IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 41/2007**

In the matter between:

SABELO MNCINA **Applicant**

and

ELLERINES FURNISHERS T/A TOWN TALK **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. SIMELANE**
FOR RESPONDENT	**:**	**S. THOMPSON**

J U D G E M E N T - 20/02/2007

1. The Applicant is a full-time sales advisor employed at the Piggs Peak branch of Ellerines Furnishers (Pty) Ltd, a furniture retail company.

2. As a sales advisor, the Applicant is paid a monthly retainer and a monthly commission based on total normal sales achieved in a sales trading month. To earn his commission, the Applicant must

achieve an established sales target.

3. The Applicant has approached the court on a certificate of urgency, complaining that the Respondent has unlawfully penalized him because on two occasions he did not achieve his monthly sales target. He alleges that in January 2007 the Respondent gave him a written warning, and cut his basic salary or retainer by the sum of E2059.00. This was done without any prior disciplinary hearing.

4. A perusal of the Applicant's salary advice for January 2007 confirms that the Respondent reduced the Applicant's retainer from E3259.00 to E1200.00. After further deduction of statutory and other normal monthly remittances and tax, the Applicant received no net pay whatsoever, and is in fact indebted to the Respondent in the sum of E62.50.

5. The Applicant complains that he is unable to support his dependants or himself as a result of the deduction from his basic salary. He submits that the matter is urgent and he should be excused from following the preliminary dispute resolution procedures prescribed by Part V111 of the Industrial Relations Act 2000. He seeks an order:

   5.1 *Condoning the non compliance with the Rules of this Honourable Court as to service and time limits and enrolling the matter on urgency.*

   5.2 *Declaring the deduction of the Applicant's wages amounting to E1996.50 as unlawful therefore null and void.*

5.3 *Directing the Respondent to pay with immediate effect the Applicant the amount of E1996.50 withheld from his wages.*

5.4 *Costs of suit.*

6. The Respondent opposes the Application. In an answering affidavit attested by one Francois Nel, the Respondent's Industrial Relations Manager, the Respondent sets up the following defence:

6.1 The Applicant has failed to disclose to the court certain relevant and material terms of his contract of employment, including terms contained in a collective agreement entered into between the Respondent and the Commercial & Allied Workers Union of Swaziland ("CAWUSWA") registered by the Industrial Court of Swaziland in October 2005.

6.2 The terms in question permit and authorize the Respondent to reduce the Applicant's retainer to E1200.00 and give him a written warning for failing to achieve his target.

6.3 Since the collective agreement was registered by the Industrial Court without objection, the terms must be regarded as lawful and fair.

6.4 The Respondent acted lawfully in terms of the

Applicant's employment contract in issuing a written warning and reducing the Applicant's retainer.

6.5 The Applicant should have joined CAWUSWA as an interested party since he is challenging the terms of a collective agreement to which CAWUSWA is a party.

7. On 3rd June 2004, the Applicant signed a contractual document in terms of which he authorized the Respondent to implement certain procedures whenever he failed to meet the minimum sales target set by the Respondent.

8. The procedures agreed to by the Applicant were subsequently incorporated into a collective agreement entered into between the Respondent and CAWUSWA on the 26th October 2005.

9. The relevant terms of the agreement relating to such procedures are set out as follows:

"16.7.3 Sales Advisors that entered into an individual agreement with the COMPANY in terms of the Note under 16.1 above, and all newly appointed sales advisors shall be assured of a minimum remuneration of E1,200.00 per month being paid, subject to the provisions of the COMPANY Sales Correction and Discipline Regarding Sub-Standard Sales Performance being applied as follows:

16.7.3.1 *Sub-standard performance (1st month): The normal retainer of E3,108.00 is payable and an additional 1-month sales training will be provided to the affected Sales Advisor.*

Note: Sales performance of below E38,861.00 is subject to re-training/correction/discipline in terms of the COMPANY Sales Advisor Correction And Discipline Regarding Sub-Standard Sales Performance.

16.7.3.2 *Sub-standard performance (2nd month): The normal retainer of E3,108.88 is payable and no disciplinary action will be taken, because the additional 1-month sales training given during the preceding month is viewed as mitigation for this month's sub-standard performance.*

16.7.3.3 *Sub-standard performance (3rd month): A reduced retainer of E1,200.00 plus 8%*

commission for sales in excess of E15,000.00 is payable, and a Written Warning will be issued for sub-standard sales performance.

Note: The PARTIES have mutually agreed to the minimum of E1,200.00 per month in order to prevent unnecessary job loss. To this end the PARTIES record that should it be necessary they will jointly make representation to the Swaziland Minister of Labour to endorse this negotiated provision.

16.7.3.4 *Sub-standard performance (4th month): A reduced retainer of E1,200.00 plus 8% commission for sales in excess of E15,000.00 is payable and a Final Written Warning will be issued for sub-standard sales performance.*

16.7.3.5 *Sub-standard performance (5th month): A reduced retainer of E1,200.00 plus 8% commission for sales in excess of E15,000.00 is*

7 *payable and a Disciplinary Enquiry to be conducted for sub-standard sales performance, which enquiry may lead to a dismissal for continuous sub-standard sales performance.*

Note: Should it at any stage be established that the additional 1 month sales training referred to in 16.7.3.1 above had been given longer than 6 months before, then no reduced retainer or disciplinary action will apply. The Sales Advisor will then revert back to the 1 month sales training whilst earning the normal retainer of E3108.88 for that month."

17 The collective agreement was registered by the Industrial Court in October 2005 in terms of the provisions of section 56 of the Industrial Relations Act 2000 (as amended).

18 By virtue of the registration of a collective agreement, the terms and conditions contained therein are deemed to be terms and conditions of the individual contracts of employment of all unionisable employees covered by the agreement. It is common cause that the Applicant is one such employee.

19 The collective agreement covered the period 1 July 2005 to 30 June 2006. On the 25th October 2006 the Respondent wrote to the Applicant in the following terms:

"Due to the fact that the minimum sales target value has been increased as a result of the union negotiations concluded for the interim period 2006 to 2007, to E40,737.50 as from the 17th *October 2006, your monthly retainer have also been increased to E3,259.00 (effective 1 October 2006) in accordance to the INTERIM SUPLEMENTARY AGREEMENT COVERING THE 2006/2007 REMUNERATION AND CONDITIONS OF EMPLOYMENT OF NON-MANAGEMENT BARGAINING UNIT EMPLOYEES.*

The Sales Advisor correction retainer rate and sales target figures shall continue unaltered for the duration of the Interim 2006/2007 Remuneration Agreement."

20 The Respondent and CAWUSWA thus negotiated and agreed on an increase in the minimum sales target value and the monthly retainer for the 2006/2007 period, without signing and registering a fresh collective agreement for the 2006/2007 period. Nevertheless, since the terms and conditions of the 2005/2006 agreement were incorporated into the Applicant's individual contract of employment, they continue to govern his employment subject to the increase in target and retainer agreed to by CAWUSWA.

21 Prima facie then, the Respondent is contractually entitled to apply the procedures set out in its Sales Correction and Discipline Regarding Sub-standard Sales Performance when the Applicant fails to achieve his sales target in any particular month.

22 The Applicant's counsel advanced two reasons why the reduction of Applicant's retainer is unlawful notwithstanding the contractual provisions:

22.7 the Applicant failed to meet his target twice. In terms of the policy, it is only on the third occasion that sub-standard performance triggers the reduction in retainer. The penalty has been prematurely imposed.

22.8 the reduction of the retainer for sub-standard performance is prohibited by section 57(1) of the Employment Act 1980. The contractual provisions are therefore illegal and void.

The court shall address each of these arguments in turn.

23. It is common cause that the Applicant failed to meet his target twice only. In his opposing affidavit, the Respondent's Industrial Relations Manager states that the Applicant did not achieve his target for the sales month 17th September to 16th October 2006. He achieved his target for the following two months, but again failed to do so for the sales month 17th December 2006 to 16th January 2007.

24. In terms of the laid down contractual procedures, sub-standard performance for a second month does not attract disciplinary action. The normal retainer is payable, and no written warning is given. The action taken by the Respondent is only applicable in the event of sub-standard performance for a third month.

25. The Respondent explains its apparently premature disciplining of the Applicant by alleging that the Applicant refused to undergo the sales training prescribed in respect of the first occasion of sub-standard performance. This allegation is contained in the affidavit of the Industrial Relations Manager Mr. Nel. In a letter written to the

Applicant's attorney on 6th February 2007, the Respondent's Group Legal Executive frames the allegation as follows:

"Our Branch Manager advised that your client refuses to undergo training and also refuses to accept the documentation addressing his performance."

26. The Respondent's allegation that Applicant refused to undergo training is hearsay. Neither the Industrial Relations Manager nor the Group Legal Executive has any personal knowledge of the factual situation. No confirmatory affidavit has been furnished by the Branch Manager. The Applicant vehemently denies the allegation. He states that he was never at any stage called for training. In the circumstances, the Respondent's allegation has not been proved.

27. In any event, the Sales Correction and Discipline Procedures do not authorise the Respondent to skip the prescribed second sub-standard month procedures if an employee refuses to undergo training after the first month of sub-standard performance. The Procedures already constitute a substantial inroad into the rights of an employee with regard to discipline for poor work performance. The Respondent cannot unilaterally make further inroads which have not been specifically agreed to by the Applicant or his union representatives. *A fortiori* where no proper enquiry has been held to ascertain whether the Applicant has indeed refused training.

28. The court finds that the reduction of the Applicant's retainer after his second month of sub-standard performance is not in accordance with the agreed contractual procedures and is accordingly unlawful.

29. Turning to the legality of the contractual procedures themselves, the court must carefully consider the meaning of section 57(1) of

the Employment Act 1980. The section reads as follows:

"*No employer shall make any deduction from the wages due to an employee, or make any agreement or arrangement for any payment to him by the employee for, or in respect of alleged bad or negligent work by the employee."*

30. Ms. Thompson for the Respondent argues that the section does not apply because the retainer payable to the respondent's sales advisors is not 'wages'. She argues that wages must be fixed, and since the monthly retainer payable to a poor performing sales advisor may be reduced, the retainer cannot be regarded as wages for purposes of section 57(1).

31. 'Wages' are defined by the Employment Act to mean "*any remuneration or earnings including allowances, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment of for services rendered or to be rendered under such contract."*

32. The definition does not exclude variable earnings or remuneration that may fluctuate from month to month. The only reference to 'fixed' wages is that wages be fixed by mutual agreement or by law. The retainer payable to the Applicant has been fixed by agreement, as appears from Respondent's letter quoted in paragraph 19 of this judgement. In the Group Legal Executive's letter dated 6th February 2007, she refers to the retainer as a 'basic salary'. The contract document signed by the Applicant in 2004 also describes

the retainer as a salary. The retainer falls squarely within the definition of wages contained in the Act. To argue that the retainer is not wages because it may be reduced in the event of poor performance begs the question, since it is the legality of that very reduction which is presently under consideration.

In the view of the court, the reduction of the retainer in terms of the Respondent's Sales Correction and Discipline Regarding Sub-Standard Sales performance is undoubtedly a deduction from wages in respect of alleged bad work. Insofar as the procedures set out in article 16.7.3 of the collective agreement and in the contractual document signed by the Applicant in 2004 provide for payment of a reduced retainer in the event of sub-standard sales performance, they are prohibited by section 57(1) and are illegal. Section 27 of the Employment Act expressly provides that any condition in a contract of employment which does not conform with the Act shall be null and void.

33. The Respondent has argued that since the collective agreement was registered by the Industrial Court without objection, the same Court cannot now declare the terms of the agreement to be illegal. It is correct that section 56 of the Industrial Act places a duty on the court to consider a collective agreement before registration, and the court may refuse to register the agreement if it conflicts with any of the provisions of the Act or any other law. This does not however render the provisions of a collective agreement unassailable once it has been registered. The Industrial Court is burdened with numerous duties and functions, one of which is to register collective agreements. Numerous agreements are brought to court for registration, and many such agreements are bulky and often complex. It would place an intolerable burden on the court if its registration of agreements were to be regarded as an unequivocal and final endorsement of the fairness and legality of all the terms and conditions of such agreements. That was never the intention of the legislature in requiring registration by the court. In the registration of agreements, the court to a large extent exercises an

administrative function, not a judicial function. Registration of the agreement cannot be equated with the granting of a judicial order. The principal purpose of registration is to serve as constructive notice to the employees covered by the agreement that the terms and conditions of the registered agreement are deemed to be terms and conditions of their individual contracts of employment. All that the court is required to do is generally to ensure that the agreement prima facie complies with the law, expresses the intention of the parties, and has been properly concluded with the consent and authority of the parties. The court is not expected to scrutinize the agreement with a magnifying glass, searching for defects or illegalities. Should any such defects or illegalities later be alleged, the court is not precluded from scrutinizing the agreement at that stage and pronouncing judicially on the validity or legality of its terms, as is the case in the present matter.

34. In view of the above findings, it is not necessary for the court to consider certain other arguments raised by the Applicant's counsel, as to the Applicant's entitlement to a prior disciplinary hearing, and whether the imposition of a reduction in retainer and a warning constitutes double punishment for the same offence.

35. With regard to the question of the joinder of the union CAWUSWA, the court does not consider that the union is a necessary party in the sense that it has a direct and substantial interest in the matter and its rights may be affected by the judgement of the court. The collective agreement for the sales year 2005/2006 has elapsed by effluxion of time. A new collective agreement has not been finalized and registered. There is no existing contract between the Respondent and the union whose terms are under challenge. No

doubt the union and its bargaining unit will be interested in the outcome of this application, since it materially affects the contractual terms and conditions of other sales advisors in the position of the Applicant, but this is not to say that the union or other employees of the respondent have a direct financial or proprietary *legal* interest in the judgement of the court, or that the order of the court cannot be carried into effect without prejudicing them. The court also does not consider that the joinder of CAWUSWA is demanded by considerations of equity or convenience in the administration of justice. The defence of non-joinder is accordingly dismissed.

36. The Court makes the following order:

a. ***The matter is enrolled as one of urgency.***

b. ***The deduction of the sum of E1996.50 from the Applicant's retainer / basic salary is declared illegal.***

c. ***The Respondent is directed to pay the amount of E1996.50 to the Applicant forthwith.***

d. ***The Respondent is to pay the Applicant's costs.***

The members agree.

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PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT