



**IN THE CONCILIATION, MEDIATION AND ARBITRATION
COMMISSION (CMAC)**

Held at Manzini

CMAC REF: SWMZ 163/08

In the matter between;

**Swaziland Manufacturing and Allied
Workers Union (SMAWU)**

Applicant

AND

Carapparel Swaziland (Pty) Ltd

Respondent

CORAM:

Arbitrator	:	Mr Robert S. Mhlanga
For Applicant	:	Mr Shadrack Masuku
For Respondent	:	Mr David Msibi

ARBITRATION AWARD

**VENUE : CMAC OFFICES, ENGULENI BUILDING,
GROUND FLOOR, MANZINI**

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant is Swaziland Manufacturing and Allied Workers Union (SMAWU). The Applicant was duly represented by Mr Shadrack Masuku in these proceedings.

1.2 The Respondent is Carapparel Swaziland (Pty) Ltd; a Textile Company duly registered in terms of the company laws of Swaziland, and whose principal place of business is situated in Matsapha in the Manzini Region. The Respondent was represented by Mr David Msibi during the arbitration hearing.

2. ISSUE TO BE DECIDED

The main issue which falls for determination herein is whether or not the Applicant (Union) has attained 50% membership of the employees at the Respondent's workplace in respect of which it seeks recognition; and I am further required to decide if such members are fully paid up members for the union to be recognized by the Respondent Company.

3. THE BACKGROUND TO THE DISPUTE

3.1 The dispute at hand emanated from the Respondent's alleged refusal to grant the Applicant (Union) recognition as a representative trade union for all unionisable employees at its workplace, following an application in terms of section 42 (1) of the Industrial Relations Act 2000 (as amended).

3.2 Subsequently, the Applicant referred a dispute to the Commission in or about July 2008. On the 21st August, 2008, the Commission conducted a verification count for purposes of determining whether or not the Applicant had 50%

membership for it to be granted recognition by the Respondent.

- 3.3** The verification count process could not resolve the dispute because the Respondent, as per the Commissioner's verification count report, disputed the authenticity of the employees' signatures appended on the stop order forms; it being alleged by the Respondent that these signatures were not genuine. Consequently, the Commissioner, in view of the disagreement regarding the stop order forms, proposed that a head count should be conducted.
- 3.4** All attempts made by the Commissioner to have the headcount conducted failed, and consequently the dispute remained unresolved as per the Certificate of unresolved dispute issued on the 2nd April, 2009.
- 3.5** Subsequently, the dispute was referred to arbitration. On the 29th October, 2009, I was duly appointed by the Commission to arbitrate the matter.
- 3.6** On the 23rd November, 2009, the matter was set for pre-arbitration meeting. During the pre-arbitration meeting the parties submitted that the Certificate of Unresolved Dispute was prematurely issued, because they expected the Commission to set a date for conducting of the headcount. The Applicant's representative submitted that in terms of section 42 (6) of the Industrial Relations Act 2000 (As amended), it was mandatory that the headcount should be conducted. However, by consent the matter was postponed to the 4th December, 2009, for hearing.

- 3.7** The Applicant insisted that a headcount should be conducted. The Respondent was not opposed to the headcount, but it alleged that there would be work disruption, if the headcount were to be conducted during working hours. The matter was again postponed by agreement to the 11th December, 2009 for continuation. From 11th December 2009 it was by consent postponed to 15th January, 2010, as the parties could not agree on the date on which the headcount should be conducted. The Respondent suggested that the headcount should be held on Saturday, because it is not a working day (employees do not work on Saturday at the Respondent's workplace); whereas the Applicant was opposed to that.
- 3.8** Again on the 15th January, 2010, by consent the matter was postponed to 29th January, 2010. On the 29th January, 2010 it was by consent postponed to the 12th February, 2010. On the 12th February, 2010 it was by consent postponed to the 19th February, 2010. The aforesaid postponements were mostly at the instance of both parties as they failed to agree on a date of the headcount. The Applicant vehemently opposed to the headcount being conducted on Saturday, alleging that Saturday is not a working day and that if the headcount were to be conducted on Saturday it would suffer prejudice because there would be poor attendance by their members (employees).
- 3.9** Eventually on the 19th February, 2010, the parties agreed that the headcount should be conducted on the 6th March, 2010, and a Memorandum of Agreement to that effect was signed by the parties. The Commission assigned Mfanimpela Dube, the Case Management Administrator to conduct the headcount. Unfortunately, the

headcount was not conducted on the 6th March, 2010, due to the poor turn up (attendance) by the employees.

3.10 Since the headcount was not held, I suggested that a verification count should be conducted again to determine the Applicant's 50% membership at the Respondent's workplace. The verification count was duly conducted and the verification results showed that the Applicant has more than 50% members. I will revert to the issue of verification count later in my analysis of Evidence and submissions.

3.11 It was agreed between the parties that the present matter should be based on papers or pleadings.

4. PRELIMINARY POINTS (POINTS IN LIMINE)

4.1 The Respondent raised the following three (3) Points In Limine in its answering affidavits;

4.1.1 That the Applicant's demand of the current payroll from the Respondent for purposes of comparing its membership against the present payroll should not be considered because the current payroll has got nothing to do with the dispute which arose on or about 5th May, 2008. The Respondent argued that it could only provide a payroll for May, 2008.

4.1.2 That the Applicant's refusal to submit or furnish it (Respondent) with the list of its members who are in good standing is contrary to the provisions of section 42 (5) and (6) of the Industrial Relations Act 2000

(As amended), and that this is prejudicial to the Respondent's case.

4.1.3 That the founding affidavit of Siphon Manana (Applicant's Secretary General) is defective in that no revenue stamp was fixed to it. It was argued on behalf of the Respondent that it is trite law that a revenue stamp should be affixed to a founding affidavit.

4.2 In response to the Respondent's aforesaid preliminary points, the Applicant filed a replying affidavit of Siphon Manana. With regard to the first point, the Applicant disputed the Respondent's allegation that it demanded any payroll. Regarding the second Point herein, it was argued on behalf of the Applicant that the Applicant was not legally obliged to disclose or furnish the Respondent with the list of its members at the time when it made an application in terms of section 42 (1) of the Industrial Relations Act 2000 (as amended). The Applicant's argument with regard to the third preliminary point was that since CMAC is not a court of law, it was not legally obliged to affix a revenue stamp on the founding affidavit of Siphon Manana.

4.3 After having considered the parties' arguments or submissions, I made an oral ruling as follows;

4.3.1 The first and second **Points In Limine** were dismissed.

4.3.2 The third point was upheld and the Applicant was ordered to affix a revenue stamp of E2-00 on Siphon Manana's founding affidavit.

5. SUMMARY OF EVIDENCE AND SUBMISSIONS

5.1 The present case is entirely based on papers or pleadings. No oral evidence was led herein. On the 6th August, 2010 closing submissions in this matter were made by the parties.

APPLICANT'S CASE

5.2 The Applicant filed its notice of application, together with the founding affidavit of its Secretary General, Siphon Manana in support of same. The Applicant also submitted the following documents in support of its application namely; (a) three (3) cash receipts books (b) stop order forms (c) current list of members. (d) Certificate of Registration.

5.3 May I mention that the abovementioned documents were never disclosed or served on the Respondent by the Applicant to enable the Respondent to reply to the founding affidavit deposed to by Siphon Manana, despite my advice that same should be exchanged prior to enable the other party to prepare its case. The Applicant's representative argued that the Applicant could not discover the aforesaid documents for fear of victimization of its members by the Respondent. He suggested that the documents should be inspected by his counterpart before the Commissioner on the date of submissions. Fortunately, the Respondent was accommodating in that eventually it was agreed between the parties that the aforementioned documents would be inspected by the Respondent on the date of submissions or arguments.

5.4 The Applicant's application is premised on the founding affidavit of Siphon Manana, the Applicant's Secretary General.

5.5 Mr Shardack Masuku, the Applicant's representative made closing submissions on behalf of the Applicant.

5.6 It was submitted on behalf of the Applicant that the Applicant has fulfilled the requirements of section 42 (1) (2) (3) (4) (5) and (6) of the Industrial Relations Act 2000 (as amended) and that it should be granted recognition sought herein. It was specifically argued on behalf of the Applicant that as per the stop order forms, the Applicant has proved that it has in excess of 50% members at the Respondent's workplace, and that such members are fully paid up. It was further submitted that each member paid E60-00 as union dues for him/her to remain fully paid up for 5 years (60 months) pending granting of the recognition. It was the Applicant's submission that it charges E1-00 per month, per member until recognition is granted. It is worth mentioning that the aforesaid submission with regard to an alleged payment of E60-00 as union dues by members to remain fully paid up for five (5) years, was made for the first time during closing submissions; no averment to that effect was made in the founding affidavit of Siphon Manana.

5.7 On the other hand, it was submitted on behalf of the Applicant that in terms of its own constitution and the constitution of the country it is not required that members should be fully paid-up in order to be members of the organization.

5.8 In response to the Applicant's application, the Respondent filed the Answering affidavit and supplementary affidavit of Tsabile Mamba, the Respondent's Human Resources Manager. The

Respondent's submissions are premised on the aforesaid affidavits.

5.9 It is the Respondent's submission that the Applicant has failed to meet the requirements of **section 42 (5) of the Industrial Relations Act 2000 (as amended)** because of the following reasons:-

5.9.1 It is the Respondent's contention that from the receipt book marked 801, payments or subscriptions made were for March, 2008 only; no payments were made by the employees for the period from April, 2008 to December, 2008.

5.9.2 The Respondent further contends that as per receipt book marked 946-601, payments reflected therein are for March, 2010, and there are no payments for the other months, namely, February, 2010, April, 2010 to June, 2010.

5.9.3 The Respondent also submits that the Applicant has failed to present receipts for the whole of 2009 as proof of payment by the members.

5.9.4 It is the Respondent's submission that it is not clear whether or not the following employees are still members of the Applicant namely; Bekisile Mamba, Nelsiwe Masuku, Thobile Shiba and Sandile Simelane, because they were not given their receipts by the Applicant. It is argued that as per receipt book marked 046-601, their receipts are still contained therein, and they were never issued to the aforementioned.

6. ANALYSIS OF EVIDENCE AND SUBMISSIONS

- 6.1** In the present case I am required to decide whether or not the Applicant has attained 50% membership of the employees in respect of which it seeks recognition; and whether such members (employees) are fully paid-up for it (Applicant) to be granted recognition in terms of section 42 (5) of the Industrial Relations Act 2000 (as amended).
- 6.2** Section 42 (5) of the Industrial Relations Act (As amended) stipulates that : *“The employer shall recognize a trade union that has been issued with a certificate under section 27 if fifty per cent of the employees in respect of which the trade union or staff association seeks recognition are fully paid members of the organization”*.
- 6.3** The Applicant bears the onus to prove that it has acquired the 50% membership threshold of all unionisable employees at the Respondent’s workplace. Secondly, the Applicant is required to show that such members are fully paid up for it to be recognized by the Respondent company. In its endeavour to discharge the onus herein, the Applicant filed the founding affidavit of Siphon Manana together with the aforementioned documents being, the certificate of registration, Receipt books, stop order forms and the current list of members.
- 6.4** It is not in dispute that a verification count was conducted by the parties before me, in order to determine whether or not the Applicant has the requisite 50 % membership. The verification count results showed that out of 745 unionisable employees, as per the employer’s (Respondent’s) payroll, 445 employees are the Applicant’s

members. Both parties confirmed the accuracy of the results and as such the results were accepted.

- 6.5** Based on the aforesaid verification count outcome, I find that the Applicant has proven that it has more than 50% membership. Infact the conversion of the 445 members into percentage is equivalent to 59.7% membership. The second aspect of the issue to be decided is whether or not the said 445 members are fully paid members. In this regard, three (3) receipt books were presented by the Applicant to the Commission in a bid to prove that all its members are fully paid up.
- 6.6** In Siphon Manana's founding affidavit, no reference was made to the aforesaid receipt books to demonstrate that the members in respect of which it seeks recognition are fully paid up. No averment or allegation was specifically made by Mr Manana in his affidavit, with particular reference to the said receipt books, to show that the employees or members are fully paid up. It cannot be said that the receipt books are self-explanatory, because there are some anomalies therein.
- 6.7** I agree with the Respondent's contention that as per receipt books marked 053-801 and 046601 the payments or subscriptions reflected therein are for March, 2008 and March 2010 respectively. I also accept the Respondent's submission that there is no proof of payment of subscription by the members for the whole of 2009 and there is no explanation on the part of the Applicant regarding this anomaly. After perusing all the three (3) cash receipt books, I also discovered that the original receipts of Bekisile Mamba (receipt No: 046769), Nelisiwe Masuku (receipt No: 046770) Thabile Shiba (receipt No: 046771)

and Sindile Simelane (receipt No: 046772) were not issued to them; they are still in the receipt book marked 046600. Again there is no explanation why these receipts were not issued to the aforesaid members if they had paid.

- 6.8** According to the aforesaid receipt books, the employees only made payments of E60-00 each in March and April, 2008, and E40-00 in March, 2010. These were the only payments made as per the receipt books. No payments were made in respect of the other months in 2008, for instance, from June, 2008 to December, 2008. I find that the E60-00 paid in March, 2008 was for three (3) months only namely, March to May, 2008, and the E40-00 paid by each member in March, 2010 was for two (2) months, namely March, 2010 and April 2010. The reason for my finding is based on the fact that as per the stop order forms the Respondent is authorized to deduct E20-00 per month from the wages of employees who are earning E2000-00 per month or less and 1% from those who are earning E2000-00 or above. Therefore, each member is supposed to pay to the Applicant E20- 00 per month or a once-off payment of E240-00 for the whole year in order for members to be fully paid up.
- 6.9** May I state that the submissions made from the bar by the Applicant's representative, which are not based on facts contained in Mr Manana's affidavit, will not be taken into account or considered herein as part of the Applicant's evidence, because only facts or allegations contained or stated in an affidavit can be admitted. All allegations or facts supporting a party's case should be stated in an affidavit or made under oath for it to have probative value and to enable the other party to either confirm or deny it in response.

6.10 The allegations that the E60-00 paid by each member covers the period of five (5) years; and that Applicant union charges E1-00 per month per member should have been encapsulated in the founding affidavit of Siphon Manana, not in the closing submissions. There is a trite principle applicable in motion or application proceedings that “a party stands or falls on its papers”. Since these facts or allegations are not stated in Siphon Manana’s founding affidavit, it is my finding that they ought to be rejected or disregarded.

6.11 With regard to the issue of whether or not the employees (members) in respect of which the Applicant seeks recognition are fully paid up; it is my finding that the Applicant has failed to prove on the balance of probabilities that the 445 employees which were verified to be its members are fully paid up members.

6.12 It is my conclusion, regard being had to the foregoing analysis of evidence and submissions, that the Applicant union has failed to fully comply with the requirements of **section 42 (5) of the Industrial Relations Act 2000 (as amended)**. The Applicant has partially satisfied the requirements of section 42 (5) in that it has only proved that it has 50% membership at the Respondent’s undertaking; but it failed to prove that such members are fully paid up for it to be granted recognition in terms of the aforesaid **section 42 (5) of the Industrial Relations Act 2000 (as amended)**.

7. AWARD

Pursuant to my foregoing findings herein, it is my decision that the Applicant's application is hereby dismissed.

DATED AT MANZINI ON THISDAY OF SEPTEMBER, 2010

ROBERT S. MHLANGA
CMAC COMMISSIONER