



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

Held at Manzini

CMAC REF: SWMZ 245/10

**Swaziland Transport and Allied Workers Union
(STAWU) o.b.o National Maize
Corporation Employees - Applicant**

AND

National Maize Corporation (Pty) Ltd - Respondent

CORAM:

Arbitrator	:	Mr Robert S. Mhlanga
For Applicant	:	Mr Wandile Nkambule
For Respondent	:	Ms Natalie Mthethwa

ARBITRATION AWARD

**Venue : MANZINI CMAC OFFICES, ENGULENI
BULDING, GROUND FLOOR, MANZINI**

DATE OF ARBITRATION : 20TH AUGUST, 2010
1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant is Swaziland Transport and Allied Workers Union (STAWU). The Applicant was represented by Mr Wandile Nkambule in this case.

1.2 The Respondent is National Maize Corporation (Pty) Ltd. The Respondent was represented by Ms Natalie Mthethwa, the Respondent's Public Relations Officer.

2. ISSUE TO BE DECIDED

The main issue to be decided is whether or not the Applicant has attained 50% membership of the employees in respect of which it seeks recognition. I am also required to decide if such members (employees) are fully paid up for the Applicant to be granted recognition by the Respondent in terms of section 42 (5) (a) of the Industrial Relations Act 2000 (As amended).

3. THE BACKGROUND TO THE DISPUTE

3.1 The present dispute relates to the Respondent's alleged refusal to grant recognition to the Applicant Union, following the latter's application for recognition made in terms of section 42 (1) of the Industrial Relations Act 2000 (as amended), as evident in the letter of application dated 25th February, 2010.

3.2 In response to the Applicant's application, as per the letter dated 8th March, 2010, the Respondent requested the Applicant to furnish it with the categories of employees the Applicant intended to represent in its undertaking.

3.3 Following the Respondent's request, the Applicant, through the letter dated 15th March, 2010,

specified the categories of employees in respect of which it seeks recognition, namely: (a) General Workers (b) Silo Workers (c) Cleaners (d) Delivery Assistants (e) Forklift drivers (f) Merchandisers and (g) Supervisors.

- 3.4** The Respondent in its letter dated 29th March, 2010, stated that it could not recognize the Applicant because it (Applicant) did not have the required 50% membership at its workplace. Despite this response, the Applicant proposed for a verification count meeting between the parties. However, the parties failed to agree on a suitable date for the intended verification count. Subsequently, the Applicant referred a dispute to the Commission (CMAC) on the 28th April, 2010.
- 3.5** On the 26th May, 2010 the dispute was conciliated, but the parties failed to reach a settlement, hence the dispute remained unresolved and as a result a certificate of unresolved dispute was accordingly issued by the Commission. Consequently, the dispute was referred to arbitration for adjudication in terms of section 42 (9) of the Industrial Relations Act 2000 (as amended).
- 3.6** Subsequently the matter was set down for a pre-arbitration meeting on the 14th July, 2010. Both parties attended the pre-arbitration meeting, whereby the Applicant was represented by Mr Basil Tfwala, while the Respondent was represented by Ms Natalie Mthethwa. During this meeting, the parties agreed that a verification count should be conducted in order to determine whether or not the Applicant union has the requisite 50% membership of the unionisable employees at the Respondent's undertaking. It was further agreed between the parties that in the case of any disagreement as to whether or not

any of the employees who signed the stop order form, is a full member of the union, a headcount shall be conducted as stipulated in section 42 (6) of the Industrial Relations Act 2000 (as amended).

- 3.7** During the pre-arbitration meeting, Ms Mthethwa, the Respondent's representative disclosed that the following employees are non-unionisable because they constitute the management team namely: (a) Chief Executive Officer (CEO) (b) Chief Financial Officer (CFO) (c) Operations Manger (OPM) (d) Technical Manager (e) Assistant Technical Manager (f) Accountant (g) Administration and Public Relations Officer.
- 3.8** By consent the matter was postponed to 30th July, 2010 in order for the verification count to be conducted. May I state that on the 30th July, 2010 the Applicant was represented by Mr Wandile Nkambule, while the Respondent was still represented by Ms Natalie Mthethwa. The verification count was conducted and the outcome showed that out of 27 unionisable employees, ten (10) employees are the Applicant's members. Both parties confirmed the accuracy of the verification count outcome. However, the Applicant's representative, Mr Nkambule argued for the first time, that the employees who form part of the Respondent's management team are not seven (7) in number, but that they are eleven (11). Eventually, it was agreed between the parties that the Applicant would file its application, and likewise the Respondent would respond thereto. In a nutshell, it was agreed that this case is entirely based on pleadings.
- 3.9** By consent the matter was postponed to 13th August, 2010 for submissions. On the 13th August, 2010, it did not take off due to the fact that the parties' papers were defective and they

had to be amended. Consequently, the matter was by consent finally postponed to 20th August, 2010 for arguments.

4. Summary of Evidence and Submissions

Applicant's case

- 4.1 After the verification count, the Applicant filed its notice of application, which was accompanied by the founding affidavit of Wandile Nkambule together with the confirmatory affidavit of Phillip Sifundza. In a nutshell, the Applicant's case is that the Applicant has 58% fully paid up members at the Respondent's undertaking. It is the Applicant's submission that since it has more than the 50% membership threshold, the Respondent is therefore legally obliged in terms of section 42 (5) (a) of the Industrial Relations Act 2000 (as amended) to recognize it as a sole collective employee representative.
- 4.2 In support of the foregoing contention that the Applicant has 58% membership, Wandile Nkambule specifically alleges in his founding affidavit that the Applicant has 10 members out of 17 unionizable employees namely; weighbridge clerk (1) Silo Workers (8), two (2) drivers, one (1) receptionist, two (2) accountant clerks, two (2) cleaners and one (1) grounds man.
- 4.3 Mr Wandile Nkambule also alleges that the Respondent's management team is made up of eleven (11) employees namely; Chief Executive Officer, operations Manager, Technical Manager, Accountant, Assistant Accountant, Administrative Human Resources Personnel, two (2) Depot Foremen and Assistant operations at Sihlobo Department.

4.4 Mr Phillip Sifundza in his confirmatory affidavit also confirms Mr Nkambule's aforesaid allegations. He reiterates the fact that the management team has eleven (11) members, as opposed to 7 as alleged by the Respondent.

RESPONDENT'S CASE

4.5 On the other hand, the Respondent's case is premised on the answering affidavit of Ms Natalie Mthethwa as well as the confirmatory affidavit of Siphon Nxumalo, who deposed to this affidavit in his capacity as the Respondent's acting chief executive officer.

4.6 On the contrary, the Respondent disputes the Applicant's contention or argument that it has 58 % membership at its workplace. The Respondent, through the aforesaid affidavits of Ms Natalie Mthethwa and Mr Siphon Nxumalo, specifically denies the Applicant's allegation that the management team is made up of eleven (11) employees. The Respondent maintains that the management is comprised of seven (7) employees namely; the Chief Executive Officer, Chief Financial Officer, Operations Manager, Technical Manager, Assistant Technical Manager, Accountant, Administration and Public Relations Officer. It is the Respondent's submission that the Assistant accountant, Depot foremen (2) and the Assistant operations at Sihlobo Department do not form part of the management team.

4.7 The Respondent in a bid to prove as to who belongs to the management team, has submitted a copy of its organizational structure which was prepared by KPMG. The Respondent further submits that there are 27 employees in the

bargaining unit (unionizable employees), not 17 as alleged by the Applicant.

4.8 In the light of the foregoing the Respondent prays that the Applicant's application be dismissed.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 As already pointed out above herein, the present case is entirely based on papers. In my analysis herein, I have considered all the parties' submissions and evidence which I deem relevant, and on which my decision will be based.

5.2 In the present case my task is to determine (based on the evidence and submissions made by the parties) whether or not the Applicant has attained the requisite 50% membership of the employees who are in the bargaining unit; and whether such employees are fully paid up members of the Applicant union. The Applicant bears the onus to prove on a balance of probabilities that it has 50% or more members, who fall under the bargaining unit at the Respondent's undertaking for it to be granted recognition in terms of section 42 (5) (a) of the Industrial Relations Act 2000 (as amended).

5.3 In casu it is not in dispute that a verification count was conducted and that the results hereof were to the effect that only ten (10) employees turned out to be the Applicant's members. Both parties accepted the verification outcome. Before the verification exercise was embarked on, all the logistics were properly attended to. On the 14th July, 2010 the parties agreed as to how the verification count would be conducted. On the date in question, the Respondent disclosed that the management team is comprised of seven (7)

employees, who do not fall under the bargaining unit. Mr Tfwala, who appeared on behalf of the Applicant on the said date accepted this, because he never raised an objection pertaining to the composition of the management team nor did he disputed the fact that they are 27 unionizable employees.

- 5.4** Again on the 30th July, 2010, before the verification count was conducted, Ms Mthethwa, the Respondent's representative mentioned that they are (27) unionisable employees and seven (7) employees who form part of the management, and that such employees do not fall under the bargaining unit.
- 5.5** The Applicant does not dispute the fact that it has 10 members at the Respondent's workplace; but its contention is that the management team is constituted by eleven (11) employees, who are non-unionisable. It is also the Applicant's argument that there are seventeen (17) employees who fall under the bargaining unit. Based on these allegations, the Applicant submits that it has 58% membership.
- 5.6** In order to determine whether or not the Applicant has acquired the alleged 58% membership, firstly I am required to decide whether the Respondent's management is comprised of seven (7) employees or eleven (11); and I am further required to determine whether or not they are 17 unionisable employees. Clearly there is a dispute of fact here, but the onus is on the Applicant to prove the aforesaid allegations.
- 5.7** The Applicant's contention that it has 58% is not backed up by any evidence or proof. The allegations contained in Mr Wandile Nkambule's

founding affidavit and Phillip Sifundza's confirmatory affidavit, to the effect that they are seventeen (17) unionisable employees, and eleven (11) non-unionisable employees who form part of the Respondent's management team are without substance and as such I do not accept same. These bare or unsubstantiated allegations herein demonstrate that the Applicant is on a fishing expedition. Both deponents namely; Wandile Nkambule and Phillip Sifundza are not privy to the internal affairs of the Respondent regarding the question as to who forms part of the management team. Mr Nkambule, does not work for the Respondent, and as such he does not have an access to any reliable information pertaining to the Respondent's organizational structure.

5.8 On the other hand, Mr Phillip Sifundza is an ordinary Silo Worker, and as such I do not expect him to have any reliable information regarding the internal affairs of the Respondent at management level. Both deponents have failed to disclose the source of their information regarding the issue at hand.

5.9 No evidence or proof was given by the Applicant to substantiate its allegations that they are seventeen (17) unionisable employees, as opposed to 27 employees as per the Respondent's records. The Applicant has also failed to show that the management is made up of eleven (11) employees, who are non-unionisable, as opposed to seven (7) employees. In the premises, I reject the Applicant's submission that it has acquired 58% membership at the Respondent's undertaking. On the other hand, I accept the Respondent's submission that the management team is comprised of seven (7) employees namely, Chief Executive Officer, Operations Manager, Chief

financial Officer, Operations manager, Technical Manager, Assistant Technical Manager, Accountant, and Administration and Public Relations Officer. I also accept the fact that they are 27 employees who are unionisable. This is because the Respondent is the custodian of official records pertaining to all employees under its employ, and thus the above facts are regarded as true and correct.

6. CONCLUSION

- 6.1 In the light of the foregoing analysis of evidence and having taken into account all the circumstances of this case; it is my conclusion that the Applicant has failed to prove on the balance of probabilities that it has acquired the requisite 50% membership for it to be granted recognition in terms of section 42 (5) (a) of the Industrial Relations Act 2000 (as amended).
- 6.2 The verification count results clearly revealed that the Applicant has ten (10) employees. This fact is not in dispute. The Applicant's contention that it has 58% members is based on bare allegations. Obviously this argument is fallacious and misleading as the Applicant has failed to prove its case, in that 10

members out of 27 unionisable employees is below the requisite 50% threshold.

7. AWARD

Pursuant to my foregoing conclusion herein, I order that the Applicant's application is hereby dismissed in its entirety.

DATED AT MANZINI ON THEDAY OF SEPTEMBER, 2010

**ROBERT S. MHLANGA
CMAC COMMISSIONER**