



**CONCILIATION, MEDIATION & ARBITRATION COMMISSION
(CMAC)**

HELD AT MANZINI
392/2010

SWMZ

In the matter between:-

STAWU: Umbuluzi Farm Chickens

APPLICANT

Employees

And

Umbuluzi Farm Chickens (Pty)

RESPONDENT **Ltd**

CORAM:

Arbitrator : Mr. Knowledge Manana

For Applicant : Mr. Basil Tfwala

For Respondent : Mr. Caleb Motsa

Ruling on Preliminary Point of Law

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. At an arbitration hearing that was held at the CMAC Offices 4th Floor SNAT Building, Manzini on the 11th August 2010. The Applicant Union, acting on behalf of **Umbuluzi Farm Chickens Employees** was represented by one of its officials **Mr. Basil Tfwala**.
2. . The Respondent Company on the other hand was represented by **Mr. Caleb Motsa**, an attorney practicing as such with **Cloete- Henwood - Dlamini Associated**, a law firm based in Mbabane.

Issue To Be Decided

3. The issue to be decided is whether or not the Commission has the necessary jurisdiction to entertain this dispute.

Background Information

4. The Respondent Company is engaged in the business of an abattoir. She has around ninety unionisable workers in her employ.
5. The Applicant Union seeks to be recognized by the Respondent as the sole representative for the workers for purposes of collective bargaining.
6. On the 28th July 2010 the Applicant Union lodged a recognition dispute with the Commission (CMAC). She alleged that the Respondent Company was refusing to grant her recognition.

7. The dispute was certified unresolved after conciliation and I was subsequently appointed, in terms of **Section 42 (9) of the Industrial Relations Act, 2000 as amended**, to arbitrate same.
8. On the first day of the arbitration, the Respondent Company's legal representative, Mr. Caleb Motsa, raised a preliminary point of law. He argued that the matter with which I was seized was *res judicata*.
9. He argued that the Commission was no longer clothed with the necessary jurisdiction to entertain this dispute by virtue of it having issued a final and binding arbitration award on the very same dispute between the very same parties.

Survey of Evidence and Argument

10. Buttressing his argument, Mr. Motsa submitted that sometime, in early 2009, the Applicant reported a dispute with the Commission, **CMAC Reference Number SWMZ 495/08**. She was seeking recognition from the Respondent.
11. He argued that the above mentioned dispute was subsequently withdrawn from conciliation through a memorandum of agreement where the parties agreed that in terms of its constitution, the Applicant Union was not permitted to organize within the Respondent Company's undertaking.

- 12.** According to Mr. Motsa, it was a material term of the aforementioned agreement that the Applicant Union would have to first amend its constitution after which it would then approach the Respondent Company and resume recognition negotiations.
- 13.** After having amended its constitution, the Applicant Union approached the Respondent and initiated negotiations as agreed but was not successful. It then dragged the Respondent Company back to the Commission. This time under **CMAC Reference Number SWMZ 269/09.**
- 14.** It was Mr. Motsa's case that the above dispute was certified unresolved and referred to arbitration. Mr. Robert Mhlanga was appointed to arbitrate.
- 15.** According to Mr. Motsa's argument, Mr. Mhlanga issued his award on the 15th June 2010. He dismissed the Applicant Union's case.
- 16.** Principal amongst the Arbitrator's reasons for dismissing the Applicant Union's case was that the Applicant Union did not satisfy all the statutory requirements for recognition.
- 17.** The Arbitrator is said to have also found that some of the amendments made to its constitution were irregular as

they were reportedly not sanctioned by the Commissioner of Labour.

18. Mr. Motsa argued therefore that the aforementioned arbitration award sounded a death knell to the Applicant Union's aspirations to ever re-lodge the same case with the Commission again.

19. On behalf of the Applicant Union, Mr. Basil Tfwala did not dispute any of the above submissions. In particular, he confirmed that the present dispute was similar, on all aspects, to the previously decided one.

20. He also confirmed that there no new developments, different from those that existed when the matter was decided by the previous Arbitrator.

21. His only defense was that the Respondent Company was supposed to have raised the objection much earlier, during conciliation, before the dispute could be certified unresolved.

22. Mr. Tfwala argued that since a certificate has already been issued, the Respondent Company was, at this stage, precluded from raising such objection.

23. He submitted that the only cause of action that was open to the Respondent Company, to halt the arbitration, was to approach the court and have the certificate of unresolved dispute revoked.

Analysis of Evidence and Argument

- 24.** First of all, may I state that in terms of **Section 42 (9) of the Industrial Relations Act, 2000** as amended, a recognition dispute that remains unresolved is automatically referred to arbitration. This clearly does not require the consent of the parties.
- 25.** Secondly, our courts have, in quite a number of cases, ruled that it is not a requirement of the law for the conciliating Commissioner to state, on the certificate of unresolved dispute, the reasons why the dispute could not be resolved.
- 26.** Our courts have also unanimously agreed that it is not permissible for a party to a dispute to make reference to issues that took place at conciliation as the entire conciliation process is conducted on a strictly without prejudice basis.
- 27.** Based on the above reasoning, I find, with great respect, the Applicant's argument that the Respondent Company was, for failure to raise the jurisdictional objection during conciliation, now precluded from doing so at this present stage, to be without any legal basis and merit.

- 28.** The law is settled that the Applicant Union or any other party can not, during arbitration, rely or make reference to anything that transpired or did not transpire at conciliation.
- 29.** I find that there is merit in the Respondent's argument that the Applicant Union's dispute is *res judicata*.
- 30.** In the Appellate Divisional case of ***APPOLIS V CORRECTIONAL SUPERVISION AND PAROLE REVIEW BOARD AND OTHERS SCA 171 /09 [2010] ZAECGHC1***, the court cited with approval the case of ***NARSI V RANCHOD NO & ANOTHER, 1984(3) SA 926 (C) at 934 B-C***, where the learned Friedman J stated as follows: "*the requirements for the successful invocation of the doctrine of the doctrine of **res judicata** are that a decision has previously been given by a competent court on the same cause of action between the same parties*"
- 31.** A similar view had also been embraced by the Court in ***NATIONAL SORGHUM BREWERIES V INTERNATIONAL LIQUOR DISTRIBUTORS 2001(2) SA (SCA) AT 239***. The court in this case had also stated that a litigant who wishes to raise the plea of *res judicata* must satisfy the two main requirements. Firstly, that the previous judgment was between the same parties. Secondly, that the judgment was based on the same cause of action and related to the same subject matter.

- 32.** As the Applicant Union's representative rightfully conceded, the dispute before me is based on the same cause of action as the one that was decided by CMAC Arbitrator Mr. R. Mhlanga.
- 33.** It also relates to the same subject matter and cause of action as the previously determined one.
- 34.** Furthermore, what is further crippling to the Applicant Union's case is that it did not submit any additional evidence or facts over and above those that were submitted before the above named Arbitrator.
- 35.** In particular, it did not submit that it now met the requirements of the law relating to recognition. Neither did it submit that it has since rectified whatever anomaly(s) that previously existed regarding the authenticity of the amendment(s) to its constitution.
- 36.** On the strength of the above, I find that the Applicant Union's recognition dispute was legally and competently decided and finalized by this Commission through an arbitration award dated 15th June 2010.
- 37.** I find that what the Applicant Union now seeks to do is re-litigate a matter that was legally and competently disposed of.
- 38.** Such can not be countenanced by this Commission.

39. Our laws do not permit re-litigation of the same issues except by appeal or review.

40. I therefore find that the Applicant Union's dispute is ***res judicata*** and that the Commission, ***functus officio***.

Ruling

41. I uphold the Respondent Company's preliminary point of law.

42. I dismiss the Applicant Union's dispute in its entirety.

43. I make no order as to costs.

SIGNED AT MANZINI ON THIS DAY OF DECEMBER, 2010.

**KNOWLEDGE MANANA
CMAC ARBITRATOR**

