IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 615/09**

In the matter between:

SPEEDY OVERBOARDER SERVICES (PTY) LTD **APPLICANT**

and

SWAZILAND TRANSPORT AND ALLIED WORKERS UNION **1st RESPONDENT**

CONCILIATION MEDIATION AND ARBITRATION COMMISSION **2nd RESPONDENT**

CORAM:

D. MAZIBUKO A. M. **JUDGE**
NKAMBULE M. **MEMBER**
MTHETHWA **MEMBER**

FOR APPLICANT **NSINDISO THWALA**
FOR 1ST RESPONDENT **BASIL THWALA**

JUDGEMENT - 20tn NOVEMBER 2009

PARTIES

1. Before Court is an application brought under a certificate of urgency. The notice of motion is accompanied by an affidavit of Mr. William Stuart who is a Managing Director of the Applicant.

2. The Applicant is described as SPEEDY OVERBOARDER SERVICES (PTY) LTD a company incorporated and registered in Swaziland.

3. The Respondent is SWAZILAND TRANSPORT AND ALLIED WORKERS UNION a trade union duly established and registered in terms of Industrial Relations Act NO. 1/2000.

4. The 2nd Respondent is the CONCILIATION, MEDIATION AND ARBITRATION COMMISSION a statutory body established in terms of the Industrial Relations Act No. 1/2000 as amended (hereinafter referred as CMAC)

RELIEF

5. The Applicant seeks an order in the following terms:-

1. "Dispensing with the normal rules of court relating to form, service and time limits as provided for the Rules of the above Honourable court and allowing the matter to be heard as one of urgency.

2. Condoning Applicants non-compliance with the rules of the above Honourable court.

3. That a *rule nisi* be issued with immediate and interim effect calling upon the 1st Respondent to show cause on a date to be appointed by

the Honourable Court why an order in the following terms should not be made final;

3.1 That the conciliation proceedings at CMAC under CMAC REF: SWMZ 484/09 be stayed and/or alternatively set aside pending the conclusion of the de-recognition proceedings that are pending before this Honourable Court under Industrial Court Case No.606/09.

3.2 Pending the conclusion of the de-recognition proceeding under Industrial Court Case No.606/09, the 1st Respondent be hereby restrained and interdicted from engaging the Applicant, its management and any of its non-unionised members in any way whatsoever. Such

interdicted activities include but are not limited to substantive negotiations, incitement to strike against the Applicant, the issuing of any strike notice or proceeding on any strike action.

4. Directing that prayer 3 operate with immediate and interim effect returnable on a date to be set by this Honourable Court.

5. Granting costs of this application in the event any of the Respondents oppose this application.

5. Further and/or alternative relief."

6. The Applicant is represented by attorney Mr. Nsindiso Thwala the 1st Respondent is represented by Mr. Basil Thwala a labour law consultant.

7. The application is opposed by the 1st Respondent. The 1st Respondent raised points of law which will be dealt with later in this judgment.

8. The 2 Respondent did not oppose the application. Instead Applicant's attorney handed up in Court a letter dated 13 November 2009 allegedly
written by the 2nd Respondent in which the latter stated that they shall abide
by whatever judgment the Court issues.

APPLICANT'S CASE

9. Applicant's avers that it has in its establishment 18 (eighteen) unionisable employees. The list of the names of those employees are attached to the founding affidavit. On or about the 12th February 2009 the 1st Respondent was granted recognition by Court as the representative of the unionisable employees at the Applicant's establishment. This recognition was granted in terms of section 42 of the Industrial Relations Act NO. 1/2000 as amended (hereinafter referred to as the Act). Though a copy of that Court order is not attached to the Applicant's papers it is common cause that such order was granted in the manner alleged by Applicant.

10. The Applicant further avers that,

"For recognition of a trade union to be granted and maintained, section 42(5) of the Industrial Relations Act requires the trade union seeking recognition to have not less than fifty per cent (50%) of the unionisable employees to be fully paid up members of the trade union."

The 1st Respondent's interpretation of the relevant section differs from that of the Applicant as will be shown below.

11. Applicant avers further that in the event that the number of registered and fully paid up members of the trade union falls below 50% (fifty per cent) of the total unionisable employees for a continuous period of more than 3 (three) consecutive months, the employer shall be entitled to move an application before the Court for the withdrawal of the recognition in terms of section 42(11) (a) of the Act. According to Applicant some of the unionisable employees of the Applicant who had joined 1st Respondent at the time the recognition order was granted have since resigned from the 1st Respondent.

12. Further it is averred that of the 18 (eighteen) unionisable employees of the Applicant only 6 (six) are fully paid up members of the 1st Respondent. A verification count was conducted on the 23rd September 2009 and is allegedly revealed that only 33% (thirty three percent) of the unionisable employees are registered members of the 1st Respondent. The number of unionisable employees who are fully paid up members of the 1st Respondent has been less than 50% (fifty per cent) for a consecutive period exceeding 3 (three) months.

13. There is no indication in the Applicant's affidavit as to which month did the numbers of paid up members drop to below 50% (fifty per cent). In his argument the Applicant's Counsel submitted that the drop in membership started in June 2009.

14. Applicant argues that the 1st Respondent was made aware of the membership drop on about 23 June 2009. The 1st Respondent was allegedly informed by letter dated 23rd June 2009 which is attached to the founding affidavit marked exhibit SO-3. The Applicant has further attached a list of the Applicant's 18 (eighteen) employees which list shows those employees who never joined the union, those who joined but resigned and those who are still members. Further the Applicant has attached copies of letters allegedly signed by 9 (nine) employees of the Applicant in which they individually tender resignation from the union (1st Respondent). The dates of resignation vary but the earliest is 9th March 2009 while the latest is 25th May 2009. This information Applicant tenders to prove that the employees of the Applicant who are paid up union members (1st Applicant) have dropped to below 50% (fifty per cent) of the unionisable employees in its establishment. Only 6 (six) unionisable employees in the Applicant's established are fully paid up members. The Applicant brought this matter to the attention of the 1st Respondent by letter dated 23rd September 2009 attached to the founding affidavit marked SO-2.

15. The situation has led Applicant to apply to Court in terms of section 42 (11) (a) for withdrawal of recognition of the union (1st Respondent). That application has been filed in Court and is awaiting argument under Case 606/2009. Argument has been set down for 26th November 2009.

16. Pending the application for withdrawal of recognition as aforementioned the Court is asked to hear an urgent application for prayers as listed in paragraph 5 above.

17. According to Applicant what makes the matter urgent is that the officials of the union (1st Respondent) conduct themselves in a manner prejudicial to Applicant *inter alia;*

(a) They have reported a dispute to CMAC on the 24th September 2009 despite the fact that their membership has dropped to below 50% (fifty per cent). A copy of the dispute to CMAC is attached marked SO-4. The nature of the dispute that has been reported to CMAC is about a deadlock over substantive agreement negotiation as alleged in the founding affidavit.

(b) On the 20th October 2009 the union (1st Respondent) convened a meeting of the employees at the business premises of the Applicant. The meeting was attended by both members and non members of the union (1st Respondent), that meeting resulted in Applicant's employees doing the "toyi-toyi" dance. That conduct resulted in the Applicant's customers taking their business elsewhere. The Court noted that there is no evidence from the Applicant's customers concerning this allegation about them. The meeting of the employees further overlapped into the business hours of the Applicant. As a result thereof the Applicant's deliveries were delayed. The Court further noted that there is no evidence as to how much of the Applicant's time was used in that meeting. By letter dated 25th October 2009 marked SO-6 the Applicant complained to the union (1st Respondent) about conducting business as usual yet their members have fallen below the 50% (fifty per cent) required for recognition for a consecutive 3 (three) month period. The Applicant notified 1st Respondent that derecognition process is underway. The Applicant further threatened to report the matter to CMAC.

(c) In his address to Court Applicant's Counsel added that 1st and 2nd Respondents should be interdicted as prayed because there is an application pending in Court to withdraw the recognition of the 1st Respondent due to be heard 26th November 2009. If they continue to operate as they do, by the time the matter is heard and finalised Applicant would have suffered irreparable harm at the hands of 1st Respondent. As an example the 1st Respondent can call a strike which will do Applicant a lot of irreparable harm.

(d) The Applicant averred that the officials of the 1st Respondent and their shop stewards on a continuous basis threaten and intimidate the Applicants' employees who have resigned from the 1st Respondent. The Court pointed out to Applicant's Counsel that there is no affidavit from the concerned employees supporting this allegation. The founding affidavit of the Applicant is deposed to by Mr William Stuart who cannot give such evidence under oath as it is hearsay to him. Hearsay evidence is generally inadmissible. Applicant's Counsel conceded that irregularity and abandoned this point.

RESPONDENT'S CASE

18. The Respondent raised 3 (three) points in *limine* which can be summarised as follows; no urgency, presence of material and foreseeable disputes of fact and no clear right to grant an interdict.

19. According to 1st Respondent the matter is not urgent at all and therefore it should not be enrolled as such. According to Applicant a membership verification count was done on the 23rd September 2009. This revealed that 1st Respondent's membership has dropped below the 50% (fifty per cent) requirement for recognition. The Applicant should have come to Court on the 24th September 2009 or shortly thereafter to launch his application. The application was brought on or about the 5th November 2009. It was set down for argument on the 16th November 2009. That delay on the part of Applicant is self created and is fatal to the Applicant's case. When asked by Court to explain the cause for delay from 23rd September 2009 to 5th November 2009 Applicant's Counsel stated that Applicant was ignorant of her rights in law in particular that Applicant could launch an application in September 2009 on the matters complained of.

20. Counsel for 1st Respondent argued that it is not correct that their membership has dropped below the 50% (fifty per cent) required for recognition. Certain (2) two domestic employees of the Applicant's Managing Director are not unionised yet they their names are included in the list of the unionised employees.

These employees are; GM Gwebu (coded GWE 001)

J Sevenhage (coded SEV 001)

When counting unionisable employees of the Applicant these (2) two should have been left out of the list. Their inclusion improperly increases the percentage of the Applicant's employees who are not members of the 1st Respondent. According to the 1st Respondent therefore the data used by Applicant in its claim before Court is incorrect and will necessarily produce incorrect results.

21. Further the point whether or not 1st Applicant has less than the requisite membership is a matter to be dealt with by the Court on the 26th November 2009 in the application for withdrawal of recognition which has

been launched by Applicant. The Applicant will have to lead evidence to prove its allegation. The 1st Respondent will have a chance to challenge such evidence as the Applicant will adduce. The Applicant therefore has no clear right to establish a case for an interdict. The allegations on which the claim for an interdict is based are disputed. The Court will have to decide on the 26th November 2009 whether or not the Applicant's allegations are factually correct.

22. The alleged reasonable fear on the Applicant's part is baseless as the 1st Respondent has so far conducted itself lawfully. By reporting a dispute to CMAC on the 24th September 2009 as alleged in the Applicants founding affidavit, annexure SO-4 aforementioned, the 1st Respondent acted lawfully. The 1st Respondent cannot be interdicted from acting lawfully. The requirement of an interdict are therefore not satisfied.

LEGAL POSITION

23. Urgent application are governed by rule 15 of the Industrial Court rules
2007. Rule 15 states as follows:

15 (1) A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of rule (14)

(2) The affidavit in support of the application shall set forth explicitly-

(a) the circumstances and reasons which render the mater urgent;

(b) the reasons why the provisions of Part V111 of the Act should be waived; and

(c) the reasons why the applicant cannot be afforded substantial relief at a hearing in due course.

(3) On good cause shown, the court may direct that a matter be heard as one of urgency.

The Applicant has failed to show good cause why they matter should be heard as urgent.

24.1 The evidence in the founding affidavit indicates that the Applicant became aware of the complaint concerning the 1st Respondent's membership since 23rd September 2009. This is the date on which a membership verification count was allegedly done. According to Applicant it became clear to them that the 1st Respondent membership has dropped below the statutory minimum for recognition. On that day or shortly thereafter Applicant should and could have filed an appropriate legal action in Court. There is no justiable reason why the Applicant failed to take the necessary legal action. If Applicant was genuinely not aware of its rights there is no explanation why legal action was not sought and obtained.

24.2 Attached to the founding affidavit is a copy of a letter dated 23rd September 2009 written by Applicant to 1st Respondent marked SO-2. That letter clearly indicates that Applicant has studied the Act and was further threatened to take legal action against 1st Respondent based on the Applicant's interpretation of the law.

24.3 The Applicant has attached to its founding affidavit copies of letters allegedly written by Applicant's employees who have since resigned from the union (1st Respondent). The latest letter is dated 26th May 2009. Upon receipt of these letters the Applicants had an opportunity to decide whether or not it has a good case for withdrawal of recognition. These letters are tendered by Applicant to prove that the employees who have resigned have adversely affected the 1st Respondent's membership. The 3 (three) months waiting period ended early September 2009. The material on which the Applicant bases its claim was available to Applicant early September 2009. There is no explanation why Applicant did not take the necessary legal action at that time.

24.4 Annexure SO-6 to the founding affidavit is a letter written by GiGi A. Reid Attorneys dated 21st October 2009 addressed to 1st Respondent. Paragraph 3.1 of the letter reads as follows;

> **"It is in your knowledge and confirmed by correspondence of the 23rd September 2009 that your membership has fallen below the requisite 50% and has remained so for three months and that the legal process for your derecognition is underway."**

This letter was written by Applicant's attorneys to 1st Respondent. The Applicant had access to legal advice as at the 21st October 2009 concerning their rights in law. However the Applicant did not take action until 5th November 2009.

24.5 In his argument, the Applicant stated that the fact that there is an application for withdrawal of the 1st Respondents' recognition which
application is due to be heard on the 26th November 2009 is a good
ground for urgency. The Court does not agree with Applicant's argument.

24.5 (a) When a Court grants a union recognition in terms of the Act, the union is entitled to operate within the limits of the law. Should it happen that it loses membership below the required 50% (fifty percent) minimum it is open to the employer to apply to Court for a withdrawal of recognition. Before the withdrawal of recognition is granted the union is entitled to operate within the limits of the law and the order granting recognition. The act does not allow an automatic withdrawal of recognition to a union in the event that the employer perceives that the union membership has dropped below the 50% (fifty per cent) required minimum. The union is entitled to operate and conduct its business as usual until the Court withdraws the recognition after hearing evidence. An order of Court granted in an application made under section 42 (II) (a) of the Act is required before recognition of a union can be interfered with.

24.6 (b) In the absence of consent from the union concerned, an application under section 42 (11) (a) will require evidence and a properly motivated application. Such evidence is missing from the application before Court. No doubt such evidence is expected to be made available to the Court on the 26th November 2009. This Court cannot decide on a matter which is not before it. The argument advanced by Counsel for Applicant requires this Court to grant an order on a matter which is not before the Court but is pending.

The effect of the application before Court is to grant the Applicant temporary judgment before the Applicant can prove its case in Court in its substantive application which has been set down for 26th November 2009.

The Court has no power to grant the required order on the papers before it.

26. The Court is not persuaded that the matter should be enrolled as an urgent application. In the matter of **Dumisani Dlarnini and 16 Others vs Swaziland Manufacturing and Allied Workers Union IC Case No. 23/09** the Court made the following comment at page 5:

"Courts have repeatedly stated that a party who takes a lackadaisical attitude towards an infringement of its rights and neglects to act promptly in seeking relief cannot at a later stage suddenly engage a high gear and try to accelerate the litigation process by claiming urgency. This is what the present Applicants are trying to do, to the disadvantage and inconvenience of the Respondent and the Court."

The Court shares the same sentiments in the present matter.

27. The substantive application for withdrawal recognition has been filed in
Court and is due for hearing on the 26th November 2009. The Applicant
can be afforded substantial relief when that matter is heard.

29. The Court dismisses the application on the basis that it is not urgent. The point of law is upheld.

30. There is no need to decide the other point of law regarding the requirement of an interdict and the presence of dispute of fact as the matter had not been properly enrolled.

31. Both Counsel for Applicant and Counsel for Respondent have failed to assist the Court with research on relevant authorities.

Counsel has a duty to argue his client's case and provide the Court with the necessary legal authorities in point. Both Counsel have failed in that regard. There will be no order regarding costs.

The members agree.

DUMSANI MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT