IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 387/08

In the matter between:

SWAZILAND MANUFACTURING & ALLIED WORKERS UNION	**1st APPLICANT**
UNIONISABLE EMPLOYEES OF THE RESPONDENT	**FURTHER APPLICANTS**
And	
LEO GARMENTS (PTY) LTD	**RESPONDENT**

CORAM:

NKOSINATHI NKONYANE:	**JUDGE**
DAN MANGO:	**MEMBER**
GILBERT NDZINISA:	**MEMBER**
FOR APPLICANT:	**A. FAKUDZE**
FOR RESPONDENT:	**M. SIMELANE**

JUDGEMENT - 26.08.08

[1] This is an application on Notice of Motion brought by the applicant against the respondent on a certificate of urgency.

[2] The applicant is 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 be heard as a matter of urgency.

2. Condoning any non compliance with rules of court.

3. That a rule nisi be issued with immediate and interim effect, calling upon the respondent to show cause on a date to be appointed by the above Honourable Court, why prayers 3.1, 3.2, 3.3 and 4 herein below should not be confirmed and made a final order of court.

3.1. That the purported retrenchment is declared null and void of no force and effect.

3.2. That all employees that have been retrenched be called back and allowed to return to work with immediate effect.

3.3. That the 1st applicant and the respondent engage in a meaningful consultations before any notice for retrenchment is issued to Further applicants.

4. Ordering the respondent to pay costs of this application.

5. That prayers 3.1, 3.2 and 3.3 operate as a *rule nisi* pending finalization of this application.

6. Further and/or alternative relief."

[3] The respondent filed its Answering Affidavit in opposition of the application and also raised some points *in limine.* The points *in limine* were argued in court simultaneously with the merits of the application. The

court will therefore now issue a final order.

[4] The 1 applicant in its Founding Affidavit states that the respondent is engaged in an unlawful retrenchment exercise at its workplace. The 1st applicant says that the retrenchment exercise is unlawful because it does not comply with the requirements of the law, and that the respondent is not following a fair selection criteria.

[5] The respondent states to the contrary that it has the right to retrench in circumstances where it finds itself facing a down turn in business. The respondent denies that the exercise is unlawful. It also states that it did consult with the Workers Committee and also notified the Commissioner of Labour. It attached armexure "LH1" which is a letter written to the Commissioner of Labour dated 16th June 2008.

[6] The application was first brought to court on 12th August 2008. The papers showed that the respondent was served on that same day. Mr. Fakudze indeed told the court that he served the papers on the respondent at 07:30 a.m. for the respondent to appear before the court at 09:30 a.m. The court was of the view that that was not sufficient notice on the respondent and ordered a re-service on the respondent on or before 12:00 noon for the matter to proceed on the following day at 09:30 a.m. It was clearly not proper and totally unfair to give the respondent only two hours to get ready to appear in court. The respondent is a company. It functions through its management structures. Once served with the

papers, management had to meet and decide on the way forward and also instruct an attorney. The court discourages the practice of not giving the other party sufficient opportunity to prepare itself to appear before the court.

[7] On the following day 13th August 2008 there was an appearance on behalf of the respondent. The respondent's representative however said she was not ready. The court allowed a postponement until 14th August 2008. On that day there was no appearance for the respondent and the court granted an interim order in terms of prayers 1, 2, 3, 3.2 and 3.3.

[8] On behalf of the respondent Mr. Simelane argued that the 1 respondent has no *locus standi* and that the application ought therefore to be dismissed. The question of *locus standi* of trade unions has been addressed by the court in numerous judgements. The question of locus standi in judicio is governed by the common law. The court has pointed out in these judgements that to have *locus standi in judicio* the union must have a direct or substantial interest in the subject matter of the application or its outcome. See:

> **Swaziland Manufacturing and Allied Workers Union and 99 others V. Natex Swaziland (IC) Case No. 76/97.**
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> **Swaziland Transport and Allied Workers Union V. Unitrans Swaziland Limited (IC) Case No.3/96.**

Swaziland Agricultural and Plantation Workers Union V. United Plantations (Swaziland) Limited (IC) case No. 79/98.

National Electricity Supply Maintenance and Allied Staff Association V. Swaziland Electricity Board (IC) case No. 560/07.

[9] The evidence in this case showed that the collective agreement of the Joint Negotiating Council for the Clothing Manufacturing and Textile Industries established in terms of Section 45 of the Industrial Relations Act,2000 (as amended) annexed to the 1st applicants Founding Affidavit and marked "SM2" expired on 30th June 2007. This document specifically states in the penultimate paragraph that;

"This agreement shall bind the parties and their members and shall remain in force until 30th June 2007."

There is no provision in this document that despite the expiry date mentioned therein, it shall remain in force until a new one is signed by the parties.

[10] The evidence revealed that the 1 applicant has just applied for recognition by the respondent on 7th August 2008. It is therefore clear to the court that the 1st applicant has no *locus standi in judicio* firstly because there is no valid binding collective agreement between the parties, and secondly because the 1st applicant has no direct and substantial interest in

the subject matter of the application or its outcome. The 1st applicant's has only an indirect interest in that if the employees are retrenched, it will lose its members and their subscriptions. It remains to be considered whether the court would have come to the same conclusion had there been a valid collective agreement between the parties, (see: **National Union of Mineworkers v Hemic Exploration (PTY) LTD (2003) 24 ILJ (LAC).**

[11] Mr. Simelane also argued that the application should fail because the requirements of an interdict have not been met. It is now dear that the 1st applicant does not have a clear right as there is no collective agreement in place between it and the respondent that it can claim is being violated. Further the 1st applicant has no direct and substantial interest of the outcome of the litigation.

[12] As regards the Further applicants, their case is jeopardized by the fact that the Founding Affidavit is based on hearsay evidence and in particular paragraphs 10, 11, 12, 13, 14 and 15. Mr. Simelane applied that these paragraphs be struck out.

[13] Indeed, as a general rule hearsay evidence is not permitted in affidavits. There is an exception however as regards interlocutory matters and urgent applications. In such situations the court allows the deponent to state that **'he is informed and verily believes'** certain facts on which he relies for relief. The deponent of the Founding Affidavit herein has failed to do that.

See: **Herbstein and van Winsen "The Civil Practice of the**

Supreme Court of South Africa" 4th edition pp 368-370.

[14] Besides the paragraphs specifically pointed out by Mr. Simelane, there are a number of other paragraphs that contain hearsay evidence in the Founding Affidavit. The Founding Affidavit is therefore fatally defective. The confirmatory affidavits thereon are not helpful as the deponents only state that they confirm facts stated in specific paragraphs that relate to them and not the body of the affidavit. The deponent is not an employee of the respondent. Prima facie, he cannot know what goes on inside the factory unless he is told by the workers.

[15] From the evidence before court however it seems that the respondent is not following the laws of this country in the retrenchment exercise. An employer is entitled to retrench its workers if there is no longer any commercial rationale for carrying on with the business. The retrenchment must however be carried out in accordance with the laws of the country. The legal requirements are listed in **Section 40(2) of the Employment Act of 1980.** They appear as follows ;

> **15.1 The employer must give not less than one month's notice of the redundancy in writing to the Commissioner of Labour and to the organization (if any) with which he is a party to a collective agreement and this notice to include;**

15.1. (a) the number of employees likely to become redundant.

15.1. (b) the occupations and remuneration of the employees affected.

15.1. (c) the reasons for the redundancies.

15.1. (d) the date when the redundancies are likely to take effect.

15.1. (e) the latest financial statements and audited accounts of the undertaking.

15.1. (f) what other options have been looked into to avert or minimize the redundancy.

[16] From the evidence before the court the date when the redundancies are likely to take effect was not mentioned in the letter to the Commissioner of Labour. Further, there was no indication that the latest financial statements and audited accounts of the undertaking were presented to the

Commissioner or the workers' committee. The retrenchment exercise is therefore prima facie unlawful.

[17] Taking into account all the above factors and also all the circumstances of the case the court will make the following order:

a) **The rule nisi is discharged and the application is thereby dismissed.**

b) **The Further Applicants are granted the liberty to bring a proper application before the court within 14 days from the date of this judgement.**

c) **The 1st applicant is ordered to pay the costs of this application.**

The members agree.

NKOSINATHI NKONYANE

JUDGE OF THE INDUSTRIAL COURT