IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Held at Mbabane

Appeal No. 11 /2006

In the matter between:

NEDBANK SWAZILAND LIMITED Appellant

and

SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS Respondent

Coram:

Annandale, JP

Matsebula, JA

Maphalala, JA

For Appellant: Adv. P.E. Flynn, instructed by Carrie and Sibandze Attorneys

For Respondent: Mr. A.M. Lukhele of Dunseith Attorneys

JUDGMENT

19 September 2006

[1] The Appellant, a financial institution carrying on business in the Kingdom as a commercial bank, considered itself under threat of illegal strike action by

the Respondent Union, and approached the Industrial Court on an urgent basis seeking a rule *nisi,* operative with immediate and interim effect, in the following terms:

> "*1. That the demands which are the subject matter of the strike contemplated by the Respondent pertaining to casual, temporary and "contracted" employees and the demands relating to the terms and conditions of employment of such employees do not fall within the sphere of recognition of the respondent.*
>
> *2. The strike action contemplated by the Respondent, insofar as it includes the matters referred to in 1 above is unlawful.*
>
> 3. *The Respondent and the employees of the applicant falling within the recognition of the respondent are hereby interdicted from participating in the contemplated strike action until such time as the matters referred to in 1 above are abandoned by the Respondent and no longer form part of the subject matter of the intended strike action.*"

[2] Initially, the Industrial Court refused to enrol and hear the matter as one of urgency and ruled that the matter should be heard according to the normal time limits prescribed by the rules of that Court. The Bank applied to the High Court for the urgent review of this ruling, and the High Court remitted the matter to the Industrial Court

with the directive that it be heard as a matter of urgency. The Industrial Court then duly heard the application and made an order, which *inter alia,* declared that employees who are part of the Respondent's bargaining unit are entitled to exercise their right to strike. The full content of the order of the Industrial Court is set out and analysed at a later stage in this judgement.

[3] The Bank, having failed to obtain an order interdicting the strike action from proceeding, noted an appeal to the Industrial Court of Appeal. The commencement date of the strike had been re-scheduled for the 21st September 2006. On the unopposed application of the Appellant the Court agreed to sit out of session to hear the appeal as a matter of urgency.

[4] The Court was obliged to secure, via the Acting Registrar of the Industrial Court of Appeal, an undertaking by the financial controlling officer in the Ministry of Justice that the extraordinary sitting of this Court would be financed by Government. It is untenable that the Judiciary has to stoop to the level of first seeking the approval of the executive arm of Government before the court is enabled to direct itself to the exigencies of its business. Despite the Constitutional provision that the Judiciary of Swaziland be afforded control of its own finances and administration, patently in order to secure judicial impartiality and independence as is the global norm, this constitutional requirement has not been implemented to date. Despite this impediment and the potential absence

of remuneration, the Honourable Members of this Court agreed in the interests of justice to hear the matter, setting aside their ordinary business as Judges of the High Court.

[5] The Court also takes this opportunity to record that Section 21(2) of the Act enjoins this Court, where possible, to endeavour to determine an appeal referred to it within three months from the date on which it was noted. The past practice has been to have only two appeal sessions per calendar year. Clearly this does not permit Section 21(2) to be properly realised and by necessity will have to result in four sessions per year in the future. The Registrar of the Industrial Court is directed to take cognisance hereof for purposes of future budgetary planning.

Turning now to the appeal, the Court is grateful to counsel for the parties for their able arguments canvassing the merits on both sides of the coin. After careful consideration of these arguments, and all the issues of fact and law, the Court has come to a unanimous decision that the appeal should succeed. The reasons for this decision now follow.

BACKGROUND

The Court a quo found that the Respondent Union is recognised by the Appellant as the collective bargaining agent *for all permanent employees of the Appellant other than staff members.* This is a finding of fact against which

no appeal lies. In any event, an examination of the recognition agreement, and other documents forming part of the evidence filed of record, confirms that this finding is clearly correct.

[8] After collective negotiations between the parties had reached an impasse in respect of certain demands advanced by the Respondent, a dispute was reported to the Commission for Mediation, Arbitration and Conciliation. This dispute could not be resolved through conciliation, and the dispute was certified as unresolved. Thereafter, the Respondent delivered notice in terms of Section 86(2) of the Industrial Relations Act 2000 (as amended) that it intended to embark on strike action to enforce compliance with its demands.

[9] The Commission arranged and supervised a secret ballot in terms of Section 86(2) of the Act, and duly notified the parties that the majority of employees whom it was proposed should take part in the strike were in favour of taking strike action. The Respondent then issued a further notice that it would be commencing strike action on the date stated in the notice.

[10] The Respondent having complied with the procedural requirements laid down in the Act, the intended strike was *prima facie* a 'protected strike' within the meaning of Section 87 of the Act.

[11] The Appellant has challenged the legality of the

strike, not on the basis of any procedural irregularity, but for the reason that one of the principal demands of the Respondent falls outside its mandate as collective employee representative, thus rendering the strike in respect of such demand unlawful.

[12] The controversial demand is set out in the Report of Dispute filed by the Respondent with the Commission. Therein, the nature of the dispute is stated to be a "*Deadlock in Collective Agreement Negotiations and Union's demand that the Bank accedes to its position on the remaining items of the Collective Agreement as outlined in 5.3 below*". The referral report then details the issues in dispute, commencing at the top thereof with "Atypical Contracts". This issue relates to contract, temporary and casual employees, including employees recruited through labour brokers ("contract workers"). The report then lists various demands made on their behalf. It insists that contract workers should be regarded the same as other employees and not covered by their own contracts with labour brokers. Further benefits are demanded to be included in the collective agreement, such as equal terms and conditions for atypical and permanent workers with regard to overtime, paid sick leave, paid compassionate leave, transport reimbursement and salaries. Union membership must also be the same for both categories. It also includes demands relating to probation, sick leave, maternity leave,

compassionate leave, overtime pay and transport, medical costs reimbursement, representation on nonrenewal of contract or termination, union vetting of salaries, pension contributions and a 13th cheque.

[13] The essential issue raised for decision in the Court below was whether the Union could include grievances of employees, who are not part and parcel of the union's recognised bargaining unit, amongst the demands giving rise to the intended strike action. Otherwise put, the Bank objects to the Union calling out its members on strike in support of demands of employees who are not part of its bargaining unit.

[14] The Court *a quo* expressly found that the Respondent Union "*had no right to negotiate on behalf of the workers not falling within its bargaining unit as envisaged by the recognition agreement*" and that "*the said workers cannot lawfully participate in the contemplated strike action.*" This finding is clearly correct in law. The Respondent is recognised as the collective bargaining agent for permanent employees other than staff. It has no lawful authority to engage in collective bargaining, or to make collective demands, on behalf of casual, temporary and contract workers who are not part of its bargaining unit, whether or not such workers are members of the Union. Likewise it has no mandate to give notice of strike action on behalf of workers excluded from its bargaining unit.

See GROGAN: WORKPLACE LAW (8th ED.) 328

[15] Since the demands made in respect of the non-permanent employees fall outside the Respondent's mandate in terms of the recognition agreement, they are unlawful. It follows that a strike to compel compliance with such demands is also unlawful.

[16] The Appellant argued before the Court *a quo* that the inclusion of unlawful demands in the report of dispute had irremediably tainted the procedural regularity of the strike action, rendering the intended strike illegal not only in respect of the demands made on behalf of the non-permanent workers but even in respect of the demands lawfully made on behalf of the Respondent's bargaining unit.

[17] In its findings on the application, the Court a quo ordered that:

> *£ The parties are to amend the recognition agreement so as to include the said workers* [ie the non-permanent workers] *as they have a Constitutional right to collective bargaining and representation, and thereafter to engage in negotiations of the said workers' conditions of employment.*
>
> 2, *The workers who are part of the bargaining*

unit as defined by the recognition agreement are entitled to exercise their right to strike.

[18] It is against this final order that the present appeal lies. The grounds of appeal are couched in the following terms :-

"*1. The Court* a quo *found that workers not falling within the Respondent's bargaining unit may not participate in the contemplated strike. The court* a quo *erred in this regard in that it ought to have found that the contemplated strike action is unlawful regardless of which workers participate therein.*

2. The Court a quo *erred in law in ordering the parties to amend the recognition agreement in that:*

2.1 The procedure for recognition is provided for in section 42 of the Industrial Relations Act and section 42(1) requires a trade union or staff association to apply in writing for recognition in respect of categories of employees named in the application. The court a quo *disregarded the provisions of section 42 and imposed recognition of the respondent as a representative of employees in respect of which the union has not applied in terms of Section 42.*

2.2 *The Court* a quo, *by ordering the amendment of the recognition agreement, deprived the appellant of its rights as provided for in Section 42.*

2.3 *The Court* a quo *acted ultra vires by ordering the amendment of the Recognition Agreement.*

3. The Court a quo *misconstrued the provisions of the Constitution. While employees have the right to collective bargaining, the Industrial Relations Act's provisions in respect of the procedures for recognition are not inconsistent therewith and must be complied with:*

3.1 The provisions of the constitution were not raised as an issue at the hearing of the application by the Respondent or by the Court mere- motu *and the appellant was not afforded the right to be heard on the issue.*

4. The Court a quo *erred in law in ordering that the workers who are part of the bargaining unit as defined by the recognition agreement are entitled to exercise the right to strike. The Court* a quo *in so ordering disregarded the inclusion of demands in the report of dispute and certificate of unresolved dispute in respect of employees which the respondent has no right to represent. The respondent's contemplated strike action which seeks to induce compliance with such demands is*

accordingly unlawful.

5 *The Court* a quo *erred in law in that it ought to have found that respondent had no right to report a dispute on behalf of employees which it does not represent. The respondent is only entitled to make a report in accordance with the provisions of Section 76(1)(c) of the Act in respect of employees which it is entitled to represent and for which it is recognized.*"

It is common cause that the Respondent has never exercised its right under Section 42 of the Industrial Relations Act 2000 (as amended) to seek recognition as the collective bargaining representative for the non-permanent workers. That this may be done in future remains an open option. If such recognition cannot be obtained through negotiation, Section 42 (as amended in terms of Act No.3 of 2005) provides a remedy by way of conciliation failing which arbitration under the auspices of the Commission.

[20] In terms of Section 32(2) of the Constitution,

" *A worker has a right to* **-**

(a) freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker; and

(b) collective bargaining and representation".

The Court *a quo* found that the Constitution does not make a distinction between permanent, contract, casual or temporary employees (para 19 of the judgment) and then held that they (i.e. the latter categories who are not part of the recognition agreement) are "*therefore, clearly eligible to representation by the union.*" The Court thereafter ordered that the parties are to amend the recognition agreement to include the said workers (casual, temporary and contract workers) and to then engage in negotiations on their terms of employment.

[21] It is laudable that our Constitution entrenches the rights of workers, as quoted above. It is also laudable that the Industrial Court is cognisant of it and that it seeks to apply it in practice. However, the recognition of the Respondent as collective representative of the non-permanent workers was not an issue before the Court *a quo* for decision. Such an order was neither sought nor claimed as of right by the Union in the papers filed in support of the interdict application, nor - according to counsel who appeared in both instances - was it argued from the bar.

[22] The result is thus that the court *a quo* made a ruling of no small significance without hearing the parties affected by it on the matter. In my respectful view, it erred in this regard, negating the *audi alteram partem* principle. In particular, the Appellant's

counsel relies on the provisions of Section 35(3) of the Constitution.

[23] Mr. Flynn for the Appellant argued before us that in the event that it was known at the time of the hearing in the Industrial Court that the Court would be relying on provisions of the Constitution in making its order, it should have so disclosed to the parties, affording them an opportunity to argue the legal issues arising in it. Even if the matter was not pleaded on the papers before it but raised *mero motu* from the bench, counsel should have been alerted to this new issue, which, as it turned out, became decisive in the outcome of the application. Further, counsel should have been afforded the opportunity to consider whether or not it should seek an invocation of Section 35(3) of the Constitution. It reads:

> "*35(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely*

frivolous or vexatious."

[24] The Appellant was thus taken by surprise. The first time it became aware of this decisive issue was when judgment was handed down. In the event that a court, in the course of preparing its judgment, wishes to take cognisance of an issue of law which was not ventilated in the papers before it or argued by either litigant, the proper course is to alert counsel of the issue and invite further argument and provide an opportunity to canvass the issue. This does not mean that the courts are to refrain from considering constitutional provisions if not pleaded or argued, but where they play a decisive role (as in the present case) the rules of natural justice must be adhered to.

[25] Furthermore, in terms of the amended Section 42 of the Act, the Industrial Court no longer exercises jurisdiction to order an employer to grant recognition to a union. This jurisdiction now vests in a commissioner appointed by the Commission to determine the recognition dispute by way of arbitration - see sections (42)9 and 42(10) of the amended Act.

[26] The Court *a quo* erred in leapfrogging' over the express provisions of Section 42 of the Act to order the amendment of the recognition agreement so as to include the non-permanent workers. It is also not for the Court to make a contract on behalf of the

parties, *a fortiori* without their participation or request.

The Court *a quo* correctly barred temporary, casual and contract employees from participating in the strike, but in my respectful view it erred by not also giving sufficient weight to the role their grievances played when strike action came into play, improperly bundled together with grievances of recognised categories of workers in the bargaining unit.

To divorce the demands unlawfully made by the Respondent on behalf of the non-permanent workers from the listed demands which were lawfully advanced on behalf of the bargaining unit, and to prohibit the participation of the non-permanent workers in the intended strike action, does not necessarily regularise the strike procedures leading up to the present situation, nor does it prevent prejudice being occasioned to the Appellant.

The categories of employees that are excluded from the bargaining unit did not play an insignificant role in the whole process. Collective bargaining means precisely what the term implies, namely to bargain on behalf of all employees whose grievances and demands were included from the onset. The demands made on behalf of the non-permanent workers are by no means insubstantial or insignificant, or of no consequence. Not having been met, they formed an integral and substantive part of the dissatisfaction that gave rise to the reporting of the dispute and the subsequent process that was followed by

the Union, culminating in the strike notice.

[30] "Strike" is defined in the Act to mean "*a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action on their part designed to restrict their output of work against their employer, if such action is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand concerned with the employer -employee relationship*".

[31] Clearly the proposed strike was intended to induce compliance with all the demands contained in the report of dispute, including the improperly made unlawful demands. It remains unknown what influence these demands had at the negotiation table and during the conciliation process under the supervision of the Commission, and whether or not the exclusion of the unlawful demands may not have resulted in a settlement. It may well be that those demands formed an indelible and inextricable part of the failure to settle the dispute by negotiation and conciliation, and constituted a contributing cause leading to the intended strike action.

[32] It was not argued before us, nor alleged in the papers, that the ballot, which sanctioned the intended strike, was irregular in any technical respect. However, Mr. Flynn properly and persuasively argued that the issue or issues to be decided must be clearly set out in the

formulation of the question to be voted upon. If the question upon which the ballot is held is ambiguous, or if it contains an issue that cannot properly be voted on, the outcome may well be based on improper considerations despite otherwise being free, fair and technically correct.

[33] As was held in STEEL ENGINEERING INDUSTRIES FEDERATION OF SA v NATIONAL UNION OF METALWORKERS OF SA (2) (1992) 13 ILJ 1422 (T), "the word '*ballot*' *includes the whole process of formulating the issue to be voted on, voting by marking the ballot papers, the counting thereof and the final declaration.*"

[34] In this case, the ballot was to decide on the strike, but unlawful demands were included in the formulation of the strike issues. It is not possible, in the view of this Court, to rectify this material and misleading irregularity by simply prohibiting the participation of the non-permanent workers in the strike, or excluding their demands from the strike issues at this stage.

[35] In the case of CHEMICAL AND INDUSTRIAL WORKERS UNION & OTHERS v BEVALOID (PTY) LIMITED (1988) 9 ILJ 447 (IC) AT 450E, Prof. Landman said:

> "*The obligation to hold a strike ballot is not a mere formality. It is a statutory requirement designed to ensure that the decision to strike inter alia reflects the will of the employees concerned. The ballot must be a secret one, so that each employee may freely and without*

> *compulsion decide whether he or she is in favour of striking.*"

This Court concurs with this statement, and in the circumstances of the present matter, it is the view of the Court that the ballot process was tainted by the Respondent unlawfully including the demands of workers from outside its bargaining unit bundled amongst its strike demands. It is a matter for speculation whether the result of the ballot would have been different if the unlawful strike demands had been omitted.

[36] It follows that the strike action contemplated by the Respondent is unlawful. To include demands of non-recognised employees as an underlying and integral cause for the intended strike action, even if their actual participation in the strike remains excluded, negates the objective norms of fairness and equity in harmonious industrial relations. The right to collective bargaining by necessity includes adherence to fair play and adherence to the laws of the land. The reported dispute by the recognised collective bargaining unit goes beyond the representation of recognised categories of employees to the extent that the inducement of compliance is so tainted that it renders it unlawful.

[37] The strike action cannot be allowed to continue in its present character, even if the unlawful demands are excluded. The only manner in which full and proper

compliance with the legal requirements for a protected strike can be achieved, in my view, would be to start *de novo* with the process of conciliation, excluding the demands of employees who are not part of the bargaining unit.

[38] For the reasons stated above, the appeal must succeed and the relief initially sought under prayers 2.1, 2.2 and 2.3 of the Notice of Motion, referred to in paragraph 1 of this judgment, is ordered to substitute the order of the Industrial Court, as a final interdict, not *interim.* In my view, it should further be ordered on appeal that the conciliation process should therefore re-commence from the stage where it was reported to CMAC, as set out in the Report of Dispute (page 41 of the record) but with the demands listed under "Atypical Contracts" as adumbrated in paragraph 12 of this judgment, to be deleted. Costs are ordered in favour of the Appellant, which costs are to include the costs of the review application in the High Court. Costs of counsel are allowed as per the provisions of Rule 68(2).

J .P. ANNANDALE
Judge President

I AGREE

J.M. MATSEBULA
Judge of Appeal

I AGREE

S.B. MAPHALALA
Judge of Appeal