IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO.67/99

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF TEACHERS

(SNAT) 1st Applicant

SWAZILAND NATIONAL ASSOCIATION OF CIVIL

SERVANTS (SNACS) 2nd Applicant

SWAZILAND NURSING ASSOCIATION (SNA) 3rd Applicant

And

SWAZILAND GOVERNMENT Respondent

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR THE APPLICANTS : MR. P.R. DUNSEITH

FOR THE RESPONDENT : ADVOCATE WISE

JUDGEMENT

The three Applicant Unions SNAT - 1st Applicant, SNACS - 2nd Applicant and SNA -3rd Applicant have brought this application on the basis of urgency seeking this Court to make the following orders:

a) Declaring that the conduct of the Respondent in bypassing the Applicants and treating directly with individual members of the Applicant's bargaining units is unlawful and unfair.
b) Declaring that all purported agreements entered into by the Respondent with individual employees in terms of Annexure "H" are null and void.
c) Interdicting and restraining the Respondent from negotiating salary increments directly with members of the Applicant's bargaining units.
d) Ordering the Respondent to pay the Applicants' costs on the attorney-client scale.

e) Further or alternative relief.

The Application was filed and served on the Respondent on the 19th March, 1999. When the matter was called for arguments on 22nd March, 1999 the Respondent's representative M/S NKWANYANA intimated that the application was being opposed and that she required time to file her answering affidavits. When asked by the court how much time she required to prepare her papers, she preferred to leave the matter at the discretion of the court. On the other hand MR DUNSEITH vehemently argued that the matter was one of utmost urgency and that M/S NKWANYANA had indicated to him that she would be in a position to file her papers by Tuesday the 23rd of March, 1999 when the matter could then proceed with the Arguments. M/S NKWANYANA had no objection to a rule nisi being issued in terms of the Notice of Application.

Upon hearing both counsel as above said, the court issued a rule nisi returnable on the 25th March, 1999 calling upon the Respondent to show cause why the order should not be made final.

Amidst this background we were taken aback by averments in paragraph 4 of the Answering Affidavit of M/S NOMATHEMBA HLOPHE that she very much regrets not having been allowed more time to adequately prepare the Answering Affidavits which allegations are buttressed in paragraph 16.1 in the following terms :

"Effectively what the Applicants have tried to achieve under the guise of urgency is to prevent the Respondent from having a full and proper opportunity to present its case properly. This amounts to a denial of the principle of audiateram partem one of the most fundamental principles of natural justice".

These allegations fly in the face of the attitude of Respondents Counsel on the 22nd March, 1999 and do not deserve any serious attention.

In its Answering Affidavit, the Respondent has challenged the locus standi of the 2nd Applicant (SNACS) on the grounds that its recognition agreement automatically lapsed once its membership dropped below 40%. To support this point, Respondent has presented data and a Supplementary Affidavit of the Accountant General in the Treasury Department of the Ministry of Finance.

The Data presented in paragraph 8.3, 8.4 and 8.5 of the Answering Affidavit shows that between the months of December, 1998 and February, 1999 the membership of SNACS has been substantially less than 40% and for the three months shown in the data, membership has been of the order of 4%. On this basis, the Respondent submits that in terms of clause 2.1 (a) of the recognition agreement, the agreement, had automatically lapsed and maintaining otherwise would also contravene Section 43 (8) of the Industrial Relations Act of 1996, which stipulates that where membership of a recognised union falls below 50% for a continuous period of three (3) months, then the recognition agreement lapses automatically. He further submitted that the

preliquisite percentages when SNACS was registered was 40% in terms of the Industrial Relations Act of 1980 and Section 36 (8) thereof corresponds with the current Section 43 (8).

MR. DAVID DLAMINI states in his Supplementary Affidavit that SNACS has requested the Treasury to remit the subscriptions deducted from salaries of its members only once per annum and the last time that was done was in May, 1998. To do this he caused the computer to do a search in respect of that month and that revealed that there were then 450 permanent and pensionable government employees who were members of SNACS who had authorised deductions of their subscriptions. He states to date a total of 452, such employees have authorised such deductions and 166 "causal" employees have similarly done so. He concludes that the total number of government employees who are members of SNACS and who have been members for the past three months is 618 which figure is very much less than 40% of the total number of unionisable civil servants who as of February, 1999 numbered 11,289.

Clause 5.1 (d) of the recognition agreement expressly provides that the agreement remains of full force and effect until such time as it has been cancelled by the Industrial Court on application by the Respondent (in the event of membership dropping below 40%).

Similarly Section 43 (8) of the Industrial Relations Act 1996 also requires cancellation of a recognition agreement by the Court.

ADVOCATE WISE for the Respondent submitted that the language of Clause 5.1(d) of the recognition agreement and that of Section 43 (8) is permissive. He explained that, by the use of the word "may" neither the Legislature nor the parties to the recognition agreement intended that it be mandatory to cancel this agreement only by order of this Court. He argued that upon the percentage of the unions membership falling below 40% the recognition agreement "automatically lapsed". With the greatest of respect to the senior counsel, we cannot uphold his submission. Accordingly, we find that the Recognition Agreement between Government and SNACS remains in force unless it is cancelled by

an order of this Court. This however is not to be construed to mean that we have been satisfied by the response of the Applicants in its replying Affidavits regarding the actual number of members it retains to date.
As submitted by Counsel for the Respondent, the questions we have to decide is whether the conduct of the Respondent is unlawful and to be able to decide this question, we have first to establish what the conduct complained of is. Recognising that the onus to establish the conduct complained of is on the Applicant, we will proceed to consider such facts as the Applicant alleges in its founding affidavit vis a vis the facts admitted or denied by the Respondent. We do appreciate however, that bare denial does not necessarily raise a bona fide dispute of fact.

From paragraph 11.4 of the Answering Affidavit, on the 16th March, 1999 the Minister for Public Service and Information informed the Cabinet that negotiations had broken down on the 15th March, 1999. Similarly the Minister on the 17th March, 1999 informed Parliament accordingly. The Applicants deny that negotiations had broken down. On the contrary, they assert that negotiations had just commenced, and were on going.

The Applicant relied on Annexure "EE"to the application, to show that the parties agreed on an agenda for the salary negotiations on the 1st March, 1999.

On the 12th March, 1999 the parties entered into an agreement, annexure "G" to the application, which agreement defined the status of the Commission's report and the scope of the intended negotiations to include matters within the report and where necessary negotiate outside the report itself.

On the 15th March, 1999 it is common cause that the Respondent tabled its proposal. This admission is contained in paragraph 10.2 of the Answering Affidavit.

On the basis of paragraph 20 to the Founding Affidavit, paragraph 16.4 - 16.5 and annexure "FF" to the replying affidavit, and based on submissions by both counsel it is now common cause that there were certain disagreements in the meeting of the 15th March, 1999 and the said meeting was adjourned to enable the respondent to discuss its mandate with its principals.

Paragraph 7 of the Respondent's further answering affidavit puts it in this manner :

"Clearly I did not mean that the impasse reached at that stage was such as irretrievably to prevent there ever being further talks between the parties or even an impasse that could only be resolved by some other process such as arbitration. I merely meant that on the points then in issue the respective negotiating teams at that stage could take the negotiations no further which is why all teams agreed to go back to their respective principals for further mandate".

On Respondent's own submissions therefore, the parties had not reached a deadlock. Negotiations were still going on and can hardly be described as having broken down. Attempt by ADVOCATE WISE to categorise different degrees of "breaking down" does not alleviate the Respondent's predicament. Here is a case that was misrepresented to Cabinet, Parliament and to the members of the public through the media. Whether this was a result of gross inadvertence or was done deliberately is hard to say at this point.

It does not escape our mind that the salary proposal by the Respondent admittedly was tabled on the 15th march, 1999. The Applicants state in paragraphs 14.1 and 14.2 of the replying affidavit that they had not received prior indication that the current negotiations were in respect of the 1998/99 and 1999/2000 financial years and they had assumed that they would be negotiating for the 1998/99 increment which was long overdue.

Nevertheless, the Applicant submits that they have no objection in principle to the agreed agenda being extended to cover both financial years, once negotiations resume between the Respondents and the Applicants exclusively in respect of their respective bargaining units.

This is a very telling submission indeed. Applicants were caught unawares by the proposal by

Government, Annexure "F" to the founding affidavit and in particular, paragraph 3.1 titled "Salary dispensation for 1998/99 and 1999/2000". Before they had time to absorb its

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contents, on the same day apparently, the Respondent considered the negotiations to have broken down.

That not withstanding, on the 16th March, 1999 the Respondents Negotiating Teams' Chairman invited the Applicants to an urgent meeting on the 18th March, 1999 to get feedback on its discussions with its principals. This invitation is contained in Annexure "FF" to the replying affidavit. The letter reads in part: "..... Government Negotiations Team invites you to an urgent meeting on Thursday the 18th march, 1999 at 10 am....., wherein the decision of the principals will be communicated as per agreement during our meeting of Monday the 15th March, 1999. The short notice is regretted but we feel that it is important that representatives of all stakeholders get the feed back as early as possible".

The following day, which was the 17th March, 1999 is when the Minister's pronouncement of a break down in negotiations was made. As it came to pass, the meeting scheduled for the 18th March, 1999 did not materialize as only one government representative showed up. Soon thereafter the invitations to individual Civil Servants, Teachers and Nurses were floated around inviting them to accept the 8% salary increase as from 1st April, 1998 and 7% from 1st April, 1999 on the understanding that such payment is interalia a "final settlement on salaries while the implementation of the recommendation of the report proceed". Such implementation is projected in terms of Appendix 1 to annexure "F" to the Application between March 1999 up to March 2001.

The Respondent in paragraph 14.2 of its answering affidavit and in annexure "H" and RA6" clearly acknowledge that negotiations will be going on. This is inconsistent with them having "broken down" whatsoever in the first place. The conduct by the Respondent in issuing Annexure "RA6" to individuals can only be characterised as bypassing the recognised unions to treat directly with the unionisable employees. It matters not whether the employees approached the Respondent in the first place or not.

Is this conduct by the Respondent unlawful and an unfair labour practice ? We were referred by MR. DUNSEITH for the Applicant in his very able submissions, to an Appellate division case of:

NUM vs EAST RAND GOLD AND URANIUM CO. LTD ("ERGO") 1992 (1) SA 700 at 734 F.
Goldstone J.A. in his judgement at page 734 B had this to say :

"The integrity of the collective bargaining agents (in the sense of the wholeness and effectiveness not being violated) is a matter of primary importance.

The maintenance of that integrity must therefore be given proper weight by an Industrial court in proceedings before it

When an employer, in the face of the recognition agreement treats directly with members' of the recognised union that conduct will usually if not in variably, have a

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detrimental effect upon the union and as a consequence upon its members as counsel for NUM put it, it would be subversive of collective bargaining and could in the long run, be detrimental also to the employer itself.

We are in total agreement with these words of wisdom from this eminent judge.

Section 43 (1) of the Industrial Relations Act 1996 provides that the recognised union is the exclusive collective employee representative for all employees covered by the recognition agreement whether or not they are fully paid up members of the union.

The above statement of the Law in South Africa therefore applies a fortiori in Swaziland. It need not

be gain said that all the recognition agreements between the three Applicants and government specifically provide that the Applicants shall have "the sole right to represent the interests of the employees covered by the agreements". The contention by ADVOCATE WISE that SNACS can only represent the 618 paid up members does not hold water therefore.

At page 735, Goldstone J.A. in the NUM case refers to Gorman Basic text on labour law at 445-6 wherein the author says the following concerning the attitude of America-Law to unilateral action on impasse:

"The law is clear that an employer may after bargaining with the union to a deadlock or impasse on an issue make "unilateral changes that are reasonably comprehended within his pre-impasse proposals". Taft Broadcasting Co (1967) enf'd (DC Cir l968). Another formation is that after an impasse reached in good faith "the employer is free to institute by unilateral action changes which are in line with or which are no more favourable than "those it offered or approved prior to impasse. Bi-Rite Foods Inc (1964).

The rationale given for such action by the employer after, but not before, the impasse springs from the fact that having bargained in good faith to impasse, he has satisfied his statutory and in our case, contractual duty to determine working conditions, if possible by agreement with his obligation to fix working conditions by joint action, he acquires a limited right to fix them unilaterally, that is , he is limited to the confines of his pre-impasse offers or proposals.
Accordingly in the event of a genuine impasse the employer may unilaterally implement a change in wages, provided that:
a) such changes are implemented in respect of all the employees represented by the union;
b) such changes are no more favourable than those offered prior to impasse.

After consideration of the submissions by counsel, and the issues of both law and fact as are formulated on both the Applicants and Respondent's papers we have come to the conclusion that no impasse was reached by the parties on the 15th march, 1999. Indeed negotiations were adjourned for the parties to seek mandate .

In the words of M/S NOMATHEMBA HLOPHE as found at paragraph 7 of the Respondent's further Answering Affidavit:

"I merely meant that on the points then in issue the respective negotiating teams at that stage could take the negotiations no further which is why all teams agreed to go back to their respective principals for a further mandate".

In the circumstances the Respondent was not at all entitled to a limited right to fix the wages of the members of the Applicant's bargaining unit unilaterally. The Respondent did not only elect to take a unilateral decision to increase the wages of the Government employees, but it went further by directly inviting employees to accept an offer contained in annexure "RA6 " to the Respondent's answering affidavit entitled "Acceptance of 8% and 7% salary increase". Such payment was to be made without prejudice to the recommendations for the implementation of the Salary Review Commission's report and the outcome of the ongoing negotiations between Government and the SNAT, SNACS and SNA on the implementation of the report.

The offending clause of this offer reads: "This offer is a final settlement on salaries while the implementation of the recommendations of the report proceed". As said earlier implementation of this report is projected to end in March 2001.

This action on the part of Government amounts to negotiating with employees represented by the Applicants by making an offer, instead of unilaterally implement the proposed increase across the board to all members of the Applicant's bargaining units. We have no doubt that, had Government taken the later course of action this matter would not have been before us today.

In the words of Goldstone J A in the NUM case:

"The announcement implementing the change is not viewed either as an avoidance of the duty to

bargain or as a disparagement of the representative status of the union. The union can take credit for the granted benefit, the employer demonstrates that it has acknowledged its duty to deal with the union and not with employees directly, and good faith negotiations can now proceed on the residual benefits which continue to separate the parties (the "unilateral" grant being deemed to "break" the impasse)".

Such grant of benefits however differs sharply from where the subject-matter of the benefits was still under negotiation and the union had no notice of the employer's intention to implement its grant

Respondent by a letter dated 19th March, 1999 purported to have notified the Applicants of its intention to implement the 8% and 7% salary award for 1998/99 and 1999/2000 respectively. This letter falls short of the requirement as the Minister for Public Service and Information had on 17th March, 1999 informed Parliament of the intention to go ahead with the implementation in any event.

In the circumstances of this case the Respondent deliberately by passed the Applicant unions and by so doing subverted collective bargaining and breached its duty to bargain in good faith. The law frowns at such conduct because it constitutes a breach of the recognition agreement; it promotes confusion, division, hostility and industrial action; individual employees are placed in an unfair bargaining position, and vulnerable to abuse and pressure and as a whole it violates the integrity of the collective bargaining agent.

In the circumstances, we order the following :

(a) the conduct of the Respondent in bypassing the Applicants and treating directly with individual members of the Applicant's bargaining units is declared unlawful and unfair.

(b) all purported agreement entered into by the Respondent with individual employees in terms of Annexure "H" and "RA6" are null and void.

© the Respondent is interdicted and restrained from negotiating salary increments directly with members of the Applicant's baragaining units.

We have considered the submission by the Respondent as contained in paragraph 11.4 of the Answering Affidavit which seek to justify their conduct as follows ; "(a) the government felt great sympathy for the employees who had been forced to go for nearly a year without an increase and consideration that it was its duty to alleviate such hardship; (b) the fact of negotiations having broken down meant that there was likely to be a further delay before an agreement was negotiated; © If the money was not paid out before the end of March, 1999 the money for the increase would have to be voted again by Parliament and that would inevitably result in a further delay ; (d) Such delays would further aggravate the hardship that employees had suffered by not having received an increase; (e) The payment of the increase would be done without prejudice to the Applicant's right to negotiate and so would not prejudice either the Applicant's or the employees in any way".

We have also considered submissions by ADVOCATE WISE to the effect that the Respondent was ready and willing to depart from the conditionality as contained in the letter of offer marked annexure "RA6" to the Answering Affidavit.

Appreciating our duty under Section 5 (4) of the Act, which states that in deciding a matter the court may make any order it deems reasonable which will promote the objects of the Industrial Relations Act 1996 read together with Section 4(1) of the Act which provides that the objects of the Act are to further, secure and maintain good industrial relations and employment conditions in Swaziland; we have duly considered the offer by Government to release the 8% and 7% salary increase for the year 1998/99 and 1999/2000 "without prejudice to the applicant's right to negotiate".

In the light of the foregoing and the Applicant's submission as contained in paragraph 14.2 of the replying affidavit to the effect that the Applicants have no objection in principle to

the agreed agenda being extended to cover both financial years once negotiations resume between the Respondent and the Applicants "exclusively in respect of our respective bargaining units";

We make the following further orders :

a) The Respondent is directed to proceed with its unilateral decision to award 8% and 7% salary increment for the year 1998/99 and 1999/2000 financial years to all of its employees.
b) The Joint Negotiating Team (JNT) is directed to proceed with negotiations in terms of their Agreement entered into on the 12th March, 1999 which is annexure "G" to the Application.
c) The Respondent is ordered to pay costs of the application in Attorney-client scale. The members concur.

NDERI NDUMA

PRESIDENT OF THE INDUSTRIAL COURT