IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 524/09**

In the matter between:

SWAZILAND DEVELOPMENT & SAVINGS BANK **Applicant**

and

SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS **1st Respondent**

CONCILIATION MEDIATION & ARBITRATION COMMISSION **2nd Respondent**

CORAM:

S. NSIBANDE JOSIAH YENDE **PRESIDENT**
NICHOLAS MANANA **MEMBER**
MEMBER

MR. M. SIBANDZE **FOR APPLICANT FOR**
MR. A. LUKHELE **RESPONDENT**

JUDGEMENT - 26/11/2009

1. The Applicant has instituted an urgent application on notice of motion in which it seeks a final 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. 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:

15. *That the Report of dispute made by the 1st Respondent to the 2nd respondent is set aside.*

16. *That the Applicant and the 1st Respondent are hereby ordered to engage in negotiations on the Collective Agreement in good faith.*

17. *That pending the fmalization of this matter the 1st Respondent is interdicted from issuing any strike notice or proceedings on any strike action.*

18. *Directing that prayers 2.1 operate with immediate and interim effect returnable on a date to be set by this honourable Court.*

19. *Granting costs of this Application in the event any of the Respondents oppose the Application.*

20. *Further and/or alternative relief."*

2. When the matter came before the Court on 29th September 2009, the parties informed the Court that the Respondent had undertaken not to issue any strike notice pending finalization of the matter. It was therefore not necessary for the Court to consider granting interim injunctive relief.

The facts of the matter are mostly common cause:

•The 1st Respondent being the only Respondent to oppose the application shall be referred to as the Respondent. The Respondent is a trade union recognized by the Applicant as the bargaining agent for all its unionisable employees in terms of the Industrial Relations Act.

•The parties have been re-negotiating their Collective Agreement since September 2007.

•They met consistently between January 2009 and April 2009 in an attempt to finalize the negotiations.

•The Applicant was expected to produce and deliver to Respondent a counter proposal

to Respondent's draft Collective Agreement on or about 29th April 2009.

•The Applicant did not deliver the counter proposal as expected. On 15th July 2009, the Applicant documented its difficulties with preparing and delivering the counter proposal and suggested a meeting on 29th July 2009.

•At the meeting of 29th July 2009 after the Applicant's difficulties with producing a counter proposal were not accepted by Respondent, the Respondent advised of its intention to report a dispute with the Conciliation Mediation and Arbitration Commission.

- Despite Applicant's undertaking to produce the counter proposal within a few days, Respondent reported a dispute with CMAC on 30th July 2009.

•The Applicant produced the counter proposal and submitted same to Respondent on 31st July 2009.

•Despite Applicant's submission of the counter proposal, Respondent pursued the dispute and a certificate of unresolved dispute was issued by the 2nd Respondent.

21. The Respondent in its opposing affidavit, raised a point of law regarding the urgency of the matter. The parties agreed that the point of law and the merits be argued together.

22. The Respondent's submission on urgency is that the Applicant basis its case on speculation in that there is no imminent danger of strike action since Respondent would have to fulfill various statutory obligations before embarking on any strike action.

The Applicant states that the matter is urgent because a notice of strike action can be issued at any time and that since the certificate of urgency was issued on 14th September 2009 there has been no delay in launching the application.

6. While the Respondent is correct that there are a number of statutory obligations to fulfill before embarking on strike action, it is our view that the Applicant need not have waited until a strike notice was issued.

Once the certificate of unresolved dispute is issued the threat of strike action lurks in the background. Such strike action could occur within a period of seven (7) days.

In our view and in the particular circumstances of this case, the Applicant stands to suffer substantial prejudice if the matter is not summarily dealt with. In the exercise of its discretion, the Court holds that there is sufficient reason to dispense with the usual procedures and time limits and hear the matter as one of urgency.

7. The Merits

The Applicant's complaint is that the Respondent's action of reporting a dispute and obtaining a certificate of unresolved dispute constitutes an unfair labour practice because:

23. A day after the Respondent reported a dispute, the counter proposals which were the source of the dispute were submitted to the Respondent, thus no real dispute exists.

24. The parties have not deadlocked on any issue on the draft collective agreement.

25. The Respondent itself had a lackadaisical attitude to the negotiations to the extent that it took 9 months to respond to a particular query from Applicant. Respondent's refusal to return to the negotiation table and to pursue the reported dispute despite the fact that the source of the complaint was rectified within days displays bad faith.

8. Ultimately, the Applicant complains that there can be no proper and fair negotiations where the Respondent holds a certificate of unresolved dispute since this amounts to an illegitimate pressure tactic and indicates the Respondent's bad faith.

26. The Respondent's position is that the Applicant was dilatory in its conduct of the negotiations to the extent that the Respondent exercised its right to invoke the provisions of Part V111 of the Industrial Relations Act 2000 by reporting a dispute. In the absence of any irregularity in the report of dispute and the steps taken thereafter, Respondent submitted, the Court had no

reason to set aside the certificate of unresolved dispute.

27. The Respondent's argument in this regard is attractive particularly since Part V111 of the Industrial Relations Act forms the bedrock of Industrial Relations by setting out the dispute resolution procedure. The Respondent being unhappy with the Applicant's failure to deliver the counter proposals exercised its right to report a dispute. The Applicant's case is not that there was any breach of the dispute resolution procedure and on the face of it the court ought not interfere with the process.

28. However, this court is enjoined by Section 8 (4) of the Industrial Relations Act to make any order it deems reasonable to promote the purpose and objects of the Act. One of the purposes and objects of the Act is to promote fairness and equity in Industrial Relations. The question to ask is whether there is any fairness and equity where one party unilaterally sets on a course that is likely to lead to strike action over the delay in the furnishing of counter proposals that are eventually furnished a day or so after the report of dispute. The answer is no, particularly where such party has itself appeared not to have taken the negotiations with any speed.

12. The Respondent appears to have been content with the speed of the negotiations. Even after 29th April 2009 when the Applicant was expected to file the counter proposal, there appears to have been no action from the Respondent until the Applicant expressed its difficulties in producing the counter proposals by letter dated 15th July 2009 and suggested a meeting on 29th July 2009. The papers do not reveal that Respondent made any attempt to have the negotiations revived and appears to have been content to await the counter proposals, however long it took Applicant to produce them.

Again it cannot be fair or an act of good faith to abandon the negotiation table and proceed with a dispute where the cause of complaint has been rectified. The counter proposals complained of were produced a day after the dispute was reported. There appears to have been no attempt to return to the negotiation table to discuss the counter proposal. There appears to be no issue on which the parties have deadlocked.

29. The fact that the counter proposals had been produced by the time the dispute went for conciliation and that there was no issue on which the parties had deadlocked ought to have been considered by the conciliator at CMAC. It

appears that the conciliator did not apply his mind to these issues and instead of acting in terms of Section 76 (3) (b) of the Industrial Relations Act by referring the dispute back to the parties, he was quick to issue a certificate of unresolved dispute.

30. Although the Respondent has not issued any strike notice as yet, it does appear that its action of ignoring the Applicant even after Applicant had furnished the outstanding counter proposal continuing with the reported dispute, indicates an intention to gain some leverage against Applicant.

Dunseith P in **Swaziland Development & Savings Bank v Swaziland Union of Financial Institutions & Allied Workers IC Case No. 335/07** stated:

"Prematurely abandoning the negotiation table in favour of taking industrial action is as inimical to good collective bargaining as is obstructive and dilatory conduct during negotiations. Taking strike action when disputes giving rise to the action are substantially resolved also strikes at the heat of good industrial relations.

The court should censure bad faith in industrial relations and collective bargaining."

31. While there is no strike notice issued in this matter, the Respondent is a step or two away from doing so, despite that the Applicant has complied with the demand giving rise to the dispute. That in our view constitutes an unfair labour practice. It is the function and duty of this Court to grant relief to victims of injustice and unfair labour practice. See **Vusi Gamedze v Mananga College Industrial Court Case No. 267/06.** A Collective Agreement is of such vital importance to the members of Respondent and to the Applicant that it is not understandable why the Respondent would want to have terms and conditions thereof imposed on the Applicant when consent can be reached on issues at the negotiating table. The conduct of the Respondent no doubt indicates bad faith.

32. For these reasons the court makes the following order:

(a) The certificate of unresolved dispute issued by the 2nd Respondent is set aside.

(b) The Applicant and Respondent are hereby directed to engage in

negotiations on the Collective Agreement in good faith.

There is no order as to costs.

The members agree.

PRESIDENT OF THE INDUSTRIAL COURT

S. NSIBANDE