IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 303/2004

In the matter between:

Y. K. K. SOUTHERN AFRICA (PTY) LTD APPLICANT

and

SWAZILAND MANUFACTURING AND

ALLIED WORKERS UNION RESPONDENT

CORAM:

NDERINDUMA: PRESIDENT

JOSIAH YENDE:MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: ADV. DAVE SMITH

FOR RESPONDENT :NDUMISO MTETWA

J U D G E M E N T - 16/11/05

The Applicant is YKK Southern Africa (Pty) Ltd, a company duly incorporated according to the company laws of Swaziland with its principal place of business situate at King Sobhuza 11 Avenue Matsapha Industrial sites Swaziland. The Respondent on the other hand is Swaziland Manufacturing and Allied Workers Union, a trade union registered as such in terms of Section 27 of the Industrial Relations Act No. 1 of 2000. The Respondent is recognized as the sole bargaining agent for the unionisable employees of the Applicant in terms of a Recognition Agreement entered into between the Applicant and the Respondent on the 19th January 1998.

ISSUES IN DISPUTE

On the 25th November 2003, the Respondent wrote a letter to the Applicant calling for a meeting on the 4th and 5th December 2003 to discuss interalia the wage increment to its members for the year 2004. To the letter was attached a draft Collective Agreement for the year 2004 for YKK, which is annexure 'B' to the application.

For the purposes of this application, only clause 2 of the proposed Collective Agreement for the year 2004 for YKK is relevant. The same reads as follows:

2.WAGES:

2.1 An across the board increment of 15% shall be paid by the employer.

The Applicant at a time and in a manner that remains contentious made a counter proposal to the Draft submitted by the Respondent as follows in a document entitled: "Wages Negotiations Proposals and Responses". The same is at page 16 of the Book of Pleadings and is annexure 'C' to the application.

Item 2 thereof reads:

" Wages; we have offered 4.5% across the Board".

Whereas it is alleged by the Applicant that the contents of this document constituted its counter proposal to the Draft Collective Agreement; and that these proposals were presented to the Respondent at the negotiation meetings held on the 10 and ll^{tri} December 2003 between the parties; the Respondent has maintained that they saw this document for the first time at the meeting held between the parties on the 29th April 2004,

This being the case, so the Respondent has argued, the Applicant's proposal was time barred in terms of Article 5 (2) of the Collective Agreement in that the said clause provides:

"Article 5 (2)

(a) Negotiations will be by way of the union submitting a Memorandum of Agreement to the employer;

(b) If the employer feels like offering or adjusting anything in the submitted Memorandum, he shall within 21 (twenty-one) days submit his memorandum to the Executive of the union;

(c) If the period stipulated in (b) lapses without any submission made by the employer, the memorandum submitted by the union shall be effective; and

(d) Shall be signed by both parties as valid agreement".

Consequently the Respondent argues that the Applicant having failed to submit its counter proposal to the proposed wage increment timeously is bound by Clause 5 (2) to implement the Respondent's proposal of 15% across the board without any alterations or adjustments.

On the contrary, the Applicant has pleaded that it submitted its counter-proposal of 4.5% at the meeting of the 10th and 11th December 2003, and within the 21 days period provided by Article 5 (2) of the Collective Agreement. That the Respondent rejected the counter proposal.

Furthermore, the said demand of 15% wage increment across the Board is both unrealistic and unreasonable for the following reasons:

1. The Applicant had in the year 2003 implemented a job grading exercise, the result of which was a wage increment of an average 11.12% across the board with effect from the end of February 2004.

2. That the projected inflationary rate for the year 2004 was a mere 3.7% and the proposed 4.5% increment was well above that

3. That the Consumer Price Index (CPI) which is very relevant to the determination of reasonable wage increments had averaged 8.4% in the year 2002, 6.8% in 2003, 4.3% in 2004 and 3.7% up to July 2005. For this reason, the offer of 4.5% was close to reality than the demand by the union.

4. That the Rand had markedly strengthened against the Dollar with a resultant substantial drop in turnover and profit margins bearing in mind that 46% of all goods manufactured by the Applicant were exported and paid for in Dollars.

This fluctuation was demonstrated by exhibit B as follows:

4.2.1 Jan to Dec 2002 - R10.52

4.2.2 Jan to Dec 2003 - R 7.56

4.2.3 Jan to Dec. 2004- R 6.46

4.2.4 Jan to August 2005 - R 6.30

5.That as a result of the drop in turnover the Applicant was not operating profitably and was incurring increased losses from year to year as was demonstrated in the financial statements produced before court as follows:

5.1 1991- Profit E827,829 - Exhibit 'D' pg 7

5.1.2 2000- Loss Rl,300,356 - Exhibit 'D' pg 7

5.1.3 2001 - Profit R4,704,633 - Exhibit F-' pg9

5.1.4 2002 - Profit R3,017,727- Exhibit 'E'pg9

5.1.5 2003 - Loss R2,735,256 - Exhibit' F 'pg 5.

5.1.6 2004 - Loss Rl,410,034 - Exhibit 'F 'pg 1

5.1.7 2005 - Loss R3,067,319 Exhibit 'G 'pg 6

(Until 30th June 2005).

A submission surprisingly made by the Applicant which appears to be in favour of the Respondent's demand for a 15% pay rise is the demonstrated trend of annual wage increments by the company to the employees over the past 7 (seven) years as follows:

6.1 1998- 12%

6.2 1999- 8.5%

6.3 2000- 10%

6.4 2001- 14.5%

6.5 2002- 14.5%

6.6 2003- 15%

6.7 2004- 4.5% (increase offered).

In this respect the court notes the following:

In the year 2000 inspite of the loss of Rl$_7$300.356 experienced by the Applicant, the company awarded a 10% wage increment across the Board. In the year 2003, the company experienced a big loss of R2,735.256 but went ahead to grant 15% wage increment across the board. It would not be far fetched to say that there is a lack of correlation between the loss and profit margins experienced by the Applicant in the years under review with the wage increments awarded to the workers across the board for each specific year.

This trend must have played a big role in the general attitude of the union and its approach to the wage negotiations at the meeting of the 29th April 2004. The expectations of the Respondent were high and

for reasons discernable from the general trend of wage increments at the undertaking.

The wage increments seem to have disregarded the consumer price index, the inflationary trends and the actual profit/loss margins experienced by the company during the period under review.

The Applicant has strongly argued for the offer of 4.5 % across the Board for the years 2004 and 2005 on the basis that on the 28th February 2004, the Applicant had given an increase to all its employees pursuant to a job grading exercise that resulted in an average weekly wage increment of 11.12%.

The Respondent has confirmed this submission through the evidence of Mr. Nene, the Executive Officer of the Union and documentation presented to court to the effect that the adjustments referred to were part of a long overdue Grading System and did not constitute wage negotiations for the year 2004.

This position is captured in paragraph 1 of exhibit 64 in the Book of Pleadings as follows:

"YKK SOUTHERN AFRICA (PTY) LTD JOB GRADING AGREEMENT

1.This adjustment is part of Grading System not wage negotiations for 2004".

It was strongly argued for the Respondent that the court should completely disregard this grading

exercise in arriving at the reasonable wage increment for the year 2004 and 2005 therefore.

The court also notes the contents of paragraph 6 of the said agreement which reads as follows:

"5 starting Monday the 16th February 2004, new spirit of cooperation will happen between shop floor and management to improve this company and to try and solve past and future problems".

The projection by the parties as captured in the agreement was positive and the court can only hope the spirit will endure regardless of the outcome of this suit.

The Respondent in its pleadings and the submissions by Mr. Mtetwa has pressed for the upholding of Clause 5 (2) of the Recognition Agreement by disregarding all the evidence by the Applicant on the financial status of the company during the years under review.

That the court would be undermining the process of collective bargaining and agreements entered into by the parties, if it considered the proposals made by the Applicant outside the 21 days limit set by Clause 5 (2).

Mr. Mtetwa submitted further that the contents of the financial statements presented to court by Mr. Taylor are not in dispute, but at the meeting of 29th April 2004, Mr. Taylor acting in bad faith had denied the union access to the financial statements.

Mr. Taylor in his testimony conceded that in hind sight, he ought not to have withheld the financial statements to the union. He conceded further that had he provided all the documentation availed to the court but not given to the Respondent during the negotiations maybe the issue of wage increment would have been resolved at the table.

Though the court commends Mr. Taylor for his candid concession, the court must point out that withholding audited statements from the union during negotiations is not in keeping with agreements between the Applicant and the Respondent and is in violation of the labour laws of Swaziland as found in numerous decided cases of this court and the Industrial Court of Appeal. This is also contrary to the letter and spirit of Clause 30 of the Code of Practice promulgated in terms of Section 109 of the Industrial Relations Act No. 1 of 2000 as follows:

"Disclosure of Information:

30 For collective bargaining to be conducted realistically, responsibly and in good faith, it is necessary for bom parties to have adequate information on the matters being discussed. Management should be prepared to meet all reasonable requests from employee organizations for information relative to planned negotiations. In particular it should make available, in convenient form, information supplied to shareholders or published in annual reports".

The Applicant was therefore wrong to withhold the audited financial reports during the negotiations and by so doing contributed significantly to the deadlock that resulted on the issue of the wage negotiations.

The Respondent motivated its demand for a 15% increment across the board by submitting further that as appears from the minutes of the 29th April 2004, one of its members by the name of Ndumiso Magongo had been awarded a 15% increment for the year 2004.

This issue was not put to the two witnesses of the Applicant (Mr. Taylor the General manager and Mr. Simon Magagula the Human Resources Manager) for them to explain to the court if indeed this took place and under what circumstances. The Applicant was therefore not presented with an opportunity to deal with this issue. This being the case, the court will disregard the same in weighing up the probabilities in this case.

It is significant to note that the Respondent did not question the audited financial statements of the Applicant indicating that the Applicant made significant losses in the year 2004 up to and including June 2005. The CPI figures and the Rand/Dollar exchange rates were equally not challenged by Mr. Nene for the Respondent and counsel for the Respondent.

Were the court to find that the Applicant did not submit its counter-proposal to the wage demand by the Respondent within 21 days in terms of clause 5 (2) of the Collective Agreement between the parties, the matter will be at an end, and the Applicant would be bound to grant the 15% wage award across the board.

In the event the court finds that the counter proposal was submitted on the 10th and 11th of December 2005, then it would have to consider all the evidence by the witnesses and the relevant documentation

to arrive at an equitable and fair wage increment across the board for the years 2004 and 2005.

For convenience I will first dispose off with the issue as to whether the Applicant presented its proposal to the Respondent within 21 days in terms of Clause 5 (2) of the Collective Agreement.

This is strictly a factual question that must be determined with regard to the evidence of Andrew Taylor and Simon Magagula for the Applicant and that of Chris Solomon Nene, the Chief Negotiator and Executive Member of the Respondent.

Both Mr. Taylor and Mr. Magagula consistently told the court that the comprehensive response contained in annexure "C to the application to the demands of the Respondent contained in annexure 'B' to the application was tabled and discussed at the meetings of the 10th and 11th December 2003. Mr. Nene on the other hand insisted that the Respondent saw this document and therefore the counter proposal to its demand for the first time at the meeting of the 29th April 2004.

Mr. Nene went on to explain that annexure C was presented by Mr. Taylor at the meeting in response to the Respondent's request for the minutes of the meeting held on the 11th December 2003.

The Applicant responded by saying that no minutes were kept of that meeting except for notes that could be made available. The Applicant went ahead to present annexure 'C' to the union as the notes that had been made during the last meeting. He therefore denied that annexure 'C' was a counter

proposal to the union demands given to them on the 10th and 11th December 2003.

A closer look at document 'C' shows that the contents thereof represent a blow by blow response by the Applicant to the demands by the Respondent contained in annexure 'B'. If this was not a prepared response to the demands by the Respondent and constitutes notes that were taken at the meetings of the 10th and 11th December 2003, then one thing is certain; the Applicant had made a counter proposal in those meetings to all the demands of the Respondent. One of those demands was an award of 15% salary increment across the Board. This was met by a counter proposal by the Applicant of 4.5% across the Board. It being common cause that the demand had been made on the 25th November 2003, it is a foregone conclusion that the counter proposal made at the meeting of the 10th and 11th December 2003 was within the 21 days limit set in terms of Clause 5 (2) of the Collective Agreement.

The conduct of the Respondent in attending the meeting of February 2004, to discuss the issues named in the Memorandum dated 25th November 2003; attending the meeting of 29th April 2004 to discuss the same issues; not taking any steps to enforce implementation of its demand in terms of Clause 5 (2) of the Collective Agreement and reporting a dispute to the Commissioner of Labour on the 3rd May 2004 leads to the inevitable inference that the issue as to what wage percentage was to be awarded across the board for the year 2004, was very much alive. The issue of the time bar is an afterthought by the Respondent that runs counter to its own conduct in the circumstances.

It is thus unnecessary for the court to delve into any details regarding the construction of Clause 5 (2)

of the Collective agreement.

The next issue that falls to be determined by the court is the quantum of the annual wage increment to the members of the Respondent for the years 2004 and 2005. We have herein before delved into the competing evidence and submissions by the parties on this issue.

The court is satisfied that the Respondent did not challenge the financial evidence before the court. This evidence underpins the Applicant's case for a 4.5% increment across the board for the years 2004 and 2005. This is the evidence that was not availed the Respondent during the negotiations.

The evidence in summary comprises of the consumer price index for the years 2002 to July 2005; the strengthening of the Rand against the Dollar between the period January 2002, to August 2005 and the financial statements for the Applicant company between the years 1999 to June 2005.

The thrust of the Applicant's case was that for the last three years under review i.e. 2003 to 2005 it had experienced massive financial losses, mainly due to the strengthening of the Rand against the Dollar with a resultant substantial drop in turn over and profit margins. This was because 46% of all the goods manufactured by the Applicant were exported and paid for in Dollars. This situation was juxtaposed against a climate of a consistent decline in the CPI as earlier demonstrated. It was not in dispute therefore that the inflationary rate in Swaziland for the period under review had continued to decline.

In her book, Industrial Relations in South Africa 2nd Edition at page 205 Sonia Bendixstates the

following:

"In wage negotiations, economic conditions are of a particular importance. Thus negotiators need to take cognizance of inflation levels, cost of living indices, levels of economic activity, business cycles, industry trends, economic forecasts,

unemployment levels and the general position of the labour market..... The following statistical indicators are most frequently used during substantive negotiations".

In this respect, the court will reiterate the necessity of the employer to avail all necessary data, and expertise during negotiations to enable the union to make an informed stand. The employer cannot and should not withhold vital information and at the same time expect the union to make a reasonable demand in the proceedings. The employer cannot have its cake and eat it at the same time.

This approach is supported by the decision in the case of Durban City Council v Durban Integrated Employees Society f!990^ 11IL3 619 as follows:

"Factors to be considered include statistical material concerning the cost of living although this material should not be mechanically applied, market factors, even where the enterprise is a municipality and does not compete in the commercial market; the effect of inflation on wages and wages paid by similar enterprises".

During the trial, though no evidence was adduced, it was alluded by the Applicant that it was one of the

better paying undertakings in the textile industry.

To counter this the Respondent adduced the evidence of one Sarah Mkhabela a machine operator. She testified that she had worked for the Applicant as a machine operator for the past 23 (twenty three) years. She produced her pay slip that showed that she earned E502.16 (Five Hundred and Two Emalangeni Sixteen Cents) per week. This translates to El,004.32 (One Thousand and Four Emalangeni and Thirty Two Cents) per fortnight.

She contended that in terms of the Regulation of Wages (Manufacturing and Processing Industry) Order of 2004, the basic minimum wage she was supposed to earn as a machine operator was E950.32 (Nine Hundred and Fifty Emalangeni Thirty Two Cents). This translated to El,900.94 (One Thousand Nine Hundred Emalangeni and Ninety Four Cents) per fortnight.

This evidence was not seriously challenged by the Applicant. The court notes that if indeed this be the case, then it is damning evidence against the Applicant regarding its compliance with the laws of the country. This however is not the case that falls to be determined by the court in casu. It was however, a useful arrow by the Respondent in its quiver.

It is not everyday that the court is asked to step into the shoes of a reputable employer to determine a wage increment across the board for a very large work force of 170 employees.

That the Applicant left a matter of such magnitude and implication into the hands of the court, is an

indication of the level of trust that the employers in Swaziland have placed on the Industrial Court.

The trust arid confidence bestowed over the years on the court by its users, should be jealously guarded. This will happen provided the court continues to discharge justice to all even handedly, upholding the law, whilst at the same time dispensing equity. Only then shall the court be truly, the guardian of harmony, growth, continuity and tranquility at every workplace in Swaziland.

Having said that, with due regard to the evidence before us, especially the following; the inflationary trends and levels, the financial statements of the Applicant; the annual wage increments across the board from 1999 to 2003; the continued strengthening of the Rand vis avis the dollar and its effect on the export of goods manufactured by the Applicant; the job grading exercise that resulted in an average 11.12% increment across the board in 2004 and the Minimum Wage Regulations in place in the industry inter alia;

The Court awards a 6.5% increment across the board for the year 2004 and 2005 to the employees of the Applicant (YKK) in the Respondent's bargaining unit.

For the role the Applicant played in the impasse due to its failure to provide the financial statements to the Respondent during negotiations, the Applicant will pay the costs of the application.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT