IN THE APPEAL COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPEAL NO. 2/96

In the matter between:

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION. Appellant

and

NATEX SWAZILAND LIMITED Respondent

CORAM:

Kotze' P.

Steyn J.A.

Tebbutt J.A.

Judgment (/4/96)

TEBBUTT J.A.

What is involved in this appeal is a consideration as to which of two Regulations contained in the Regulation of Wages (Manufacturing and Processing Industry) Order 1994, promulgated in Legal Notice No. 60 of 1994 under the provisions of the Wages Act No. 16 of 1964, viz Regulations 13 and 17, apply to certain circumstances that arose between the respondent company and its employees during 1995.

Those circumstances are these:

On 27 July 1995 the respondent circulated a memorandum headed "Short-Time Working" to all its employees informing them that respondent's major market place, South Africa, had been flooded with cheap imports and that, as a result, respondent's fabric order book had fallen away by at least 30%. In consequence respondent had decided to cut all overtime, except that prescribed by negotiation or vital for operational purposes ,to cut all casual labour and to cut all new employment. Certain paragraphs of the memorandum are particularly germane. One of them reads as follows:

"These actions alone will not cover the shortfall between our monthly costs of operation and anticipated lower revenues, and as we are able to produce the necessary fabric to accommodate our reduced order book by cutting out all weekend production in the weaving and finishing divisions, working a 120 hours week in these areas will assist in minimising the shortfall."

The memorandum then went on to say that the production shifts in the weaving and finishing divisions would not work on Saturdays or Sundays from the weekend starting on Saturday 12 August to that ending on Sunday 24 September 1995. The last paragraph of the memorandum then reads:

"Management regrets having to institute these unwelcome decisions and undertakes to lift short-time working as soon as it is possible to do so" (my emphasis).

In terms of a Collective Agreement between the respondent and the appellant the latter is the collective employee representative of those of respondent's employees who are members of appellant union. On 25 August 1995 in a memorandum to respondent headed "Short-time Issue" appellant states that -

"Since management has embarked on a short-time working programme that involves some of our hourly paid members" -

it put certain points forward viz that those of its members who were "on short-time" were willing to work over weekends,

particularly if management should change its mind "over the short-time issue". Appellant added that -

"Management should know that we will claim the wage losses incurred during the short time period."

Respondent responded to this by stating in a memorandum, headed now "Lay-off Situation", that appellant was not willing to recognise that the lack of fabric orders had "necessitated a lay-off situation having to be implemented whether you like it or not." (my emphasis). It said that any claims for alleged shortages in wage packets would be rejected.

It will be observed that in its initial memorandum which it headed "Short-time Working" respondent undertook to lift "short-time working" as soon as possible, but in response to appellant's memorandum in which appellant referred throughout to the "short-time" issue, respondent on 29 August 1995 referred to a "lay-off situation".

Appellant's reaction to the latter was to apply on 20 September 1995 on notice of motion in "the High Court for an order -

1. "That the applicant's members are entitled to payment of their wages for the period during which the respondent has placed them on a short-time working programme later labelled by the respondent as lay-off times;
2. "Ordering the respondent to pay to the applicant's members affected by the aforesaid short-time working programme their wages and other benefits in accordance with their conditions of service".

It also claimed interest on the wages claimed and costs.

The issue before the High Court (Sapire A.J. as he then was) was whether what respondent had done fell within the ambit of Regulation 13 or Regulation 17 of the Regulations mentioned at the start of this judgment. In other words were its employees placed on "short-time" as provided for in Regulation 13 or were they "laid off" in terms of Regulation 17.

It is accordingly convenient now to set out the provisions of Regulations 13 and 17.
Regulation 13 reads thus: "Short time.

1. 13. If an employer finds it necessary for reasons beyond his control to employ an employee on short time, he may do so subject to the Labour Commissioner consenting in writing to such an arrangement, and on the understanding that the employer intends resuming full time working within three weeks.
2. Where an employee has been placed on short time under sub-regulation (1) he shall be paid not less than fifty percent of his weekly wages were he is employed for periods which, in aggregate, are equivalent to or less than fifty percent of his normal weekly hours of work.
3. No reduction shall be made in an employee's earnings where the employee has been placed

on short time,and works in aggregate, more than fifty percent of his normal weekly hours of work during any week he has been placed on short time."

Regulation 17, in turn, reads as follows: "Lay-off.

1. 17. Due to circumstances beyond his control an employer may lay-off employees for up to fourteen working days, without pay provided that at the end of this period he shall either re-employ the employees in their original jobs, or give them notice of termination of service in accordance with the provisions of the Employment Act, 1980.

(2) During the period of any lay-off, the employer shall not engage other employees to replace the employees he has laid off.
(3) The employer shall give:-

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1. a permanent employee fourteen days' notice before the lay-off.
2. a seasonal employee twenty-four hours notice before the lay-off.

(4) An employer may apply for a temporary exemption for a specified period according to the circumstances of the enterprise, from the application of regulation 17(3)(a), after consultation with the employees organisation, for a reduction of the period of notice to be given to employees, before lay-off."

Appellant's application was dismissed, with costs, in the High Court, the learned Judge holding that the respondent's actions constituted a lay-off within the provisions of Regulation 17. Its employees were therefore not entitled to pay during such periods as they did not work. It is against that finding that the appellant now comes on appeal to this Court.

With the utmost respect to the learned Judge a quo, I do not think that his finding is correct.

In enacting Regulations 13 and 17 the Legislature obviously had in mind that when a situation arose over which an employer had no control two scenarios presented themselves both of which were for the employer's benefit to enable it to cope with the situation.

Mr. Shabangu, who appeared for the appellant invited this Court, at some length, to find that the respondent's difficulties in filling its order book did not constitute "reasons" "or" circumstances beyond its control". Although he had raised the point in his heads of argument, it was not a ground of appeal by appellant and respondent directed no argument to it either in its heads of argument or in argument before this Court. In the circumstances it would be inappropriate to accept Mr. Shabangu's invitation.

Nor, for the purposes of this judgment is it necessary to do so. I shall assume, without coming to a decision thereanent, that it did constitute a circumstance beyond its control as contemplated in Regulations 13 and 17.

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The two scenarios are these. The employer can lay-off all or some of his employees and does not have to pay them while they are so laid-off. He must, in the case of permanent employees, give them fourteen days notice or give seasonal workers 24 hours notice, before he does so. He then has fourteen days within which to assess the situation. Regulation 17 lays down that at the end of that period the employer must either "re-employ" the employees affected in their original jobs or give them notice of termination of service. It is, in my view, clear from the use by the Legislature of the word "re-employ" that it considered a lay-off in terms of this Regulation to be tantamount to a provisional dismissal or a temporary discharge. The employer, after no more than fourteen days, then has to make up his mind either to re-instate ("re-employ") the employees in their original jobs or to make the provisional dismissal final by giving the employees notice of termination of service. As this has to be in accordance with the provisions of the Employment Act of 1980, benefits such as severance pay,

notice pay and other terminal benefits will accrue to the employees. The relief afforded to an employer by this Regulation enabling him to cease paying the employees affected during the period of fourteen days allowed to him to assess the situation, is a drastic measure insofar as the employees are concerned for they not only lose pay but have the threat of dismissal hanging over their heads.

The second scenario is less drastic. It enables an employer in terms of Regulation 13, when faced with a situation beyond his control and in order to assess that situation, to call on his employees for a period of not more than three weeks to work for a lesser number of working hours than their normal working hours per week, with a consequent reduction in wages as provided for in sub-paragraphs (2) and (3) of Regulation 13. The employer who wants to invoke this provision must, however, obtain the written consent of the Labour Commissioner before he does so and he must intend resuming full-time working within three weeks.

Mr. Kuny, who appeared for the respondent, argued that respondent had chosen to make use of the first of the two scenarios - and that this was also what the learned trial Judge had found - by instructing the

production shift employees not to work on seven consecutive Saturdays and Sundays.

In order to argue that what respondent had done fell within the ambit of Regulation 17, Mr. Kuny was obliged to submit that the fourteen working days set out in Regulation 13 did not have to be consecutive working days. I am not persuaded that the argument is correct. In my view several factors militate against such a conclusion. In the first place the Legislature itself, in giving an employer fourteen days to assess his situation, has set out that "at the end of this period" he must either re-employ or terminate the services of the employees. Its reference to "this period", in my opinion, in itself means a continuous period of fourteen days. It could, moreover, not have been in contemplation of the Legislature that there could be a provisional or temporary dismissal of an employee for a day or two here or there over a period of weeks or months. The fact that the Legislature laid down that after such temporary dismissal the employer has, as one of his options, to "re-employ" the employee is a strong presumption that he cannot temporarily dismiss an employee for one or two days over weeks or months even though the total of those days does not exceed fourteen. The Legislature could also, in my view not have contemplated an employee having the threat of eventual dismissal hanging over his head for weeks or months. Nor could it have intended that the less drastic relief of a reduction in wages had to continue for no longer than three weeks whereas the more drastic relief for the employer could continue, if the employees were laid off periodically, for more than fourteen days or even months.

I am satisfied that the period of fourteen days must be a continuous one.

This is one of the reasons why I do not think that Regulation 17 applied to respondent's actions.

More important is the fact that it is clear from what respondent set out in its memorandum of 27 July 1995, that it did not have in contemplation that it would be temporarily or provisionally dismissing

the production shift employees and would, at the end of September 1995, have to decide whether to re-employ them or to terminate their services.

Apart from the fact that the memorandum is headed "short time Working" and that respondent said that it undertook to lift "short time working" as soon as possible, both being factors that are highly significant as respondent, by the use of those terms, clearly knew of the provisions of Regulation 13, the whole tenor of the memorandum reflects an intention to curtail the employee's working hours. The Collective Agreement provided in respect of production shift employees for a normal working week of 208 hours. I have already cited the passage from the memorandum of 27 July 1995 in which respondent stated that, as it could produce the necessary fabric to accommodate its reduced order

book by cutting out all weekend production in the weaving and finishing divisions -

"working a 120 hours week in these areas will assist in minimising the shortfall".

This is, in my view, a clear intention on respondent's part to do no more than reduce weekly hours of work, as is contemplated in Regulation 13.

An employer who wishes to place employees on short time must, however as pointed out above, obtain the written consent of the Labour Commissioner in order to do so. It is undisputed that respondent never obtained such consent nor made any effort to do so. Its placing its employees on short-time without such consent accordingly did not comply with the provisions of Regulation 13 and was invalid. The appellant was therefore entitled to the orders which it claimed in its notice of motion on behalf of its members.

It follows that the appeal succeeds, with costs. An order is made in terms of Prayers (a)(b)(c) and (d) of the Notice of Motion dated 20th September 1995.

(Signed)

TEBBUTT J.A.

(Signed)

KOTZE' P.: I agree

(Signed)

STEYN J.A I agree