

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini CMAC REF: SWMZ 472/08

In the matter between:

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

AND

Tuntex Garments Company (Pty) Ltd Respondent

CORAM:

**Arbitrator : Mr R. S. Mhlanga
For Applicant : Mr S. Masuku
For Respondent : Mr. Z. Mkhathshwa**

RULING ON THE POINTS IN LIMINE

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1. DETAILS OF THE PARTIES

1.2 The Applicant is the Swaziland Manufacturing and Allied Workers Union (SMAWU), duly represented by Mr Shadrack Masuku.

1.3 On the other hand, the Respondent is Tuntex Garments Company (Pty) Ltd, a company registered in terms of the company law of Swaziland, and it is represented herein by Mr Zwide Mkhathshwa.

2. BACKGROUND

2.1 The present dispute emanated from the Respondent's failure to grant the Applicant Union Recognition, following the application made by the Applicant in terms of section 42 of the Industrial Relations Act 2000 (As amended).

2.2 Subsequently, a dispute was reported to the Commission (CMAC) by the Applicant Union. The dispute was conciliated upon, but it was not resolved, hence a Certificate of Unresolved Dispute was issued. The dispute was then referred to Arbitration in accordance with section 42 (9) of the Industrial Relations Act 2000 (as amended).

2.3 Initially, Commissioner Velaphi Dlamini was appointed to arbitrate in this matter, but he later recused himself from this case citing the fact that the Respondent is his client.

2.4 On the 16th October, 2009, the Commission appointed Commissioner Banele Ngcamphalala to arbitrate. Unfortunately, Commissioner Banele Ngcamphalala left the Commission, and I was

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appointed on the 16th November, 2009 to take over the matter.

2.5 On the 14th December, 2009, the matter was set for pre-arbitration meeting, before me. On this date, the Respondent's Representative orally raised preliminary points, to the effect that the present Respondent is defunct or non-existent. He argued that the Applicant was supposed to report a dispute against Tuntex Textiles (Pty) Ltd, being the company to which the Applicant applied for the Recognition in terms of section 42 of the Industrial Relations Act 2000 (As amended) , instead of the Respondent.

2.6 Secondly, the Respondent argued that the present dispute is prematurely before the Commission because the Applicant failed to comply with the provisions of section 45 (5) (b) of the Industrial

Relations Act 2000 (as amended).

2.7 Subsequently, the Points In Limine were reduced into writing, and same were served to the Applicant and also filed with the Commission (CMAC). On the 12th March, 2010, submissions were made by the parties with regard to the preliminary points.

3. ISSUE TO BE DETERMINED

I am called upon to determine the aforesaid **Points In Limine**, raised by the Respondent first, before I decide the main issue herein namely; whether or not the Applicant is entitled to be granted Recognition in terms of Section 42 (5) of the Industrial Relations Act, 2000 (as amended).

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4. SUMMARY OF THE PARTIES SUBMISSIONS

4.1 The Respondent has raised the following Points In Limine namely;

- (a) That the Applicant reported a dispute against a defunct company (Respondent).
- (b) That the dispute is prematurely before the Commission because the Applicant has failed to comply with the requirements of section 42 (5) and (6) of the Industrial Relations Act, 2000, (as amended).

4.1.2 The Founding affidavits of Zwide Mkhathshwa and Paul Weng were filed in support of the said Points In Limine.

4.1.3 With regard to the first point, it is submitted herein on behalf of the Respondent that the Respondent, Tuntex Garments Company (Pty) Ltd is defunct or not existing. It is said that the factory, Tuntex Garments closed down in April, 2005, due to operational requirements. Following its closure, the management and clerical staff were redeployed to Tuntex Textiles (Pty) Ltd.

4.1.4 It is argued that the Applicant Union never applied for Recognition to the Respondent (Tuntex Garments Company). It is submitted that the application for Recognition was made by the Applicant to Tuntex Textiles (Pty) Ltd, on the 5th May, 2008. Reference is made to a copy of the said application filed of record, and it is marked as Annexure "TGS".

4.1.5 On the other hand, the Respondent raised a point to the effect that the present dispute was

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prematurely reported to the Commission (CMAC), because the verification count process which the parties had started was never completed; it was left hanging. It is submitted that pursuant to the application for recognition, the parties embarked on a Verification Count exercise in order to determine if the Applicant Union represents 50% of the employees employed by Tuntex Textiles (Pty) Ltd.

4.1.6 The Respondent further submits that during the attempted Verification Count, the Applicant only produced stop-order forms; the Applicant allegedly failed to produce proof of fully paid-up membership. It is alleged herein that the Applicant failed to prove that it has 50% membership, for it to be granted recognition.

4.1.7 In conclusion, the Respondent prays that the Points In Limine raised be upheld and that the Applicant's application be dismissed.

4.2 APPLICANT'S SUBMISSIONS

4.2.1 On the other hand, the Applicant opposes the Respondent's foregoing Points In Limine. The answering affidavit of Siphon Manana was filed in support of the Applicant's case.

4.2.2 With regard to the first Point In Limine; the Applicant confirms that it made an application for recognition to Tuntex Textiles (Pty) Ltd, but however the subsequent correspondences from the

company reflected the letter-head of Tuntex Garments Company (Pty) Ltd. It is the Applicant's submission that the introduction of the new name, Tuntex Garments Company (Pty) Ltd, caused it to have a bona fide belief that the name of the

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company it is dealing with, is Tuntex Garments Company (Pty) Ltd, not Tuntex Textiles (Pty) Ltd.

4.2.3 It is the Applicant's further contention that since the 5th May, 2008, up to the time when these points in limine were first raised, no objection was made by the Respondent with regard to the wrong citation of the Respondent's name. It is argued that even during conciliation, the Respondent never raised an objection that the Respondent was wrongly cited. Therefore, the Applicant submits that this preliminary point is overtaken by events and that it is also frivolous, vexatious and time wasting.

4.2.4 In the alternative, it is submitted by the Applicant that what needs to be done herein is to correct the Respondents citation by substituting the present Respondent with Tuntex Textiles (Pty) Ltd. The Applicant contends that no prejudice will be suffered by the Respondent if the intended amendment or correction of the citation is effected.

4.2.5 Regarding the second point in limine, the Applicant denies the allegations that the dispute was prematurely reported to the commission (CMAC). It is argued that the dispute was properly reported to the commission, after all the attempts made by the Applicant to have a meeting with the Respondent have failed.

4.2.6 In conclusion, the Applicant prays that the Respondent's Points In Limine be dismissed.

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5. ANALYSIS OF SUBMISSIONS AND CONCLUSION

5.1 I will now look at the Respondent's points in limine Ad Seriatim. Firstly, may I point out that it is not necessary for me to determine whether or not the Respondent is a defunct company, but I am called upon to decide whether or not it is true that the Respondent was wrongly cited in this case.

5.2 It is common cause that Tuntex Textiles (Pty) Ltd and Tuntex Garments Company (Pty) Ltd are sister companies, and they are both members of Tuntex Incorporation based in Taiwan. I also accept the fact that currently, it is Tuntex Textiles (Pty) Ltd that is in operation, following the closure of Tuntex Garments Company (Pty) Ltd. It is also not in dispute that the Applicant made an application for recognition to Tuntex Textiles (Pty) Ltd on the 5th May, 2008.

5.3 It is not in dispute that, pursuant to the said application for Recognition, the employer in the course of communication between the parties, introduced a new name, Tuntex Garments Company (Pty) Ltd, in that all the subsequent correspondences or letters were bearing the letterhead of Tuntex Garments Company (Pty) Ltd. These letters were always signed by Mr Zwide Mkhathwa on behalf of Tuntex Garments Company (hereinafter referred to as the Respondent).

5.4 After the parties have failed to meet in order to discuss the formalization of the Recognition, the Applicant subsequently reported a dispute to CMAC wherein it cited the Respondent, Tuntex Garments Company (Pty) Ltd. In my opinion the

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Applicant genuinely believed that the current name of the employer or company from which it seeks recognition is Tuntex Garments (Pty) Ltd, instead of Tuntex Textiles (Pty) Ltd. On the other hand, the other party never raised an objection to the effect that the Respondent was non-existent or defunct and that as such it was wrongly cited or not the correct party in the dispute herein. Even during the conciliation process of the dispute no objection was made by Mr Zwide Mkhathwa, who at all material times hereto, have been appearing on behalf of the employer in this matter.

5.5 The documents filed by the Respondent herein clearly shows that Tuntex Textiles (Pty) Ltd ought

to have been cited as the Respondent, instead of Tuntex Garments Company (Pty) Ltd, in these proceedings. However, the Applicant was right in the beginning because it directed its application for recognition to Tuntex Textiles (Pty) Ltd, but the employer through its Human Resources Manager, Zwide Mkhathshwa maliciously misled the Applicant (Union). In my view the employer deliberately did this, in anticipation of desperate times as one of its delaying tactics to be employed to put brakes on the matter, so that it takes long for the dispute to be resolved.

5.6 It is my considered view that this point in limine was ill-conceived because the Respondent acted in bad faith. It was not necessary for the Respondent to raise this preliminary point, because all the Respondent was supposed to do, was to advise the Applicant that it should correct the citation. I accept the Applicant's submission that the Point In Limine raised herein is frivolous,

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vexatious and time-wasting. In my view this point in limine was self-created in that the Respondent is the one which caused the Applicant to cite the present Respondent in the first place. Therefore, it is my conclusion that the first point in limine should be dismissed. It is my finding that the Applicant should be granted leave to amend the citation of the Respondent by replacing it with Tuntex Textiles (Pty) Ltd.

5.7 With regard to the second preliminary point to the effect that the dispute is prematurely before the commission; it is my conclusion that this point has been overtaken by events in that it should have been raised during the conciliation. It does not matter now because the commission is already seized with jurisdiction over the matter. This point should have been raised during conciliation, whereupon the Commissioner concerned would have made a ruling whether or not the dispute was prematurely referred to CMAC.

5.8 In my view the issue of whether or not the Applicant has 50% membership falls into the merits of the dispute as a whole. This is the main issue which I have to decide in the merits, and as such it is deferred, and it will be determined in the main case.

6. RULING

6.1 In the light of the foregoing analysis and conclusion herein; I hereby make a ruling that the Respondent's **Points In Limine** are hereby dismissed.

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6.2 I further make an order that the Applicant should amend its application to reflect the correct citation of the Respondent, and such shall be done within seven (7) days from the date of receipt of this ruling.

6.3 Accordingly a new date for the arbitration hearing will be set within 14days from date hereof, and both parties will be duly notified of same.

DATED AT MANZINI ON THIS 22nd DAY OF APRIL, 2010

ROBERT S. MHLANGA

CMAC COMMISSIONER

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