IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 681/09**

In the matter between:

NEDBANK SWAZILAND LIMITED **APPLICANT**

And

SWAZILAND UNION FINANCIAL INSTITUTIONS & ALLIED WORKERS **1st RESPONDENT**

EMPLOYEES OF THE APPLICANT FALLING WITH THE SCOPE OF RECOGNITION OF THE 1st RESPONDENT **2nd RESPONDENT**

CONCILIATION MEDIATION & ARBITRATION COMMISSION **3rd RESPONDENT**

CORAM:

NKOSINATHI NKONYANE **JUDGE**

DAN MANGO NICHOLAS **MEMBER**

MANANA **MEMBER**

FOR APPLICANT **M. SIBANDZE**
FOR 1st & 2nd RESPONDENTS **M. MKHWANAZI**

JUDGEMENT 17.12.09

[1]

This is an application brought by the applicant, against the respondents under a certificate of urgency and is seeking the following relief;

"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* do issue with immediate and interim effect calling upon the Further Respondents' 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:

2.1 That the 1st respondent be and is hereby interdicted from calling upon the Further Respondents who are its constituents and employees of the applicant to go on strike pursuant to the Certificate of Unresolved Dispute under cases number 370-09 and 33109 before CMAC and the Strike Notice dated 1st December 2009.

2.2 That the 3rd Respondent be and is hereby interdicted from proceeding with the Strike Ballot pending the finalization of this matter.

3. Directing that prayers 2.1 and 2.2 operate with immediate and interim effect returnable on a date to be set by this Honourable Court.

4. Granting costs of this application in the event any of the respondents oppose the application.

5. Further and / or alternative relief.

[2] The 1st and 2nd respondents filed an answering affidavit. The 3rd respondent did not file any papers as it became clear that the

relief sought by the applicant against it under prayer 2.2 had been overtaken by events. Mr. Sibandze, for the applicant indicated to the court that the applicant will not file any replying affidavit. The matter accordingly proceeded on argument.

[3] The 1st and 2nd respondents in their answering affidavit had raised three points of law. These were however rightfully abandoned as it became clear that they were not going to be upheld by the court. The remaining prayer before the court to which the arguments were directed therefore was prayer 2.1. this prayer is predicated upon two certificates of unresolved dispute with report of dispute numbers 370-09 and 331-09.

[4] The facts relating to the first dispute showed that the applicant commissioned a job evaluation exercise. The results of this exercise were unfavourable to the 1 & 2 respondents and were accordingly rejected. A dispute arose and it was referred to CMAC. The parties agreed to seek an independent and objective job evaluation specialist to validate the results. The parties agreed to the appointment of a company called 21st century Business and Pay Solutions to undertake the process. The company confirmed the results of the first job evaluation exercise. The 1st and 2nd respondents accordingly rejected this report hence the looming strike action.

[5] The applicant's argument in court was that as the company, 21st Century Business and Pay Solutions was engaged by consent of the parties, it was implicit in that agreement that the results would be adopted by the parties and implemented without further negotiations. The respondents denied this and argued that as the results of the first job evaluation exercise were subject to negotiations before implementation, the same would apply to the second exercise by 21st Century Business and Pay Solutions.

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[6] The applicant concedes in its papers that there was no written agreement that the parties would be bound by the findings of 21st Century Business and Pay Solutions. As the results of this company's job evaluation exercise were less favourable to the employees, the union and the employees were entitled to reject the report as the labour laws of this country prohibit any undertaking or agreement by the parties that the employee will accept terms and conditions of employment that are less favourable than the ones that the employee previously enjoyed.

[7] Naturally, at work the employees look forward to improved terms and conditions of service and not to reduced or less favourable terms and conditions of employment. The raison d'etre of a union is to negotiate for its members better terms and conditions of employment. If the parties fail to reach an agreement during negotiations for better terms and conditions, any party to the dispute may take a lawful action by way of lockout or a strike.

(See Section 86(1) of the Industrial Relations (Amendment) Act, 2005).

[8] There is no allegation or any evidence before court that the 1st and 2nd respondents are in breach of the procedures required by the law to be followed before they can engage in a lawful strike action.

[9] The main argument by the applicant in court was that when the parties agreed to engage the service of 21st Century Business and Pay Solutions, it was implicit that the results would be adopted and automatically implemented. The respondents denied this.

[10] Mr. Mkhwanazi for the respondents submitted that it was an express term of reference of the first exercise that implementation of the results would be subject to negotiations and that the respondents naturally expected the same to apply in

respect of the second exercise. Mr. Sibandze argued that as there was a dispute as to whether there was an implicit term that the results of the second exercise, the matter presents itself as a triable one to determine if there was an implicit agreement between the parties that the results of the second exercise would be adopted and automatically implemented.

[11] The court does not agree that the matter should be referred to trial. That exercise would clearly be a waste of time and will serve no useful purpose in this particular case. In terms of the labour laws of this country it is unlawful for an employer to change the existing terms and conditions of employment of an employee to less favourable terms and conditions of employment and parties cannot lawfully agree or undertake that the employee will accept less favourable terms and conditions of employment than those that the employee previously enjoyed.

See: Sections 3, 26 and 27 of the Employment Act.

Gerard Shields v. Carson Wheels (PTY) LTD t/a Carson Wheels case No. 237/2006. (IC).

That the results of the two job evaluation exercises resulted in less favourable terms and conditions of employment was not denied by the applicant.

[12] The second dispute relates to a Pension Fund that was set up by the applicant on behalf of its employees, the members of the 1st respondent. The applicant initiated negotiations with the 1st respondent with the aim of amending Article 12 of the Collective Agreement which provides inter alia, that, the Pension Fund provides for a contributory defined benefit scheme. The applicant wanted the closure of the defined benefit to new employees. The union did not agree to the proposal of closure of the defined benefit scheme to new employees.

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[13] Mr. Sibandze argued in court that in principle this dispute cannot form the basis of the proposed strike action as both parties have no right or power in law to give direction to the trustees of the fund. The court was referred to the case of;

PPWAWU National Provident Fund v. Chemical Energy Paper Printing Wood and Allied Workers Union 2008 (2) SA 531 (W).

That case is however distinguishable from the present one before the court. In that case the union made a resolution which sought to impose obligations on trustees elected or appointed by the union or its members. The question before the court was whether such resolution was unenforceable, contrary to law or contrary to public policy.

[14] The court answered this question in the affirmative and held that the fund's trustees owe a fiduciary duty to the fund and that each of them is required to exercise an independent judgment as to what constitutes the best interests of the fund.

[15] In the present case there was no evidence that any of the parties wanted or intended to influence or usurp the powers of the trustees of the fund. Instead, the parties were dealing with a term of the employees' term of contract. The union was of the view that the proposed changes would result in less favourable terms and conditions of employment for the new employees; hence it opposed the proposed change. The court does not see anything wrong or unlawful with the parties negotiating changes in the terms and conditions of employment.

[16] The court is unable to see how negotiations of terms and conditions of employment can be said to be in violation of the Retirement Funds Act, 2005. The court was referred to Sections 9

and 10 of this Act. Section 9 deals with the duties of the Management Board of a Retirement Fund. Paragraph (f) provides that the Management Board shall ensure that;

"*The rules and operations of the fund are not in violation of this Act.*"

[17] The rules of the applicant's fund were not produced in court. The court does not know what they provide for. The court therefore is not in a position to come to the conclusion that the issue pertaining to the applicant's Pension Fund is not properly before the court, and that therefore the proposed strike is unlawful. Contrary, before court there is evidence that the Pension Scheme in place is a condition of employment. The court does not see how the parties could be said to be excluded from negotiating on the Pension Scheme when it is expressly provided in Article 12 of the Collective Agreement between the parties that the Pension Scheme is a condition of employment. Article 12 of the Collective Agreement provides that;

"The *parties agree that contributory Pension Scheme in place is a condition of employment. Negotiations may take place at the request of either party on the scheme. The details of such schemes shall be given to all current and future employees on engagement.*

The employees shall be entitled to propose to the bank that half of such Board is made up of members nominated by them, it being understood that this is presently a contributory Defined Benefit Scheme."

[18] Section 10 of the Retirement Fund Act deals with the fiduciary responsibilities of the Management Board of a Retirement Fund. Section 14 of the Act states that the amendment of the rules of a Retirement Fund is the function of the Management of the Fund. Section 14(1) states that;

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> *"A retirement Fund may alter or rescind or make any addition to its rules provided that no such alteration, rescission or addition shall affect the rights of any creditor or the fund other than as a member."*

[19] As already pointed out, the court was not furnished with the rules of the applicant's Pension Fund. The court therefore is not in a position to assess how the negotiations between the parties of a condition of employment could impact on the rules of management of the applicant's fund in a way that undermines the independence of the trustees of the fund. In any event the applicant stated in paragraph 30 that it was withdrawing the dispute under CMAC report of dispute No. 370-09. The status quo ante should therefore prevail between the parties.

[20] Taking into account all the foregoing observations and also all the circumstances of the case, the court will make the following order:

a) The application is dismissed.

b) The respondents are legally entitled to embark on the proposed strike action the issue between the parties being that of interest and there being no allegation or evidence that the respondents have not followed the provisions of the Industrial Relations Act.

c) The applicant is to pay the costs of the application.

The members are in agreement.

NKOSINATHI NKONYANE

JUDGE OF THE INDUSTRIAL COURT