IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CASE NO: 632/17

HELD AT MBABANE

In the matter between:

INNSTAFF SWAZILAND (PTY) LTD **APPLICANT**

And

SWAZI ECONOMIC IMPROVEMENT WORKERS'

UNION **1st RESPONDENT**

NOMCEBO SHONGWE N.O. **2nd RESPONDENT**

CONCILIATION MEDIATION &

ARBITRATION COMMISSION **3rd RESPONDENT**

Neutral Citation: *Innstaff Swaziland and Swazi Economic Improvement Workers Union & 2 Others [632/17] [2018] SZHC 35 (8 March 2018)*

Coram: **LANGWENYA, J.**

Heard: 8 November 2017, 19 January 2018

Delivered: 8 March, 2018

Summary: *Civil Procedure-review of arbitrator's award finding that Union had reached fifty percent threshold of unionisable workers at the employer's establishment. During conduct of verification count, arbitrator added and or deleted certain names in list provided by the employer-manner and reasons for so deleting and or adding names opaque-no record of proceedings filed- reason for not filing record given as the nature of the proceedings.*

Issue for determination-Section 42 (5) of the Industrial Relations Act (IRA) 2000-arbitrator misconceived nature of enquiry-Section 42 (5) of IRA calls for a two-pronged approach to wit-whether Union met fifty percent threshold of unionisable workers at employer's workplace- and whether the workers were fully paid up members of the Union-Award reviewed, corrected and set aside-matter sent to third respondent to start de novo before a different arbitrator.

Introduction

[1] The applicant, Innstaff Swaziland (Pty) Ltd (the employer) approached this court in terms of section 19 (5) of the Industrial Relations Act to review and set aside the arbitration award of the second respondent (the arbitrator) made under case number SWMB 402/16 dated 5 April 2017. In terms of the arbitration award, the arbitrator directed the applicant to grant the first respondent the Swazi Economic Improvement Workers' Union (SEIWU) (the trade union) recognition as a collective employee representative with effect from 5 April 2017 in accordance with section 42 (9) & (10) of the Industrial Relations Act 2000 (IRA) (as amended).

Ad Jurisdiction

[2] As indicated above, the application is brought in terms of section 19 (5) of the Industrial Relations Act, 2000 which provides the following:

> '*A decision or order of the Court or arbitrator shall at the request of any interested party, be subject to review by the High Court on grounds permissible at common law*'.

[3] The import of the above provision is that it arrogates exclusive jurisdiction to this Court to review an arbitrator's award in terms of the IRA and on

grounds ‘permissible at common law’. Doubtlessly, the present proceedings relate to the review of an award issued in terms of the IRA. I am of the view that the matter is properly before this court because all the jurisdictional issues and facts that bring this matter within the ambit of the IRA have been met; for that reason, this court is properly placed to consider the merits of the application for review.

Background

[4] On 7 November 2016, the first respondent (the Union) reported an unfair labour practice dispute of non-recognition by the applicant (the employer). The dispute was conciliated at the Conciliation Mediation and Arbitration Commission (CMAC) but was unresolved. In terms of section 42 (9) of the Industrial Relations Act (IRA)[1], the matter was referred to automatic arbitration for determination.

[5] On 8 February 2017 the parties presented themselves before the second respondent (the arbitrator) for a pre-arbitration meeting. It was at the pre-arbitration meeting that the Union lamented that despite meeting the fifty

[1] Industrial Relations Act, 2000.

percent threshold, the employer was refusing to grant it recognition. In rebuttal the employer argued that the Union did not meet the fifty percent threshold requirement. As a result of the dispute, it was agreed that the arbitrator should conduct a verification head count of all the employees of the applicant. It was agreed that the head count would take place on 17 February 2017 in terms of section 42 (6) of the IRA. Following the usual haggling and dilatory pattern in such matters, the head count was held on 28 February 2017.

[6] Consequent to the conduct of the verification count exercise, the arbitrator found that:-

> '*The verification count proceeded without any glitches and the results were as follows: the respondent (the applicant in the present proceedings) has a staff compliment of 462 (four hundred and sixty-two) employees. Of the 462 employees, 293 (two hundred and ninety-three) employees supported the Union and this translated to 63.42% of the employees in favour of the Union*'.

[7] Dissatisfied with the award, on 3 May 2017 the applicant approached this court seeking a review, correction and or setting aside of the arbitration award on the following grounds:-

1. That the arbitrator's award was reached arbitrarily, capriciously and or *mala fide* because she relied on an outdated list of applicant's employees to conduct the verification count; the arbitrator also added names to the list by hand.

2. That the arbitrator misconceived the nature of the discretion conferred upon her and took into account irrelevant considerations or ignored relevant ones through rushing to conduct a head count when she was aware that the stop order forms had proven that the Union had less than fifty percent membership within the applicant's establishment.

3. The arbitrator did not apply her mind as she failed to consider that the Union was irrelevant to the hospitality industry as the first respondent does not operate in the hospitality sector.

[8] In rebuttal, the first respondent argued that the arbitrator did not act capriciously as she followed a clear process which all parties had agreed to in conducting the verification count. What the clear process which all parties agreed to is, is unclear as there is no record of proceedings. It was the contention of the first respondent that the arbitrator correctly determined that the Union had 63.42% membership within the establishment of the applicant; that the figure of 63.42% membership was not arrived at arbitrarily as calculations were done by each party on 3 March 2017 and not by the arbitrator alone. The Union averred that the arbitrator added names of certain employees that were omitted in the list she was given by the applicant. There was therefore no malice on the part of the arbitrator but to ensure that the names of the workers reflected in a stop order form were also reflected in the list submitted by the applicant.

Absence of Record of Proceedings on Review

[9] Through a notice of motion, the applicant approached this Court to have the award made by the second respondent reviewed, corrected and or set aside. The applicant asked that the second and third respondents be directed to file

and serve the applicant with a record of arbitration proceedings. It is the latter request that I will deal with briefly.

Review proceedings are regulated by Rule 53 of the High Court which requires:

> '*…the presiding officer…to dispatch…to the Registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he by law required or desires to give or make, and to notify the applicant that he has done so*[2]'.

[10] The second and third respondents had to make available to the Registrar the record of the arbitration proceedings for purposes of review. Rule 53, in my view is aimed at promoting uniformity and consistency in practice and procedure as it sets the guidelines on standards of conduct expected of those who practice and litigate at the High Court on review of administrative and other tribunals. In the case of review proceedings from the third respondents, Rule 53 promotes the statutory imperative of expeditious dispute resolution. The Rules of the High Court are binding and should be adhered to and they are not to be adhered to or ignored by parties at their convenience.

[2] Rule 53 (1) (a) of the High Court, 1969

[11] In the present matter, the record of arbitration proceedings was not filed and no reasons were given for not filing same. This Court had to make an order directing the second and third respondent to file the record before an explanation was proffered by the second respondent. The explanation was by way of a confirmatory affidavit deposed to by the second respondent and filed in Court on 30 January 2018. In it the second respondent states as follows:

> '*This affidavit is filed for purposes of giving light to the court as to the conduct of proceedings in the said matter as no electronic recording was done due to the nature of proceedings*'.

[12] The effect of the arbitrator's explanation is that no record of proceedings was filed for purposes of this review. The grounds of review are not confined to the conduct of the verification count as the appellant complains that the arbitrator was aware that the stop order forms of employees in applicant's employer were below the fifty percent threshold. This is information that may or may not have been canvassed at the pre-arbitration meeting. There is no explanation why the record of the pre-arbitration proceedings was not compiled particularly because the arbitrator makes passing reference to same in her award.

Reliance on Outdated List to Conduct Verification Exercise

[13] The applicant complains that the decision of the arbitrator was reached arbitrarily as the process leading to her decision was marred by numerous irregularities[3]. The first irregularity is that the arbitrator relied on an outdated list to conduct the verification exercise. The list contained names of employees who had since left the applicant's employ and therefore ought not to have been counted during the verification exercise. When the anomaly was brought to the attention of the arbitrator by the applicant, the former ignored the complaint[4]. Added to the mix and compounding the matter is the fact that the arbitrator also added names of employees who were in the list already and others who had left the applicant's employ; the arbitrator's explanation was that the employees had been omitted from the list she was using[5].

[3] Applicant's Founding Affidavit, Paragraph 10.1.
[4] Applicant's Founding Affidavit, Paragraph 10.2.
[5] Applicant's Founding Affidavit, Paragraph 10.2.1

[14] The applicant, it would appear provided the so called outdated list on the basis of which the verification count was conducted. At the pre-arbitration meeting the arbitrator states that she requested the applicant to supply her with an excel list so that she could arrange the names in an alphabetical order. The Human Resource Operations Site Manager who is the deponent to the applicant's founding affidavit could not provide same as, he is said to have explained that the list would have to be sourced from their head office in South Africa. Why the applicant could not, in due course secure a current list from its head office in South Africa is unclear. What is clear is that the arbitrator was not responsible for providing the list of employees-the applicant was. If the applicant did not furnish the arbitrator with a current list, it has itself to blame. In my view, the applicant's complaint about an outdated list while not lacking in ingenuity is utterly without merit.

[15] The applicant laments further that the arbitrator acted in a capricious and arbitrary manner when, during the verification exercise she added names of employees who were already in the list and others who had left the applicant's employ resulting in the double counting of some of the employees. The arbitrator's explanation in this regard is that the Union complained about a number of employees whose names did not appear on the list supplied by the

applicants. After comparing and cross-referencing the names of the employees as reflected in the stop order forms, the arbitrator added the omitted names to the list. Where the parties pointed out that there was a duplication of names of employees, those names were deleted from the list and not double-counted. In support of the arbitrator's version, the Union states that the verification count was conducted in accordance with a clear process agreed to by all parties. The Union points out that the arbitrator only added employees' names which did not appear on the list but were reflected in the stop order forms.

[16] In the award, the arbitrator states as follows:

> '*From documents contained in the file it remains clear and undisputed by the respondents [the applicants in the current proceedings] that the applicant union [the first respondent in the current proceedings] meets the statutory requirements the only glitch is with regards to the validity of some of the stop order forms (signatures)*[6]*'*.

[17] This Court is of the view that the arbitrator committed an irregularity to conclude that the Union met the statutory requirements while at the same

[6] Page 24 of the Book of Pleadings, Para 5.3 of the arbitrator's award.

time acknowledging that some of the stop order forms had questionable signatures. The fact that the arbitrator added and or deleted some of the names from the list casts doubt on the whole process because it is not stated whose name(s) were added or deleted from the list; how many such names were added and or deleted from the list and whether the parties met and agreed on the computation of the numbers. It is also not helping that there is no record of proceedings against which the assertions by the parties can be weighed.

[18] It may well be the case that the parties agreed to a procedure to be followed in the conduct of the verification exercise; that certain names of the employees were for one reason or another added and or deleted from the list; that the reasons for adding and or deleting the said names of the employees were (in)valid; that there was no malice or caprice on the part of the arbitrator when adding and or deleting certain names from the list but all these issues cannot be assessed by a reviewing court in the absence of a record of proceedings. In my view, whatever procedure was followed in the conduct of this matter was both opaque and not discernable from the award.

[19] Notably in her award, the arbitrator makes no reference to the complaint of adding names to the 'outdated' list she used for the conduct of the verification exercise. The explanation from the arbitrator comes late in the day when the applicant cannot respond to or rebut same- in response to an order of this Court dated 19 January 2018[7]. The explanation of the arbitrator is contained in a confirmatory affidavit filed in this court on 30 January 2018 and she says the following:

'*[11] Notably, after the results were issued, the respondent raised objections with regards to the list of employee names that they issued which was used for the head count claiming that the list was outdated. At the pre-arbitration meeting I had requested that they supply us with an excel list so that I could sort it alphabetically so as not to waste time when conducting the exercise and the response I got from the respondent's managers being the Human Resources Operations site manager, one Andile Mciza, and Ms. Nomabizo Mthethwa, the respondent's site manager, in the presence of Union officials was that it would not be possible to obtain one at that time as they would have to request it from their Head office in South Africa.*

[12] I was taken aback when the results were announced that they started disputing the validity of the list which was supplied by Innstaff

[7] The Court ordered the second and third respondents to file in court and serve the applicant with a record of arbitration proceedings concerning the matter under consideration on or before Friday 2 February 2018 and thereafter to notify the Registrar that she has done so.

Swd (Pty) Ltd and they only questioned its legitimacy after the results were issued when both representatives were present during the head count and made no objection to the fact that we were counting against the total number of employees on the list as supplied by themselves.

[13] Further, I wish to clarify that the Union had raised an issue of a number of employees whose names did not appear on this list. After having satisfied myself that in respect of their stop order forms their names were added by myself on the list. Where however, the parties pointed out that there was a duplication, those names were deleted from the list'.

[20] The first respondent's answer to the applicant's lamentation is that the verification count was based on the so-called 'outdated' list supplied by the applicant. It is the first respondent's contention that during the verification count the applicant added names of employees who were omitted on the list. The first respondent avers further that:-

'*[13.4]…May I further submit that the (sic) employee that were handwritten by arbitrator were in fact available in the list and just that at the time of conducting the head count she could not locate the names. The fact that they do appear on the list was pointed out to*

the arbitrator adjusted by the applicant on the 3rd of March, 2017 and figures were accordingly[8]'.

[21] In the absence of a record of proceedings of the arbitration it is difficult to say whose version is correct. When the application to have the matter reviewed by this Court was initiated, the applicant requested that the second and third respondents be directed to file the record of proceedings. Instead of the record being filed, the second respondent filed a confirmatory affidavit stating that 'no electronic recording was done due to the nature of the proceedings[9]'. On what law this is premised, is unclear.

[22] What is clear is that there is a dispute about the list of employees and the manner the verification count was conducted. A record of proceedings could have gone a long way to clear the matter. The failure to produce a record of proceedings before the arbitrator is, in my respectful view irregular.

Arbitrator's Failure to apply her Mind

[8] Page 42, Book of Pleadings, First respondent's answering affidavit, para 13.4.
[9] Second Respondent's Confirmatory Affidavit, paragraph 4.

[23] The applicant complains that the arbitrator misconstrued the nature of the discretion conferred upon her by taking into account irrelevant considerations and ignoring relevant ones. This, the arbitrator did by rushing to conduct a head count when she was aware that the stop order forms had proven that the Union had less than fifty percent membership within the applicant's establishment. Put differently, the applicant argues that relevant information that is favourable to the applicant was given less weight and that which was not favourable to the applicant was given high and undue weight. However a weighty issue this might be to the applicant, this contention does not add any weight to the applicant's case.

[24] In my respectful opinion, it is up to the arbitrator who knows what she desires to achieve to decide what information to collect and what weight of importance and relevance to put on each information or facts placed before her when deciding. Accordingly, it would be unjustifiably presumptious for the Court to prescribe to the arbitrator what information to collect in the decision making process and what weight of importance and relevance to place on each piece of information collected. If the Court did that, it would not only be appropriating to itself powers it does not have but it would also

be overstretching-without justification the Court's power to control the arbitrator's decision making. This, the court will be loath to do.

Dispute Determined by Arbitrator

[25] An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of the dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined[10].

[26] What is a 'dispute' per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about non-recognition of a trade union requires, at minimum a difference of opinion about: whether or not the trade union has attained fifty percent membership of the employees in respect of which it seeks recognition; and whether such employees are fully paid up for the trade union to be granted recognition[11].

Section 42 (5) of the IRA states as follows:-

[10] Mouldings (Pty) Ltd (Wardlaw) (2007) 28 ILJ 1042 (LAC)
[11] Industrial Relations Act 2000, section 42 (5)

'*The employer shall recognise a trade union or staff association that has been issued with a certificate under section 27 if;*

(a) Fifty percent of the employees in respect of which a trade union or staff association seeks recognition ***are fully paid up members of the organisation***' (my emphasis).

Section 46 (6) of the IRA states as follows:-

'*For purposes of determining whether a trade union or staff association represents fifty percent of the employees in respect of which it seeks recognition, a stop-order form duly signed by the employee shall be sufficient proof that the employee is a full member of the Union, and in the case of any disagreement a head count shall be conducted*'.

[27] In a dispute concerned with recognition of trade unions within an employer's establishment, section 42 of the IRA is the guiding light. A union that seeks organizational rights must fulfill the requirements of section 42 (5) that is, it has to have fifty percent of members within the employer's company and such members must be fully paid up. Absent satisfaction of the requirements of section 42 (5) of the IRA, there can be no recognition of the Union[12].

[12] This is because the section uses peremptory language.

[28] A dispute of non-recognition of a trade union requires that the question of fifty percent membership and that of fully paid up members be decided by the arbitrator. Section 42 (5) calls for a two-pronged enquiry namely; whether the Union met the fifty percent threshold of unionisable workers at the employer's workplace, and whether the workers were fully paid up members of the Union. With due respect, in the present matter, and in her stating the issue for determination, the arbitrator does not seem to have appreciated the double-barrel nature of the enquiry.

[29] In stating the issue for determination, the arbitrator says she is required to determine '*whether the applicant union meets the fifty percent threshold specified by the statute*'. The arbitrator ends there. She does not enquire into whether the workers are fully paid up. It is my respectful view that the arbitrator misconceived the nature of the enquiry in the manner she articulated the requirements of section 42 (5) of the IRA on the question of non-recognition of trade unions. It is trite that once an arbitrator misconceives the nature of the enquiry, the conclusions reached by the arbitrator cannot by all accounts be reasonable and fall to be set aside.

[30] The reviewability of the award is not one where this Court should substitute its decision for that of the arbitrator. The irregularities that have been presented before this Court are procedural in nature. Another arbitrator should address the dispute afresh, give the parties a fair trial and prepare a record of the proceedings.

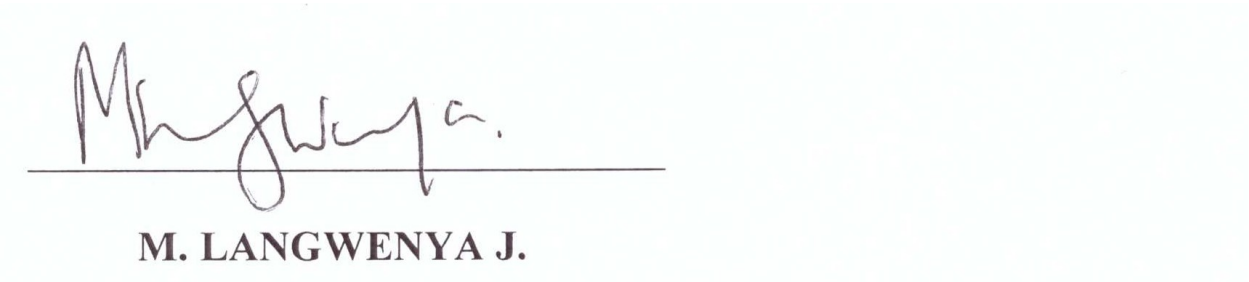
Order

[31] In light of the above, the following order is made:

i) The arbitration proceedings presided over by the second respondent on 5 April 2017 under Case No. SWMB 402/16 are hereby reviewed, corrected and set aside.

ii) The matter is referred back to the third respondent to start *de novo* before a different arbitrator.

iii) There shall be no order as to costs.



M. LANGWENYA J.

For the Applicant : Mr. C. Bhembe

For the first Respondents : Mr. A. Ndwandwe