IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2431/98

In the matter between

SWAZILAND WATER SERVICES AND	APPLICANT
ALLIED WORKERS UNION	
And	
SWAZILAND WATER SERVICES	RESPONDENT
CORPORATION	
Coram	SB. MAPHALALA - J
For Applicant	MR L. MAMBA
For Respondent	MR H. FINE

JUDGEMENT

(18/11/98)

The matter came before court on a certificate of urgency for an order in the following terms:

a) Dispensing with normal forms and times for service and hearing the matter urgently.

b) Directing and ordering the respondent to implement 8.5% salary increase in favour of the applicant's members in terms of an agreement dated 8th July 1998.

c) Directing that such increment be applied after implementation of the annual notch increment.

d) Directing the respondent to comply with orders (b) and (c) on or before the 20th November 1998 and that such increment be backdated to April 1998.

e) Ordering the respondents to pay the costs of this application.

The application is supported by the founding affidavit of one Ntokozo Sikhondze who is the President of the applicant. Applicant is the Swaziland Water Services and Allied Workers Union, a trade union registered in terms of the Laws of Swaziland.

He annex hereto marked "A" a copy of the applicant's certificate of registration. Further that the respondent is the Swaziland Water Services Corporation, a statutory board established in terms of the Laws of Swaziland.

He deposed that during June 1998 the applicant entered into a recognition agreement with the respondent in terms of which the respondent recognized the applicant "as the sole workers representative". A copy of the said recognition agreement is annexed marked "B". During the period

June/July 1998 and in terms of Article 3 of the Recognition Agreement the parties hereto entered into wage increment negotiations. The joint negotiation team comprised of the following appointed representatives of the respondent:

Mr. J. M. V. Dlamini - Chief Management Negotiator

Mr. David Ndlangamandla

Bafana Matsebula and

Sandile Dlamini

The applicant was represented by the following members of its Executive Committee:

Jonathan Mavuso

Lucky Ndlovu

Sipho Khumalo

John Mkhatshwa

G.T. Vilakati and the deponent as President of the Applicant. The facilitator was Mr. Robert Shongwe and the Secretary was Mr. Dumisa Dlamini. After a number of adjournments of the meetings, agreement was finally reached on the 8th July 1998 on an increment of 8.5% across the board. The deponent annexed a copy of a memorandum of agreement by Mr. Dlamini, the Chief Management Negotiator and himself marked annexure "C".

The agreement reads in extenso as follows.

"Memorandum of agreement between SWASAWU and Management Negotiating Team.
We the undersigned (as representatives of Trade Union and Management), hereby agree that the basic salary adjustment for the year 1998/99 shall be increased by 8.5% across all levels. This is with effect from the 1st April 1998.

1.	Management Team	2.	SWASAWU
	Chief Negotiator ... (Signed)....		President... (Signed)...
	Date ...08/07/98.....		Date ...08/07/98.....

Witnessed ... (Signed).... Facilitator/Coordinator

... (Signed).... Secretary/Recorder"

As a background to the issue in dispute in these proceedings the deponent stated the following:

The salary structure of the respondent is divided into grades ranging from Grade Al to A3, with each grade divided into notches usually ranging from one (1) to six (6) whereas the grades are a reflection of an employee position in the corporation the notches reflect the length of time an individual employee has been employed by the respondent. For instance, an employee who is the labourer for example will be employed in Grade Al notch in his first year of employment. The following year in April he will receive a notch increase and move to Al notch 2. Such notch increment is customary and is totally independent of any salary increment that may be negotiated. In fact any agreement on salary increment is usually

implemented after the notch increment have been affected. Accordingly it is applicant's submission that it was the clear understanding of the joint negotiating committee that the 8.5% increase agreed to was independent of the customary notch increases.

During August 1998 applicant learnt the management had sought to include the notch increment as part of the 8.5% increment. Contrary to the understanding of both negotiating teams. On the 3d September 1998 the joint negotiating committee issued a memorandum of understanding to the effect that when the parties reached agreement on the increment they were ad idem that the agreement did not affect the notch increment. Applicant annexed the said agreement marked "D" which was signed on the 3rd September 1998 by the same parties who signed annexure "C". The body of the agreement reads as follows:

"Memorandum of Agreement between SWASAWU and Management Negotiating Team.

We the undersigned as representatives of the Joint Negotiating Committee (JNC) hereby clarify our understanding of 8.5% salary adjustment for the year 1998/99.

1. 8.5% was awarded across the board.

2. The agreement was not intended to change the existing pay structure of the Swaziland Water Services Corporation.

3. Therefore, an implementation that includes revoking notches is contrary to the understanding of the JNC and cannot be a decision of the JNC...

Deponent submits that he is advised that the agreement that salaries were to be increased by 8.5% on the understanding that this was independent of the notch increment is legally binding on the respondent and it is bad faith on their part to renegade on it even in the face of the memorandum of understanding signed by their own representatives.

On the 11th September 1998, the applicant caused a letter to be served on the respondent wherein it was pointed out that a binding legal agreement had been reached and that if the respondent did not adhere to it further legal steps would be

taken. A copy of the said letter is annexed marked "F". The deponent brings to the court's attention that it is noteworthy that notwithstanding annexure "D" the respondent still persists that it has honoured the agreement and that the 8.5% increment is inclusive of notch increments.

The deponent submitted that the matter was urgent for the following reasons:

a) There is now a growing frustration amongst the members of the applicant due to the fact that applicant has done all it could do in terms of the Recognition Agreement.

b) There is now a growing pressure on the Executive of the Union and it is feared that members may in frustration resolve to embark on strike action, which they are entitled to do so, in terms of the Industrial Relations Act.

c) Salaries are due on or about the 20th instant and if the agreement is not implemented by then, members may embark on industrial action which will have serious consequences on the health and economy of the country.

It is applicant's view that the respondent's attitude in this matter is obviously dishonest and potentially capable of creating an explosive situation. Applicant submits further that an appropriate order as to costs must be made by the court to mark its disapproval.

These are the factual allegations which founds applicant's case.

Now I come to consider the case by the respondent. The respondent filed an answering affidavit of its Managing Director a Mr. Peter Bhembe. Respondent admits paragraphs 1, 2 -10.1, 10.2, 10.3 of the applicants founding affidavit. In relation to paragraphs 10.2 - 10.3 respondent avers that save for denying that all employees automatically receive a notch increase on an annual basis and putting applicant to strict proof thereof, the contents of these paragraphs are admitted. At the meeting between the parties held on the 29th June 1998, the respondent proposed that all employees should receive the April notch increment as a starting point for negotiation and that the respondent continued with the negotiations on this understanding. Respondent denies the contents of paragraph 11 and state that the 8.5% increase included an increase of 2.6% in respect of notch increases. Paragraph 12 is also denied and respondent alleged that the figure of 8.5% included the notch increase. Paragraphs 13, 14, 15, 17, 18, 19 and 20 are denied by the respondent. In respect of paragraph the respondent avers that the interpretation placed on the memorandum of understanding annexure "D" by the applicant that the agreement "did not affect the notch increments" is not correct. Annexure "D" according to the respondent which states that "an implementation that includes the revoking notches is contrary to the understanding" does not mean that the implementation does not exclude the inclusion of notch increases, which were not a right of entitlement of all employees, was included for all employees as part of the 8.5% salary adjustment.

In respect of paragraph 14 respondent denies this paragraph and avers that the agreement to increase salaries by 8.5% included across the board increase of 2.6% in respect of notch increases to all employees. Respondent states that not all the employees were entitled to notch increases as of right and that the respondent agreed to such an increase. On paragraph 15 respondent admit that the letter dated 11th September 1998 was served on the respondent, but deny that the applicant was entitled to take legal steps against the respondent. Respondent deny that it had negotiated in bad faith and state that the dispute regarding notch increment arose as a result of a bona fide misunderstanding between the parties. Respondent alleged that the applicant has breached the spirit of the Recognition Agreement between the parties, which is based on the "fundamental belief in dialogue, discussion and negotiation". It was incumbent on the applicant to proceed to mediation as a way of resolving the dispute between the parties as set out on Appendix 1 to the Recognition Agreement, annexure "1". Proceeding to the court by was of urgency instead of attempting to resolve the dispute by way of mediation, the applicant has demonstrated its bad faith. The applicant was not entitled to proceed to court before attempting to resolve the dispute. On paragraph 17 respondent avers that it is fully justified in persisting that it has honoured the agreement and that the 8.5% increment is inclusive of notch increment. In respect of paragraph 18 respondent denies that the matter is urgent and state that applicant has done all that it could in terms of the Recognition Agreement. That it is significant that applicant states that members may resolve to embark on illegal strike action as a ground of urgency and state that this can never constitute a ground for the averred urgency.

These are respondent's factual allegations in opposition.

The applicant then filed a replying affidavit deposed by the President of the Union. In respect of paragraphs 5 of respondent's answering affidavit applicant confirms that it was agreed that all employees would get a notch increment of 2.6% as a starting point for negotiations and that this notch increment was to be backdated to April 1998. That it is significant that respondent admits that the question of notch increments was not relevant to subsequent wage increment negotiations. Applicant therefore does not understand why the respondent denies that the 8.5% salary increment was irrelevant to the notch increment. Applicant avers that the deponent to the respondent's answering affidavit was not party to the negotiations. He therefore does not have personal knowledge of what the understanding at the negotiations was. It is significant that the deponent or the respondent have not seen it fit to annex a confirmatory affidavit by any member of their negotiating team. On paragraphs 8 and 9 applicant avers that annexure "C" was signed on the 8th July 1998. After it became clear to the Joint Negotiating Committee that the respondent was reneging on the agreement the Joint Negotiating Committee sought

to clarify the position by causing annexure "D" to be signed. Under normal circumstances it would not have been necessary to sign annexure "D" and applicant submits that the balance of probability is in favour of the applicant's version of events and not the respondent's. Furthermore, it is inconceivable that the Joint Negotiating Committee would have signed annexure "D" unless it sought to clarify and record the understanding of the parties at the negotiations.

There is no legal basis whatsoever for the allegation that the applicant was not entitled to take legal steps against the respondent. It is the applicant's case that it is the

respondent itself, which has violated the spirit of the Recognition Agreement by reneging on a legally binding document. The applicant is entitled to approach the court for an order directing the respondent to abide by the agreement. The respondent cannot now invoke the very Recognition Agreement, which it has itself breached. By illegally refusing to abide by the agreement, the respondent has created a volatile situation and it is the existence of such a volatile situation that is a ground for urgency.

These are the facts giving rise to this dispute. The matter came for arguments on the 23rd October 1998 where Mr. Mamba for the applicant took the court through the papers before court and contends that paragraph 19 at page 63 of The Book of Pleadings respondent does not deny that the negotiations were binding. He argues that there is no question of mediation that arises thereof. Annexure "B" and "C" are clear. All the allegations made by Bhembe in his answering affidavit are hearsay. Respondent does not even file a confirmatory affidavit of one person who was in the negotiating team. He submitted finally that annexure "E" was not replied to by the respondent.

Mr. Fine for the respondent submitted that the issue before court is not of interpretation. There was a dispute and thus the production of annexure "D". According to the Recognition Agreement there is a dispute resolving mechanism. Mr. Fine contended that if the court finds that there is a dispute then the matter is not to be before the court.

The issue of paramount importance in this matter is whether or not a dispute exist in this matter. In the event the court finds that there is a dispute then the matter has to be referred to mediation in terms of the Recognition Agreement signed by the parties. On the other hand if the court finds that there is no dispute the court is then obliged to grant the order as sought by the applicant. I have scrutinized the papers before me and also considered the able submissions by both counsels. My view in the matter is that annexure "C" and "D" to wit, the memorandums of agreement between SWASAWU and Management Negotiating Team do not conflict with each other but are rather complimentary. Annexure "C" serves to clarify or amplify the agreement embodied in annexure "C" I agree in toto with Mr. Mamba for the applicant that the respondent does not aver in its papers the negotiated agreement was not binding. Moreso annexure "E" of the applicant's papers is not replied to by the respondent and remains uncontroverted. Annexure "E" is a letter written by the union to the corporation on the 11th September 1998 directed in particular to the management it read in extenso as follows:

"Re: Salary Increment Agreement Implementation "

I have been mandated by the membership of our union to address this letter to you. At the outset we would like to place the following on record:

1. During June 1998 Management gave the go ahead for Salary Increment Negotiations to begin. To this end management appointed its negotiating team which was led by Mr. J.V. Dlamini, the Human Resources Manager.

2. Our team was led by Mr. N. Sikhondze (President).

3. At all material times it was understood by the parties, as has been the case last year, that whatever agreement that would be reached would be binding upon them.

4. On the 8th July 1998 an agreement was reached and increment were agreed at 8.5% across the board.

5. To our membership's dismay, the agreement had not been implemented at the time salaries for the month of July 1998 were paid.

6. The Management Negotiating Team was approached and the explanation given by it was that the Board of Directors had not met.

7. During August 1998 we were informed that the Board had approved the increments.

8. On or about the 18th August 1998, the Acting Director called our team for a meeting and from that what transpired from that meeting, management was not prepared to honour the agreement. Indeed when salaries for the month of August 1998 were paid, the increments did not comply with the agreement in the following aspects;

8.1 Only management received the increment

8.2 No member of our union received the 8.5% increment

8.3 Whereas, the annual salary notch increment had been affected in April 1998 in August 1998 management sought to argue that 8.5% increment agreed upon was inclusive of the notch increments teams (sic) as it had not been the practice over the years.

9. On the 3rd of September 1998 the negotiating parties signed a memorandum of understanding to the effect that the management agreed upon were not inclusive of the notch increment. We have not yet heard any reaction from management to this memorandum.

We regard the agreement as legally binding and resent management's attitude in negotiating in bad faith.

Our membership is very anxious to have this matter settled soon and has mandated the executive to request you to confirm in writing within 48hrs that:

1. The 8.5% increment will be paid at the end of September 1998 backdated to April 1998.

2. The annual notch increment are irrelevant and unconnected with the agreed increments, unless we receive such communication as we have requested we shall embark on any course of action that the law may permit.

Yours in unity,

.....(Signed).....

Eric Lucky Ndlovu

cc. Chief Negotiator.

As it has been pointed out earlier in the course of this judgement that the allegations contained in this letter were not challenged at all by management not even a courtesy of a reply to it was extended to the union. It is trite in law that unchallenged testimony is taken as admitted by the other side.

Mr. Mamba for the applicant further argued that Mr. Bhembe who deposed to the Corporation answering affidavit can be likened to a stranger who tells the court hearsay evidence. I must state I ma inclined to agree with Mr. Mamba in this regard that the respondent's case would have gained some credence by the inclusion of one of the members of the negotiation team who was representing the respondent in the negotiations to shed more light on the issue. This was not done by the respondent.

The issue of the payment of the notches at the commencement of the negotiation as an incentive to open up the negotiation seem to me to be an afterthought on the part of the respondent. Why was annexure "E" not challenged in this regard?

It is my considered conclusion that the two documents to wit, annexure "B" and "C" are as clear as day and there is no ambiguity at all in what they mean. They simply mean the following:

1. 8.5% was awarded across the board.

2. The agreement was not intended to change the existing pay structure of the Swaziland Water Services Corporation.

3. Therefore, an implementation that includes revoking notches is contrary to the understanding of the JNC (Joint Negotiating Team) and cannot be a decision of the JNC.

The respondent cannot now be seen to cloud such a clear agreement by introducing other matters, which they failed to address in annexure "E". It is also noteworthy that according to paragraph 7 of annexure "E" which was not challenged by respondent the applicant stated as follows:

"7. During August 1998 we were informed that the Board had approved the increments"
In the result, I rule as follows:

1. The respondent is directed and ordered to implement 8.5% salary increase in favour of applicant's members in terms of an agreement dated 8th July 1998.

2. Respondent is directed that such increment be applied after implementation of the annual notch increment.

3. Respondent is directed to comply with orders (1) and (2) on or before 20th November 1998 and that such increments be backdated to April 1998

4. Respondent to pay the costs of this application.

S.B. MAPHALALA

JUDGE