<u>IN THE INDUSTRIAL COURT</u> OF SWAZILAND

HELD AT MBABANE

CASE NO.362/08

In the matter between:

SWAZILAND MANUFACTURING & ALLIED WORKERS UNION	**1st APPLICANT**
UNIONISABLE EMPLOYEES OF THE RESPONDENT	**FURTHER APPLICANTS**
AND	
ZHENG YONG (PTY) LTD	**RESPONDENT**

CORAM:

S. NSIBANDE:	**ACTING JUDGE**
N. MANANA:	**MEMBER**
A.M. NKAMBULE:	**MEMBER**
A FAKUDZE:	**FOR APPLICANTS**
Z. SHABANGU:	**FOR RESPONDENTS**

JUDGEMENT - 23/10/2008

[1] The Applicants have applied to court for an order:

> *" 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 and 3.2 wherein below should not be confirmed and made a final Order of Court.*
>
> > *3.1. That the lock-out and/or lay-off is declared null and void of no force and effect.*

3.2. That all employees that have been locked out or put on lay-off be called and allowed to return to work with immediate effect.

3.3. That the Further Applicants unlawfully locked out or placed on unlawful lay-off are paid all their remuneration they would have been paid if they (Further Applicants) were not locked out or placed on lay-off.

4. Ordering the Respondent to pay costs of this Application.

5. Further and/or alternative relief. "

[2] The matter first came before Court on 31st July, 2008 when the Applicants sought an interim order with immediate and interim relief. This application was opposed by the Respondent.

[3] The Applicants' complaint was that its members had been unlawfully placed on lay-off alternatively that they had been locked out unlawfully by the Respondent. It was said, on behalf of the Applicants, that the proper procedure set out in the collective agreement and in terms of the law had not been adhered to by the Respondent and that employees were surprised on 29th July, 2008 when some of them were refused entry into the Respondent's premises.

[4] The Respondent denied these allegations and indicated that there had been full compliance with the law. It was alleged that a consultative meeting had been held with the 1st Respondent in attendance. Further it was alleged that the Commissioner of Labour had granted Respondent permission to abridge the time limits for giving notice of the lay-off to employees.

[5] Having heard arguments on the issue of an interim order, the Court held that a case had not been made for same and ordered that a full set of affidavits be filed and the matter argued on the merits at a later date.

[6] The matter was eventually heard on 26th August, 2008 wherein the Respondent filed a notice to raise points of law;

6.1 *Locus Standi* - that the Applicant lacked *locus standi* to bring these proceedings as it has no real and substantial interest in the relief sought nor in the outcome of the proceedings.

6.2. *Misjoinder* - that first Applicant is not a necessary party to these proceedings since it has no direct and/or substantial interest in the outcome of the matter and in the relief sought.

6.3. Description of Further Applicants - that there is no proper description of the Further Applicants and that such Further Applicants had not filed any affidavits in support of the application.

[7] On the issue of *locus standi*, the Applicant stated that it had *locus standi* because the matter in court touched upon a collective agreement between the parties. Further that since the 1st Applicant was a recognized trade union at the Respondent's factory then it had the necessary *locus standi* to bring the application.

The question of *locus standi* of trade unions has been addressed by the Court on numerous occasions. The court has pointed out, repeatedly, that the question of *locus standi* is governed by the common law and that what determines whether an applicant has *locus standi* is whether such Applicant has a direct and substantial interest in the subject matter of the application.

(See **1. Swaziland Manufacturing and Allied Workers Union vs. YKK Southern Africa (Pty) Ltd (I.C.) Case No. 263/08.**

2. Swaziland Manufacturing and Allied Workers Union, Unionisable Employers of the Respondent vs. Leo Garments (Pty) Ltd. (I.C.) Case No. 387/08.

3. Swaziland Manufacturing and Allied Workers Union and 99 others vs. Natex Swaziland (I.C.) Case No.76/97).

[9] The 1st Applicant's position was further weakened by the expiry of the collective agreement which expired on 30th June, 2007. Mr. Fakudze for 1st Applicant -argued that in terms of the **Industrial Relations Act (section 55)** the expired agreement remained in force until a new agreement was signed by the parties. This submission was clearly wrong as **section 55** deals with the validity of collective agreement that was in place prior to the promulgation of the Act. The section clearly states that such agreements remain in force until they lapse by effluxion of time or until replaced by collective agreements registered under

the provisions of **section 56,** which ever is earlier.

The section clearly has no bearing on this matter.

[10] Clearly, the 1st Applicant has no *locus standi in judicio* because of the lack of a binding collective agreement between the parties and because the 1st Applicant has no direct and substantial interest in the subject matter of the application or its outcome. The Is Applicant may have an indirect financial interest in the outcome of the matter in that if the employees are layed off then it stands to lose the monthly subscriptions due to it. That, however, is not enough to grant it *locus standi in judicio.*

[11] The merits of the lay-off complained of must be pursued by the individual employees who are affected by the lay-off should they consider it to be irregular. The 1st Applicant may arrange for such individuals to be represented in court if it so wishes but it can not have *locus standi* to institute the proceedings on behalf of such employees and its own name.

[12] The first point raised in *limine* is therefore upheld. In the circumstances it will not be necessary to deal with the point regarding *misjoinder.*

[13] In respect of the issue of the Further Applicants, the Respondent complains that there is no proper description of who these Further Applicants are nor do they file any papers authorizing 1st Applicant through Mr. Sipho Manana to institute these proceedings on their behalf. They do not state they are Applicants in the matter and merely confirm that they were either allowed in or denied entry when they got to the Respondents main gate.

The Applicant's representative argued that a list had been provided indicating exactly who the Further Applicants were and that the confirmatory Affidavits filed by three of the Further Applicants were sufficient in the circumstances to establish Mr. Manana's authority to institute these proceedings.

[14] The confirmatory affidavits referred to are those of Sthembiso Sihlongonyane, Lungile Dlamini and Nosipho Mthupha.

[15] The Further Applicants case faces insurmountable obstacles in the Courts view. Firstly, their case is base on the Founding Affidavit of Mr. Sipho Manana which is based on hearsay evidence. Mr. Manana does not allege to be an employee of the Respondent who was present when the alleged lay-offs or lock-out were taking place. He states that he was telephoned by

certain unnamed members of the 1st Applicant who told him what was happening at the Respondent's premises.

[16] While there is an exception to the general rule that hearsay evidence is not permitted in affidavits in that in urgent matters a deponent may be allowed to state that *"he is informed and verily believes"* certain facts on which he relies to seek relief, the deponent of the founding affidavit, in this matter has not done so. The founding affidavit therefore becomes fatally defective.

> (See **Swaziland Manufacturing and Allied Workers Union, Unionisable Employees of the Respondent vs. Leo Garments (Pty) Ltd (I**.C.) **387/2008.)**

[17] The second obstacle is that of the description of the Further Applicants. It is common cause that some of the unionisable employees of the Respondent were not locked-out or layed-off. However the Further Applicants are said to be the entire membership of the 1st Applicant, a number of whom were not affected by the lay-off as indicated and who have no direct and substantial interest in the matter. A clear and concise description of the parties is called for in terms of Rule 14 (5) of the Industrial Court Rules precisely so that the other party can know who is bringing the application and decide whether it is necessary to oppose it or not. The description of the Further Applicants falls short of the required clarity and conciseness.

[18] Finally, the last obstacle is that confirmatory affidavits attached to the founding affidavit do not confirm the facts as stated in the body of the founding affidavit but merely confirm specific facts that touch upon the deponents to the confirmatory affidavits. They do not state they are the Further Applicants in the matter. Lungile Dlamini, a deponent to one of the confirmatory affidavits states that she has read the affidavit of Sipho Manana and confirms *"the facts therein so far as they relate to myself...'"* However, Sipho Manana makes no mention of Lungile Dlamini in the founding affidavit and the court is left wondering what facts she confirms.

[19] From the facts set out in the papers before court it may well be that the actions of the Respondent in laying-off the employees are irregular. The court is not in a position to make a finding in this regard, having not heard arguments on the merits of the application. *Prima facie,* there is no reason why the employees affected by the lay-off cannot institute a fresh application challenging the purported lay-off.

[20] The Court's finding on the points raised in *limine* is that the Applicants have failed to establish *locus standi* in *judicio* and the court makes the following order:

(a) The application is dismissed.

(b) The employees of the Respondent affected by the lay-off complained of in this matter are granted leave to institute a fresh application before the court within twenty-one (21) days of this judgement.

(c) The 1st Applicant is ordered to pay the costs of this application.

The members agree.

<u>S. NSIBANDE</u>
ACTING JUDGE