if conciliation is unsuccessful.

13. The Applicant placed the 'negotiated Schemes of Services' and the 'amended Schemes of Service' before the court for comparison, and counsel for the Applicant drew our attention to a number of anomalies and discrepancies which appear ex facie the Schemes. It does appears that some members of the Accountancy and Stores Cadres will be disadvantaged if the alleged unilateral document is

implemented. For instance, the negotiated Scheme for the Accounting Cadre phases out the position of Accounts Officers, and the current Accounts Officers are transferred to Grade C3 Notch 1 or the next higher amount within the Grade. Under the amended Scheme, the position of Accounts officer is retained at the lower Grade B5. This discrepancy between the scales affects 36 posts.

14. The Applicant also alleges that it was agreed at the JNT that the effective date for implementation of successful restructuring appeals, which includes the implementation of the Schemes of Service as an appeal result, was backdated to 1st April 2005, but the Respondent has purported through Circular No. 4 of 2007 to unilaterally change this date to 1st July 2007.

15. Quite apart from the demonstrated disadvantages that certain members of the affected cadres may sustain if the amended schemes are implemented instead of the negotiated schemes, it does not seem fair or just to require the Applicant to stand by whilst Schemes of Service are unilaterally implemented if those Schemes are contrary to the terms of the JNT agreement and contrary to fair labour practice. The Respondent has a duty to bargain in good faith. When an employer bargains with a union to agreement and then discards the agreement reached in order to implements its own creation, this is subversive of collective bargaining and labour relations. It weakens the union by demonstrating to its members that the negotiations were an exercise in futility. As was stated by Goldstone J.A. in a slightly different context in **NUM v East Rand Gold and Uranium Co. Ltd (1991) 12 ILJ 1221 (A) at 1238:**

"Unilateral changes made while the employees' representative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position."

16. If the Applicant and the Respondent were duly mandated to negotiate the Schemes of Service, and if they reached consensus on such Schemes, then in our view it is indeed a circumstance giving rise to urgency when the Respondent purports to implement its own unilateral Schemes of Service. To allow illegitimate Schemes of Service to come into force will not only undermine the union and disadvantage those employees directly affected by discrepancies in the new Schemes, but also sow the seeds of confusion and further dispute.

17. We are satisfied that the Applicant has demonstrated sufficient grounds of urgency to warrant the court hearing the matter outside the normal parameters of the rules of court, so as to timeously determine whether the Respondent should be interdicted from implementing the so-called amended Schemes of Service. We do not consider that reporting a grievance or invoking the dispute reporting procedures prescribed by the Industrial Relations Act or returning to the negotiation table, as proposed by the Respondent, constitutes an adequate or satisfactory remedy against the unfair labour practice alleged in the founding affidavit. The court considers that it should, like a football referee, decide whether the rules of the game have been infringed at this stage, since it will not usually be possible to restore the status quo if play goes on whilst the infringement continues.

18. For these reasons, we dismiss the Respondent's points in limine.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT