A

DYNAMIC PLANTATIONS BHD

v.

YB MENTERI SUMBER MANUSIA & ANOR AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
C [CIVIL APPEALS NOS: W-01-30-2002 & W-01-31-2002]
25 AUGUST 2008

LABOUR LAW: *Industrial Court - Recognition - Recognition by conduct - Section 9 of Industrial Relations Act 1967 - Employer had not*
D *expressly recognized trade union of its employees - Employer member of employer trade union which had concluded collective agreements for category of work involving employer's employees - Whether employer bound by terms and conditions of collective agreements - Whether employer had by conduct accorded recognition to trade union in question - Flexibility*
E *in formalities for recognition of trade union - Recognition may be accorded without strict compliance with provisions of s. 9 of Industrial Relations Act 1967*

The appellant was a member of an employer trade union known
F as Malayan Agriculture Producers Association (MAPA) since 1983. The 2nd respondent ('NUPW') was a trade union of employees for plantation workers. MAPA had negotiated and concluded collective agreements with the 2nd respondent concerning working terms and conditions for estate workers generally including those
G working for the appellant. There were five successive collective agreements entered into between MAPA and the 2nd respondent. The last was dated 30 January 1997. This collective agreement was for a period of three years ending 31 December 1999. On 18 April 2000, the 2nd respondent wrote to the appellant requesting
H commencement of negotiation for a collective agreement. The appellant refused to do so on the ground that the appellant had not granted recognition to the 2nd respondent under s. 9 of the Industrial Relations Act 1967 (the Act). Then on 23 May 2000, the appellant ceased to be a member of MAPA. The 2nd
I respondent referred the matter to the Industrial Relations Department. Pursuant to this, the Minister (the 1st respondent) decided to refer the dispute to the Industrial Court under s. 26(2)

of the Act. The appellant applied for judicial review of the 1st respondent's decision and for *certiorari* to quash it. The High Court dismissed the appellant's application and hence this appeal. The principal issue was whether the Minister had jurisdiction to refer the purported dispute over the refusal by the appellant to negotiate a collective agreement with the 2nd respondent to the Industrial Court for adjudication as a "trade dispute" under s. 26(2) of the Act when the 2nd respondent had not sought nor obtained recognition from the appellant under the provisions of the Act.

Held (dismissing the appeal with costs)
Per James Foong JCA (majority):

(1) Though the 2nd respondent had not sought recognition from the appellant under s. 9 of the Act but by participating in MAPA as a member and agreeing to be bound by the terms and conditions of the collective agreements, the appellant had by conduct recognized the 2nd respondent as a trade union of its employees for that category of work. There was not just one collective agreement but a series of five in succession. Once the appellant had recognized the 2nd respondent it could not turn around to refute it. (paras 23 & 24)

(2) The word "may" in s. 9(2) of the Act allows a certain degree of flexibility for a trade union to be recognized. The appellant had already recognized the 2nd respondent by entering into a binding agreement with the 2nd respondent without the need to comply with the formality of s. 9 of the Act. In a normal situation the requirements of s. 9 of the Act must be complied with but where, like in this case, the employer has by conduct previously recognized the 2nd respondent then the formalities of s. 9 are considered fulfilled. (para 26)

(3) When the collective agreement was entered into, MAPA was acting as an agent of the appellant. The appellant as principal had held itself out to recognize the 2nd respondent. The departure of the appellant from MAPA was no more than a dismissal of MAPA as its agent. After the agent is dismissed, the collective agreement continues to bind the principal. Thus, the appellant could not turn round to say that it did not recognize the 2nd respondent. (para 28)

A **Per Zainun Ali JCA (dissenting):**

(1) There was no evidence whatsoever to suggest that the NUPW had sought for or been granted recognition under s. 9 of the Act. The lack of such a prerequisite rendered
B NUPW shorn of its legal standing to engage in any act of collective bargaining with the appellant under the Act. Thus any consequent steps taken such as the decision by the Minister to refer the matter as a trade dispute was premature since there can never be such a 'trade dispute' in the absence
C of proper standing of parties. The Minister's decision was a nullity. (paras 44 & 45)

(2) The fact that MAPA acted as principal did not constitute a claim for recognition of or by NUPW or a grant thereof by the appellant. The membership of a trade union of employee
D *per se* does not mean that it automatically grants recognition to a trade union of workmen. Even if the appellant remained a MAPA member, MAPA would be able to represent it for a further collective agreement only if the appellant authorized it to do so. (paras 48, 51 & 56)
E

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah ahli sebuah kesatuan sekerja majikan yang dikenali sebagai Malayan Agriculture Producers Association (MAPA) sejak
F tahun 1983. Responden kedua adalah sebuah kesatuan sekerja bagi pekerja-pekerja ladang ('NUPW'). MAPA telah merunding dan merumuskan satu perjanjian bersama dengan responden kedua berkaitan syarat-syarat perkhidmatan pekerja-pekerja estet amnya termasuk mereka yang bekerja dengan perayu. Terdapat lima
G perjanjian bersama yang meterai di antara MAPA dan responden kedua, di mana yang terakhirnya bertarikh 30 Januari 1997. Perjanjian bersama ini adalah untuk tempoh tiga tahun dan berakhir pada 31 Disember 1999. Pada 18 April 2000, responden kedua menulis kepada perayu memohon dimulakan rundingan untuk
H satu perjanjian bersama. Perayu enggan atas alasan bahawa ia tidak pernah memberi pengiktirafan kepada responden kedua di bawah s. 9 Akta Perhubungan Perusahaan 1967 (Akta). Bermula 23 Mei 2000, perayu tidak lagi menjadi ahli MAPA dan berikutnya responden kedua merujuk halperkara kepada Jabatan Perhubungan
I Perusahaan. Akibatnya, Menteri (responden pertama) memutuskan untuk merujuk pertikaian ke Mahkamah Perusahaan di bawah s. 26(2) Akta. Perayu memohon semakan kehakiman terhadap

keputusan Menteri dan *certiorari* bagi membatalkan keputusan tersebut. Mahkamah Tinggi bagaimanapun menolak permohonan perayu dan perayu merayu. Isu penting yang berbangkit adalah sama ada Menteri mempunyai bidangkuasa merujuk pertikaian berkait keengganan perayu untuk merundingkan perjanjian bersama dengan responden kedua ke Mahkamah Perusahaan untuk diadili sebagai "pertikaian perusahaan" di bawah s. 26(2) Akta, dalam keadaan di mana responden kedua tidak memohon atau memperolehi pengiktirafan perayu di bawah peruntukan Akta.

Diputuskan (menolak rayuan dengan kos)
Oleh James Foong HMR (majoriti):

(1) Walaupun responden kedua tidak memohon pengiktirafan dari perayu di bawah s. 9 Akta, namun dengan penglibatannya sebagai ahli MAPA dan persetujuannya untuk terikat dengan terma dan syarat-syarat perjanjian-perjanjian bersama, perayu melalui tingkah lakunya telah mengiktiraf responden kedua sebagai kesatuan sekerja bagi pekerja-pekerjanya yang termasuk dalam kategori tersebut. Terdapat bukan satu tetapi lima perjanjian bersama kesemuanya. Sebaik perayu mengiktiraf responden kedua ia tidak boleh lagi berpaling untuk menyangkalnya.

(2) Perkataan "may" di dalam s. 9(2) Akta membenarkan satu tahap tolak ansur dalam mengiktiraf sesebuah kesatuan sekerja. Perayu sudah pun mengiktiraf responden kedua apabila ia memeterai perjanjian mengikat dengan responden kedua tanpa perlu mematuhi formaliti s. 9 Akta. Dalam keadaan biasa kehendak-kehendak s. 9 Akta mestilah dipatuhi, tetapi di mana majikan melalui tingkah laku terdahulunya telah mengiktiraf responden kedua, seperti yang berlaku di sini, maka formaliti-formaliti s. 9 dianggap sebagai telah dipenuhi.

(3) Bilamana perjanjian bersama dimeterai, MAPA telah bertindak sebagai agen perayu. Selaku prinsipal perayu telah mendedahkan dirinya sebagai telah mengiktiraf responden kedua. Keluarnya perayu dari MAPA hanyalah satu tindakan menamatkan MAPA sebagai agen, tidak lebih dari itu. Selepas agen ditamatkan, perjanjian bersama masih terus mengikat prinsipal. Oleh itu, perayu tidak boleh berpaling dan berkata bahawa ia tidak mengiktiraf responden kedua.

A **Zainun Ali HMR (menentang):**

(1) Tidak ada langsung keterangan yang menunjukkan bahawa NUPW telah memohon atau telah diberi pengiktirafan di bawah s. 9 Akta. Ketiadaan prasyarat ini menjadikan NUPW
B tidak mempunyai kedudukan di sisi undang-undang untuk terlibat dalam apa-apa perundingan bersama dengan perayu di bawah Akta. Oleh itu, apa-apa langkah berikutnya yang diambil seperti keputusan yang dibuat Menteri untuk merujuk halperkara sebagai suatu pertikaian perusahaan adalah
C pramatang, kerana 'pertikaian perusahaan' yang dikatakan itu sebenarnya tidak wujud ekoran ketiadaan 'proper standing' pihak-pihak. Maka keputusan Menteri itu adalah satu nullity.

(2) Fakta bahawa MAPA bertindak selaku prinsipal tidak menjadikan ini satu tuntutan pengiktirafan NUPW atau
D pemberian pengiktirafan tersebut oleh perayu. Keahlian dalam sesebuah kesatuan sekerja pekerja *per se* tidak bermakna ia secara automatik memberi pengiktirafan kepada kesatuan sekerja pekerja. Jikapun perayu masih menjadi ahli MAPA,
E MAPA hanya boleh mewakilinya untuk perjanjian bersama selanjutnya jika perayu mengizinkan MAPA berbuat demikian.

Case(s) referred to:

Dynamic Management Sdn Bhd v. Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat [1998] 2 ILR 237 ***(refd)***

F *Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Berhad v. Perbadanan Perkapalan Antarabangsa Malaysia Berhad [2007] 3 ILR 686* ***(refd)***

Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Firebricks Sdn Bhd [1976] 2 MLJ 67 ***(refd)***

G *The All Malayan Estates Staff Union v. The Malayan Agricultural Producers Association [1982] CLJ 362; [1982] CLJ (Rep) 392 HC* ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 9(2), (3)(a), 13(1), (2), (7), 17(1), (2), 18(1), 26(2)

H Trade Unions Act 1959, ss. 9, 12

For the appellant - CS Kumar (YC Chin with him); M/s Kumar & Partners
For the 1st respondent - Shamsurryati Shamsuddin; AG's Chambers
For the 2nd respondent - B Lobo; M/s Lobo & Assoc

I *[Appeal from High Court, Kuala Lumpur; Judicial Review Application No: R2-25-97-00]*

Reported by Amutha Suppayah

JUDGMENT

James Foong JCA:

Introduction

[1] These two appeals were heard together and it was agreed by all parties that the decision in Appeal No. W-01-30-2002 will bind Appeal No. W-01-31-2002.

Background

[2] The appellant is a public listed company which owns palm oil and rubber plantations and was a member of an employer trade union known as Malayan Agriculture Producers Association (MAPA) since 1983. It ceased to be a member on 23 May 2000.

[3] The 2nd respondent is a trade union of employees for plantation workers.

[4] When the appellant was a member of MAPA, MAPA negotiated and concluded collective agreements with the 2nd respondent concerning working terms and conditions for estate workers generally. These terms and conditions applied to those employees working for the appellant.

[5] There were five successive collective agreements entered into between MAPA and the 2nd respondent. The last was dated 30 January 1997.

[6] Article 1 of this collective agreement declares:

> The parties bound by this Agreement are member companies of MAPA specified in Appendix "A"...

And in Appendix A, the appellant's name appears.

[7] This collective agreement was for a period of three years ending 31 December 1999. However, art. 2 of part 1 of this agreement states:

> This Agreement shall come into force with effect from 1st January, 1997 (the 1st day of the month in which the Agreement is concluded) and shall continue to remain in force for a period of three (3) consecutive years and thereafter until superseded by a new collective agreement or an Award of the Industrial Court.

[8] On 18 April 2000, the 2nd respondent wrote to the appellant requesting commencement of negotiation for a collective agreement on wages and terms and conditions for the harvesters employed in the plantations owned by the appellant.

[9] The appellant on 8 May 2000 rejected this request of the 2nd respondent to commence collective bargaining on the grounds that the appellant has not granted recognition to the 2nd respondent under s. 9 of the Industrial Relations Act 1967 (the Act).

[10] Then on 23 May 2000, the appellant ceased to be a member of MAPA.

[11] Dissatisfied, with the appellant's contention, the 2nd respondent informed the appellant that it will refer the matter to the Industrial Relations Department for appropriate action under s. 18(1) of the Act.

[12] Pursuant to a request by the 2nd respondent, the Industrial Relations Department invited the appellant and the 2nd respondent to a conciliatory meeting on 7 July 2000. But due to the appellant's insistence that the 2nd respondent has not been recognized by the appellant, no agreement between the parties was reached.

[13] On 29 August 2000, the Director-General of Industrial Relations informed the appellant and the 2nd respondent that the Minister of Labour & Manpower (the 1st respondent), has decided to refer the dispute to the Industrial Court under s. 26(2) of the Act.

[14] On hearing this, the appellant applied by to the High Court for judicial review of the 1st respondent's decision and for *certiorari* to quash it.

[15] After the hearing, the High Court on 22 April 2002 dismissed the appellant's application; thus this appeal to us.

Grounds Of The High Court

[16] Briefly, the grounds proffered by the High Court in refusing the appellant's application are these:

(1) The appellant has never raised the issue of recognition of the 2nd respondent during the entire period of the collective agreements entered into between the MAPA and the 2nd respondent and the last agreement is still binding on the appellant.

(2) The past conduct of the appellant in being a member of MAPA and agreeing to be bound by the terms of the collective agreements imply that the appellant has recognized the 2nd respondent.

(3) MAPA was the principal in the collective agreements and the appellant was its agent.

(4) The terms contained in the last collective agreement are still in force.

Principal Issue

[17] The appellant submitted to us that the principal issue in this case is:

> Whether the Minister had jurisdiction to refer the purported dispute over the refusal by the appellant to negotiate a collective agreement with the 2nd respondent to the Industrial Court for adjudication as a "trade dispute" under s. 26(2) of the Act when the 2nd respondent had not sought nor obtained recognition from the appellant under the provisions of the Act.

Appellant's Grounds

[18] It is the contention of the appellant that this should be answered in the negative for the simple reason that before the 2nd respondent can invite the appellant to collective bargaining, the 2nd respondent must be first recognized by the appellant.

[19] Section 13(1) of the Act demands this:

> Where a trade union of workmen has been **accorded recognition** by an employer ... (emphasis added).

[20] Since the 2nd respondent has not sought recognition from the appellant and neither has the appellant granted any recognition to the 2nd respondent under s. 9 of the Act, a trade dispute over the failure to conclude a collective agreement could not have arisen to permit the 1st respondent to refer the dispute to the Industrial Court.

[21] The appellant maintained that those "past collective agreements during the appellant's tenure of membership with MAPA, did not confer recognition upon NUPW (2nd respondent) nor was the appellant trying to contest their validity".

Decision Of This Court

[22] After hearing submissions in this appeal, by majority (with Justice Datuk Zainun Ali dissenting) we dismissed this appeal with costs.

Reasons Of The Majority

[23] We agree that though the 2nd appellant has not sought recognition from the appellant under s. 9 of the Act but by participating in MAPA as a member and agreeing to be bound by the terms and conditions of the collective agreements, the appellant has by conduct recognized the 2nd respondent as a trade union of its employees for that category of work. One must be reminded that the collective agreements were negotiated and entered into by MAPA on behalf of the appellant. The appellant was expressly named as a consenting member of MAPA in the collective agreements. If the appellant has not recognized the 2nd respondent, why was it prepared to be bound by the terms and conditions of the collective agreements? By these acts and conduct, we consider the appellant has recognized the 2nd respondent as a trade union.

[24] We wish to highlight that there was not just one collective agreement but a series of five in succession, each after the previous term has expired and replaced by a new collective agreement. We find it hard to accept the appellant's argument that though it was bound by such collective agreements at the material time yet it has never recognized the 2nd respondent. If such contention is accepted then it would make a mockery of the concept of acceptance by conduct. We are firm in our view that once the appellant has recognized the 2nd respondent it cannot now turn around to refute it.

[25] We are aware of the requirements in s. 9(2) and s. 9(3)(a) of the Act which says:

Section 9(2)

A trade union of workmen **may** serve on the employer or a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers. (emphasis added).

Section 9(3)

An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim - accord recognitio ... .

[26] Counsel for the appellant has insisted that there must be strict compliance of this section before recognition can be granted to the 2nd respondent. However, we are of the opinion that the word "may" appearing in s. 9(2) of the Act allows a certain degree of flexibility for a trade union to be recognized. As illustrated earlier, the appellant has already recognized the 2nd respondent by entering into a binding agreement with the 2nd respondent without the need to comply with the formality of s. 9 of the Act. Of course we agree that in normal situation the requirements of s. 9 of the Act must be complied with but where, like in this case, the employer has by conduct previously recognized the 2nd respondent then the formalities of s. 9 of the Act are considered fulfilled.

[27] Further, the issue of recognition may not necessary arise. Article 2 part I of the collective agreement provides for this agreement to run "until superseded by a new collective agreement or an award of the Industrial Court". Such an arrangement is permitted under s. 17(2) of the Act which reads:

As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court.

As there is no new subsequent collective agreement or a decision of the court to vary it, the collective agreement continues to be in force and the question of the 2nd respondent not being recognized does not arise.

[28] The appellant has persistently argued before us that it has left MAPA as a member and therefore not bound by terms of the collective agreement. However, we are of the view that when the collective agreement was entered into, MAPA was only acting as an agent of the appellant. The appellant was the principal rather than the reverse as found by the High Court. As principal, the appellant has held itself out to recognize the 2nd respondent. The departure of the appellant from MAPA in our view is no more than a dismissal of MAPA as an agent of the appellant. After the agent is dismissed, the collective agreement continues to bind the principal. Thus, the appellant cannot now turn around to say that it does not recognize the 2nd respondent.

Conclusion

[29] Based on the reasons aforesaid we dismissed this appeal with costs.

[30] Y.A. Dato' Ahmad bin Haji Maarop has read this judgment in draft and agrees with the contents.

Zainun Ali JCA:

[31] The issue before us is simply this:

Whether the Minister has jurisdiction to refer the purported dispute over the refusal by the appellant to negotiate a collective agreement with the NUPW to the Industrial Court for adjudication as a **'trade dispute'** under Section 26(2) of the Industrial Relations Act, 1967 when the 2nd respondent (NUPW) had neither sought nor obtained **recognition** from the appellant as required under the Industrial Relations Act, 1967. (emphasis added).

Parties at the outset, had agreed that the appeal be heard together with Appeal No: W-01-30-2002 and that the decision herein will bind the aforementioned appeal.

[32] Background Facts

It is imperative that some preliminaries are emplaced vis-a-vis the legal position of employer-employee and trade unionism and collective bargaining in this country. The governing Act is the Industrial Relations Act 1967 and all rights and positions of parties flow from this statutory regime.

Section 13 Industrial Relations Act 1967 is the starting point to collective bargaining. In fact it is a pre-condition to doing so.

Section 13 reads as follows:

Where a trade Union of workmen has **been accorded recognition** by an employer or a trade union of employers (emphasis added)

a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or

b) the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.

The invitation under subsection (1) shall be in writing and shall set out the proposals for a collective agreement.

Thus, before it can even begin inviting the employer to go to the negotiating table, the said trade union of workmen must first be clothed with recognition; otherwise it has no locus to do so.

[33] The process and procedure for seeking recognition is a fundamental safeguard to both employer and employees. Recognition under s. 13 accords the employee with legal standing to issue a statutory invitation to commence collective bargaining with the employer and vest it with the right to negotiate terms of employment in a union. This collective bargaining regime enables a trade union (in this case, NUPW) to issue a statutory invitation to commence collective bargaining and enables it to ventilate dispute arising therefrom. This is governed by Part IV of the 1967 Act.

[34] The appellant, was a member of the Malayan Agricultural Producer Association ('MAPA') until 23 May 2000. MAPA is a trade union of employers registered under s. 12 of the Trade Unions Act 1959.

[35] MAPA recognises NUPW for collective bargaining purposes, where NUPW could issue statutory invitation to any member of MAPA, to commence collective bargaining under s. 12 of the Act. This is done, where a MAPA member (such as the appellant) authorising MAPA (under r. 4A of MAPA rules), to negotiate any collective agreement on its behalf. In this regard, MAPA acts as

principal, acting on behalf of its member. NUPW does not engage in collective bargaining with such member but only through MAPA.

The appellant had never been party to any collective agreement directly with NUPW. Nor has NUPW invited the appellant directly for collective bargaining outside of the MAPA framework of negotiations.

[36] More importantly, after the expiry of the last CA ie, on 31 December 1999, NUPW had never sought for, nor been granted recognition under s. 9 of the Industrial Relations Act 1967 at any material time. Section 9 reads as follow:

Part III - Recognition And Scope Of Representation Of Trade Unions

Section 9. Claim for recognition.

(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities, that is to say:

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned,

[1 B, C, D Ins, Act A 1322: s. 8]

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

[Subs. Act A1322: s. 8]

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition.

[Am. Act A1322: s. 8]

(3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

[Ins. Act A1322: s. 8]

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn;

(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquiries to ascertain:

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim;

[4 & 4A Subs. Act A1322: s. 8]

(4B) For the purpose of carrying out his functions under subsection (1B) or (4A) the Director General:

[Am. Act A1322: s. 8]

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement, and

[Am. Act A1322: s. 8]

(b) may refer to the Director General of Trade Unions for him to ascertain on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

[Am. Act A1322: s. 8]

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot:

[Ins. Act A 1322: s. 8]

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

[Subs. Act A 1322: s. 8]

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify;

[Am. Act A 1322: s. 8]

(6) A decision of the Minister under subsection (11D) or (5) shall be final and shall not be questioned in any court.

[Am. Act A 718:s. 3] [Am. Act A 1322: s. 8]

[37] The appellant was a member of MAPA until 23 May 2000. The last collective agreement (CA) dated 1977, ended on 31 December 1999. During the pendency of its membership in MAPA and the pendency of the life span of the last CA both parties are bound by the agreement between them. This issue must be made clear. Insofar as the terms of the last CA are concerned, parties are bound by them and these would be incorporated in the terms of employment implied or express. They are good until the next CA. If new terms are to be had, then negotiations can only be initiated between the appellant and a 'recognised' trade union. The 'recognition' does not run in perpetuity. What does, however, are the terms of the CA until they are substituted or amended with a new CA (emphasis added).

[38] In this case, the facts are clear enough. On 18 April 2000, the appellant received a letter from the 2nd respondent (NUPW) requesting for negotiation for **a new CA** to replace the one which expired on 31 December 1999; ie, to negotiate terms and conclude collective agreement on wages, terms and conditions of employment of harvesters employed in the plantations owned by the appellant company (emphasis added).

[39] However on 12 June 2000, the appellant wrote to the 2nd respondent (NUPW) rejecting their request to commence collective agreement on the grounds that the appellant had not (at that point in time) granted to the 2nd respondent recognition as

A required under the Industrial Relations Act 1967. In fact there is no evidence that the 2nd respondent had applied to be recognized, as such.

[40] The 2nd respondent demurred, and referred the matter to
B the Industrial Relations Department for appropriate action. (See s. 18(1) of the Act).

[41] Though the said department invited parties for a conciliation meeting, the appellant maintained its threshold objection at the
C meeting.

[42] On 9 September 2000, the appellant received a letter dated 29 August 2000 from the Director-General of Industrial Relations, informing them that the Minister (the 1st respondent) had decided to refer the matter as a 'trade dispute', to the Industrial Court
D under s. 26(2) of the Act for a decision.

[43] My view is this:

i) NUPW lacks legal standing to commence collective bargaining

E The NUPW has no legal standing in the first place to engage in collective bargaining with the appellant, when it had not first in time, sought recognition under s. 9 of the Act.

Recognition is a pre-condition for collective bargaining (See
F *Dynamic Management Sdn Bhd v. Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat* [1998] 2 ILR 237: *Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Berhad v. Perbadanan Perkapalan Antarabangsa Malaysia Berhad* [2007] 3 ILR 686.

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ii) Minister's decision of referring non-conclusion of collective agreement as 'trade dispute' to Industrial Court, a nullity

Secondly, the Minister's decision to refer the 'dispute' between the parties to conclude a collective agreement as a
H 'trade dispute' is wrong in law and is a nullity.

[44] There is no evidence whatsoever before the Minister, to suggest that the NUPW had sought for or had been granted recognition under s. 9 of the Act.

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[45] The lack of such a prerequisite, renders the NUPW shorn of its legal standing to engage in any act of collective bargaining with the appellant under the Act. Thus any consequent steps taken such as the decision by the Minister to refer the matter as a trade dispute is premature since there can never be such a 'trade dispute' in the absence of proper standing of parties. Thus the Minister's decision is a nullity.

In view of the above, the arguments of the respondent and the findings of the learned judge in these records amount to a misdirection.

[46] Much support was sought by the respondents on the past collective agreements between MAPA-NUPW. However it must be noted that those depended upon mutual recognition between MAPA and NUPW and not between the appellant and NUPW. This is because NUPW and MAPA engaged in collective bargaining based upon the recognition status between themselves as principal (s. 9 of the Act). This does not however, translate into 'recognition' as between each member (including the appellant) with NUPW.

[47] The past collective agreements were based on the appellant's consent to becoming a member of MAPA – where under r. 4A of MAPA's constitution, it could request to be included and be bound by any specific collective agreements that MAPA negotiated with NUPW.

[48] The fact that MAPA acted as principal does not constitute a claim for recognition of or by NUPW or a grant thereof by the appellant.

[49] In any event, the past collective agreements entered into during the appellant's tenure of membership in MAPA are not in issue here. They manifest as implied terms into the employee's contract by operation of law (s. 17 of the Act).

[50] There is nothing in the Act which indicates that the recognition granted between a trade union of employers may automatically be transferred to a member thereof. The Act only allows for the **succession of the terms of employment** but not the recognition status itself. Section 17(1) of the Act is clear (emphasis added).

[51] Thus the membership of a trade union of employee *per se* does not mean that it automatically grants recognition to a trade union of workmen. Otherwise Parliament would have made express provisions for the same in s. 9 or 13 of the Act as it did in the collective agreement provided in s. 17.

[52] There is also nothing in the MAPA-NUPW agreements to suggest that such of the MAPA members had conferred recognition to NUPW or that NUPW had sought recognition from them.

[53] Thus in this appeal, in the absence of an actual claim for recognition and the grant thereof by both the 2nd respondent and the appellant respectively, the prerequisite or precedent fact necessary to trigger s. 13 does not exist.

[54] The issue before us in this appeal is not concerned with the legal application or the binding effect of the MAPA-NUPW collective agreement after the cessation of the appellant's MAPA membership. Neither is this a situation where the appellant is trying to elude its obligation or breach an existing term of a collective agreement entered into by MAPA-NUPW agreement during it tenure of membership.

[55] It must be emphasised that the predecessor agreement which MAPA had entered into with NUPW are not in issue here. *These predecessor agreements also do not provide or give NUPW a future right to engage in collective bargaining with the appellant or other MAPA members unless NUPW sought for and is granted recognition from them after their cessation as MAPA members*. (emphasis added).

[56] In any case, even if the appellant remains a MAPA member, MAPA would be able to represent it for a further collective agreement only if the appellant authorized it to do so. (See *All Malayan Estates Staff Union v. The Malayan Agricultural Producers Association* [1982] CLJ 362; [1982] CLJ (Rep) 392 HC; *Non-Metallic Mineral Products Manufacturing Employees Union and Ors v. South East Asia Firebricks Sdn Bhd* [1976] 2 MLJ 67.

[57] The learned trial judge had clearly failed to make a distinction between the validity of past agreements within the MAPA framework (which were not in issue) and the current right of NUPW to issue a statutory invitation to commence negotiations

under s. 13(1) for a fresh collective agreement and to subsequently issue the invitation through the trade dispute process.

[58] Thus whilst the predecessor agreements continue to bind the appellant (see s. 17 of the Act), it does not, *ipso facto*, confer recognition status to NUPW, necessary to vest it with the legal capacity to issue an invitation to engage in collective bargaining to the appellant outside the MAPA framework.

[59] A perusal of Part III of the Act is instructive. Whereas recognition under Part III can only be sought by a union and granted to a union, there is no provision in the act allowing for the recognition prerequisite to be dispensed with.

[60] As a direct consequence of the non application and non granting of recognition of NUPW by the appellant, the Minister's decision to refer the 'dispute' over the collective agreement to the Industrial Court is wholly wrong and is therefore a nullity. Clearly the learned judge failed to comprehend that the non-vesting of recognition to NUPW means that NUPW is precluded from engaging in any collective bargaining and therefore it cannot legally consider the inability of concluding a collective agreement as a "trade dispute".

[61] What then is a trade dispute? In the Act, it is defined thus:

> "trade dispute" means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work or any such workmen.

So when there is a refusal by the employer to negotiate a collective agreement upon being served with a statutory invitation to commence collective bargaining then the deeming provision in s. 13(7) of the Act is triggered. It reads:

> (7) If after such steps, as aforesaid, have been taken, there is still refusal to commence collective bargaining, a trade dispute shall be deemed to exist upon the matters set out in the invitation.

A **[62]** Only then would such a refusal become a trade dispute. It is only when a dispute between an employer and his workmen, so defined exists that a 'recognised' Union may step in and represents the employees in that dispute. In that connection, a union negotiates the agreement as a principal, not as an agent. And a
B dispute over the refusal to engage in collective bargaining can only become a "trade dispute" by virtue of the deeming provision in s. 13(7) of the Act (see *Malaysia Shipyard v. Engineering Sdn. Bhd* [R1-25-31-981])

C **[63]** Thus, in the absence of recognition under s. 9 of the Act, a union cannot issue a invitation under s. 13(1) of the Act. As a result too, there cannot be a deemed trade dispute under s. 13(7) which is capable of being reported under s. 18 – which in turn becomes the basis for conciliation under s. 18 and reference under
D s. 26(2).

The above clearly evidences the minister's lack of jurisdiction to entertain NUPW's representation.

In view of the foregoing, I find that this appeal should be allowed.
E I would accordingly allow this appeal with costs.

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