CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)
MNZ 392/2007

In the Matter Between:

SPRAWU APPLICANT

And

PALFRIDGE LIMITED RESPONDENT

PATRICK B. MKHONTA **ARBITRATOR**

HELD IN MBABANE

AWARD - 20 MARCH 2007

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A. Details of Parties, Representation and Hearing

1. The Arbitration hearing was held on 19 January 2007 at 9.00 am at the Commission's offices in Manzini. The Applicant in this dispute is SPRAWU of P.O. Box 1158 Manzini. I will, hereinafter, refer to SPRAWL) as the Applicant. The Respondent is Palfridge of P.O. Box 424, Matsapha. I will, hereinafter, refer to Palfridge as the Respondent or the employer.
2. I am the Arbitrator in this case having been appointed as such by the Conciliation Mediation and Arbitration Commission (CMAC), herein referred to as the Commission. I have jurisdiction over the dispute before me.
   At the Arbitration hearing, the Applicant was represented by Mduduzi Gina, Graham `Nkambule, and Mduduzi Simelane. The Respondent was represented by Adelaide Zondi, Veli Ndzinisa and Derek Stewart.
3. At the beginning of the arbitration, the parties confirmed that the dispute had been properly brought before the arbitration; agreed on the language to be used; and exchanged documents; the Arbitrator explained the arbitration process and proposed a procedure to be followed.
4. The arbitration proceedings were recorded.

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B. Background

This dispute was reported to the Commission by the Applicant. The parties were duly invited for conciliation. Both parties participated in the conciliation meeting(s) that took place in October-November 2006 at CMAC's offices in Manzini. However, the conciliation process was unsuccessful because the parties failed to reach a settlement. The dispute was declared an unresolved dispute on 7th December 2006. The dispute was then referred to arbitration.

C. Issues in Dispute

On the one hand, the Applicant (SPRAWL)) alleges that they -as an employee organization representing workers at Palfridge - made an application to the Respondent for recognition, in terms of the Industrial Relations Act, 2000 (as amended). The dispute arises out of the refusal by the Respondent to grant them the recognition sought. On the other hand, the Respondent, whilst acknowledging that they received an application for recognition from the Applicant, disputes a number of the claims made by the Applicant in support of their application for recognition. The Respondent alleges that there are a number of legal points that the employer raised which needed to be addressed before an agreement could be reached concerning the recognition of a union at Palfridge. The

legal points which were drawn to the attention of the union on previous occasions include the argument that the Applicant does not qualify to represent workers in the manufacturing industry - where Palfridge belongs - but qualifies to represent workers in the processing industry.

D. Questions to be decided

It must be determined whether the Applicant has fulfilled the provisions of section 42 (1) - (5) of the Industrial Relations Act 2000 (as amended) which stipulate the requirements for a union to gain recognition as employee representative in an undertaking. It must also be determined whether or not the Applicant qualifies to be granted recognition as the sole employee representative at Palfridge in light of the legal points that are raised by the Respondent as to the nature of the industries that the parties allegedly belong to.

E. Summary of Evidence and Arguments on the Merits APPLICANTS CASE

The Applicant submits that:

(I) they made an application to the Respondent for recognition as the sole representative of the employees at the workplace, as provided for in section 42 of the Industrial Relations Act 2000.

(II) the present dispute arises out of the failure of the Respondent to grant them the recognition sought. The Respondent elected to ignore their application for recognition despite the fact that the Industrial Relations Act, 2000, under section 42 (3) - (4) stipulates a time frame within which an employer must respond to an application for recognition;

Section 42 (3) of the Act stipulates that:

"If less than fifty percent of the employees in respect of which the trade union or staff association seeks recognition are fully paid up members of the organization concerned, recognition shall be at the discretion of the employer and the employer shall, within 30 days of the receipt of the application, reply in writing".

Section 42 (5) of the Act states that:

"If not less than fifty percent of the employees in respect of which the trade union or staff association seeks recognition are fully paid up members of the organization concerned, the employer shall, within 30 days of the receipt of the application and in writing –

a) grant recognition to the organization; or

b) if the employer is in doubt, and advises the applicant so in writing, the parties shall go for a verification count
c) if the employer decides not to grant such recognition, the employer shall lodge with the Court the reasoning for the refusal to grant recognition and serve a copy thereof on the industry union or industry staff association, as the case may be".

(III) the Respondent's failure to respond within the time frame stipulated under section 42 (3) and section 42 (5) of the Act was viewed by the union as a breach of the same provisions. The union was therefore left with no other choice but to report a dispute as provided for in the relevant sections of the Industrial Relations Act including section 42 (6). The report was in fact made as reflected in Annexure SPR 3, being CMAC Form 1 - a Report of Dispute. The parties were invited for conciliation and both participated in meetings that took place in October -November 2006 for the purpose of finding a voluntary settlement;

(IV) As part of the efforts aimed at finding a voluntary solution to this dispute, CMAC recommended a verification count. The verification count was duly conducted. There were, however, queries from the Respondent concerning the authenticity of the signatures in the documents that the union had submitted for

the verification count, indicating that the Respondent was in doubt. Consequently, a head count took place as provided for in the Act. The outcome of the headcount revealed that the union had attained more than 50% of the unionizable employees at Palfridge;

(V) the union's case is based on verifiable information concerning the number of employees at Palfridge who are their members. The union submitted to management a list showing the names of its members. It was demonstrated in this list that 287 of the employees at Palfridge were members of the union. The figure of 287 represents 83% membership of Palfridge employees. A few names were added into the list by hand. Based on the size of the membership, the union had hoped that it would be recognised as provided for under section 42 of the Act.

On this point, the union drew attention to annexure SPR 2 -being the list of names of employees at Palfridge who they claim are their members;

(VI) the union is of the view that the Respondent has disregarded the provisions of the Act in order to deny the union their statutory and constitutional rights. The reasons the were given by the Respondent for not recognizing the union were irrelevant and not founded on the provisions of the Act;

(VII) (VIM) the Union denies the allegation made by the Respondent concerning the reasons for non-recognition. In particular the union denies that there was ever a High Court case on this dispute which delayed discussions concerning the application for recognition.

EVIDENCE

The Applicant submitted the following as evidence supporting its position:

- SPR 1 - a letter addressed by which the applicant applies for recognition as the employee representative at Palfridge;
- SPR 2 - a list of SPRAWU members at Palfridge;
- SPR 3 - a copy of CMAC Form 1, a report of dispute;
- SPR 4 - a certificate of unresolved dispute;
- SPR 5 - a signed stop order form

APPLICANT'S PRAYERS

Based on the above submissions and evidence, the Applicant submits that they have fulfilled the provisions of section 42 of the Industrial Relations Act, 2000 and prays that:

(I) the union (SPRAWU) be granted recognition as the sole employee representative at Palfridge;

(II) that the Respondent be ordered to start effecting deductions as per the provisions of section 43 of the Industrial Relations Act.

RESPONDENTS CASE

The Respondent submits that:

(I) the company does not at all deny that an application for recognition was received from the Applicant. Neither does it deny the fact that SPRAWU has attained more than 50% membership of the unionizable workforce at the company. However, the company has a number of legal points that they would like to raise which relate to the suitability or otherwise of SPRAWU to serve as the sole representative of workers at Palfridge;

(II) the company is of the view that SPRAWU is not the legitimate employee organization that ought to represent workers at Palfridge. The basis for this reasoning is that Palfridge is a manufacturing firm categorized under the manufacturing industry; hence its employees ought to be represented by a union that belongs to the same industry. The Applicant in this case is a union that was established to represent workers in the processing industry, and not in the manufacturing industry. The company would be quite happy to recognize a union which by virtue of its mandate is qualified to be active in the

manufacturing industry. The company holds the view that it is wrong for SPRAWU to interfere in the manufacturing industry because there already exists (a) competent union(s) in this industry, that can effectively represent workers, including Palfridge employees;

(III) the allegation that the company chose to ignore the Applicant's application for recognition is denied. The Applicant's application for recognition was put on hold as a result of a court case;

(IV) the Applicant's application for recognition was viewed by the company as a pending issue for discussion but to the company's surprise, the Applicant abandoned the discussions and chose to report a dispute without any notice;

(V) the company is persuaded that its employees deserve to be represented by a union in the manufacturing industry. Since SPRAWU (a union that is in the processing industry) had applied for recognition, the company needed to establish what SPRAWU's interest was in the manufacturing industry, how they thought they could best advance the interests of the workers at Palfridge in light of the fact that there are clearly other unions in this industry who could represent the workers, and whether the company as a whole stood to benefit anything at all from SPRAWU's involvement;

(V) the union's conduct, especially as this relates to the issuing of notices, has been a source of great concern. It was observed that the union had issued notices in the company's premises and also wrote text messages that were defamatory in nature about people and institutions including the Commission itself;

(VI) the list of employees supplied by the Applicant as proof of the employees who are their members is fraught with problems. There is a real possibility that some of the signatures were forged. Furthermore, the list that was submitted as annexure SPR 2 (containing handwritten names) surfaced long after the conciliation meeting had come to an end.

(VII) the union made workers to sign forms which they did not understand. Even to this day, some of the employees are still enquiring about what the implications are of their signing these forms. Furthermore, some of the people whose names appear in the list have since left the company.

EVIDENCE

The Respondent submitted the following documents in support their position:

- annexure R1 - a list of employees at Palfridge
- annexure R2 - a copy of members of SPRAWU who resigned
- annexure R3 - a list of dismissed employees
- annexure R4 - a list of deceased employees

- annexure R5 - a list of employees who resigned at work
- annexure R 6 - list of desertees

F. ANALYSIS OF FINDINGS

The arbitration must determine whether the Applicant has fulfilled the requirements of section 42 of the Industrial Relations Act and whether they are eligible to represent workers in the manufacturing industry, and whether they should be granted their first prayer - recognition in terms section 42 of the Act.

From the evidence before this arbitration, it is clear that the Applicant applied to the Respondent for recognition as demonstrated in annexure SPR 1. The Respondent does not deny this fact. It is therefore common cause that the Applicant has the intention to represent employees at Palfridge. It must then be determined whether the Applicant has attained more than 50% of the unionizable workforce at Palfridge which is the explicit requirement for recognition in terms of section 42. The Applicant submits that it has attained this important threshold. The Applicant submits that a verification count and a head count were conducted at the point of conciliation (based on SPR 2) which revealed that the union had attained more than 50% membership at Palfridge. The arbitration must consider figures relating to membership that were tabled before the matter was referred to arbitration and will not concern itself with current figures since they cannot be verified. I will therefore not attach a lot of weight to the evidence submitted to prove that some of the employees have

died or have left the company. The Respondent does not at all deny that there was a verification count and subsequently a head count which produced an outcome in favour of the Applicant's claims. It is therefore common 'cause that at the point of conciliation i.e. October
- November, 2006, the Applicant (SPRAWU) had more than 50% membership at Palfridge amongst the unionizable employees. On the basis of this, I should come to the conclusion that the Applicant had fulfilled the provisions of section 42. The final issue to be addressed
is whether SPRAWU is competent to represent workers in the manufacturing industry. The Respondent claims that the Applicant does not qualify to do so. The Applicant on the other hand claims that it is an industry union which may represent workers in the manufacturing and processing industry and that the country's laws and/or regulations do not distinguish between a manufacturing industry and a processing industry. The Applicant argues that in fact there is only industry - the manufacturing and processing industry. n this point the Applicant drew attention to the Wages Regulations which contains legal provisions for the various industries in the country. The wages Act refers to a "manufacturing and processing ndustry", which is to say, therefore, that, of the

various industries in the country, one of them is the manufacturing and processing

industry - to be recognised as such and indivisible.

The Respondents spent time advancing a case on this point, suggesting the manufacturing industry ought to be viewed as separate from the processing industry. No evidence however was led

to support the claim that the manufacturing industry exists separately from the processing industry.

On this point I accept the Applicant's submission because it is more persuasive. In the absence of any evidence to the contrary, I must conclude that the manufacturing and processing industry is one and the same industry, and that the Applicant is fit to represent workers in this industry, which is also the industry to which the Respondent belongs.

G. Conclusion

(I) I find on a balance of probabilities that the union has fulfilled the provisions of section 42 of the Industrial Act in that it has attained not less than fifty percent of the unionisable employees at Palfridge;

(II) I find on a balance of probabilities that the Applicant is competent and/or qualified to represent workers in the industry of the employer, the manufacturing and processing industry;

(III) It is not for this arbitration to make a ruling on the second prayer. On this point, the parties must refer to the relevant provisions of the Act.

H. Award

Having considered all the evidence before me, I now make the following ruling:

The first prayer is granted. The Respondent is obliged to recognise the Applicant with effect from 10 April 2007.

20 MARCH 2007

PATRICK MKHONTA ARBITRATOR