IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 506/2013

In the matter between:

SWAZILAND HEALTH INSTITUTIONS AND ALLIED WORKERS UNION (SHIAWU) **Applicant**

And

THE CLINIC (PTY) LTD **Respondent**

Neutral citation: *Swaziland Health Institutions and Allied Workers Union (SHIAWU) v The Clinic (Pty) Ltd (506/2013) [2014]* SZIC 15 (April 2014**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard submissions: **28 MARCH 2014**

Judgment delivered: **09 APRIL 2014**

Summary:

The Applicant applied to the Court for the registration of a collective agreement between the parties. The Respondent opposed the application on the basis that the signing of the document by the Applicant's executive is questionable as they had complained that the contents of the document were not what the parties had agreed upon.

Held—As there were now questions arising about the signing and contents of the document, the Court will decline to register the document until such time that a document that has been agreed to by the parties is brought to Court for registration. The application accordingly dismissed.

JUDGMENT
09.04.2014

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[1] The Applicant in this matter is a trade union duly registered in terms of the provisions of the Industrial Relations Act of 2000 as amended. The trade union is recognized by the Respondent as the bargaining agent for its members.

[2] The Respondent is a limited liability company duly incorporated in terms of the laws of the Kingdom of Swaziland.

[3] The parties engaged in the process of collective bargaining early in the year 2012. The purpose of the collective bargaining was to allow or enable the parties to reach an agreement in terms of which their relationship is formalized and earnings, conditions of service and other matters of mutual interests are regulated for an agreed period. Indeed, **Section 55 (1) (d) of the Industrial Relations Act No.1 of 2000** as amended, provides that a collective agreement shall be for a specific period of not less than twelve months and not more than twenty four months, unless modified by the parties by mutual consent.

[4] Unfortunately the parties failed to reach an agreement. The matter was reported to the Conciliation, Mediation and Arbitration Commission, hereinafter referred to as CMAC. The dispute could not be resolved at CMAC and a certificate of unresolved dispute was issued. The Applicant thereafter issued a strike notice. The Labour Commissioner intervened, and the dispute was resolved. The Respondent however denied in its Answering Affidavit that all the issues were resolved.

[5] The parties agreed that the Applicant would prepare a draft collective agreement and send it to the Respondent for comments, and that thereafter a final draft would be prepared and signed by the parties. The Respondent stated that the draft collective agreement prepared by the Applicant was far

from what was agreed between the parties. The Respondent therefore drafted another document. This document was sent to the Applicant with a covering letter indicating that the Applicant should sign the document by close of business on Friday 22nd February 2013. The Respondent stated that should the Applicant fail to sign by the said date, the offer would expire.

[6] In its Founding Affidavit the Applicant stated that it did comply with the condition stipulated by the Respondent and signed the document on 21st February 2013 at 17:55 hours. This was denied by the Respondent, which argued that since the Applicant failed to sign on the date stipulated the offer lapsed, and that therefore there was no binding collective agreement between the parties.

[7] The Applicant has therefore instituted the present application for an order that the collective agreement signed by both parties be registered in court. The application is opposed by the Respondent on the basis that the Applicant did not sign the collective agreement on or before the stipulated period, being the close of business on Friday 22nd February 2013.

[8] The collective agreement is annexed to the Applicant's Founding Affidavit. On page twelve it shows that it was signed by the Applicant's Secretary General on 21st February 2013.

[9] The collective agreement was sent to the Applicant for signature with a covering letter, annexure "AA" of the Founding Affidavit. The covering letter reads as follows:-

17th February 2013

The Secretary General/Branch Chairman
SHIAWU
P. O. Box 14
Manzini.

RE: COLLECTIVE AGREEMENT

1. *SHIAWU is in receipt of the signed collective agreement signed by the COO and CEO as the employer's final offer on 2012 wage negotiations.*

2. *That the collective agreement was hand delivered to the Branch Chairman on the 12th February 2013.*

3. *That parties need to conclude the collective agreement by appending their signatures to make it a binding legal document and that the collective agreement cannot remain unsigned.*

4. *That the employers offer will expire by close of business on Friday the 22nd February 2013.*

Yours sincerely

(signed)
Michael Koekmoer
CHIEF OPERATIONS OFFICER

cc. Commissioner of Labour
FSE

[10] The Applicant responded to this correspondence by letter marked "MK3" annexed to the Respondent's Answering Affidavit. It appears as follows:-

"February 21, 2013

The Chief Operations Officer
The Clinic (Pty) Ltd
P. O. Box 3
MBABANE.

Dear Sir,

RE: Your letters dated 12th and 17th February 2013 respectively

1. *Your letters in the caption herein above are hereby referred.*

2. *We wish to acknowledge receipt of the said correspondence we however wish to state that the letter dated 17th February 2013 was only delivered or received today the 21st day February 2013 and our response to both is as outlined below:*

3. *The alleged agreement prepared and signed by the employer representatives misrepresents what the parties have negotiated and agreed upon. Therefore does not and cannot constitute the company's*

offer whether interim or final in so far as it is in variance with what was agreed upon.

4. *We now wish to refresh the memory of our social partner (the Clinic). When we referred the dispute to the Commission there were four items constituting the issues in dispute by the 17th December 2012, there were two issues not yet resolved and by the end of December last year all the issues in dispute were resolved following the intervention of the Labour Commissioner. The Union was then tasked to prepare a draft collective agreement.*

5. *The collective agreement that we have signed is one that has been prepared by the Labour Commissioner who facilitated the amicable settlement of the issues in dispute. It is worth mentioning that the Labour Commissioner is a neutral party in all these issues and a trustworthy person to prepare a collective agreement based on what the facilitated and was amicably agreed upon by both parties.*

6. *Now the collective agreement you have prepared is way out of what the parties have agreed upon and if the company insists that that's the document to be signed; we will view this conduct in the serious light and it is our view that this conduct by the company of reneging on what has been agreed upon and bringing in new issues amounts to not just negotiating in bad faith but constitutes unfair labour practice and this may require the intervention of the court should the company persist in the way and manner it is handling the issue of signing of the agreement.*

7. *We therefore request your seniority to refer and/or liaise with the Labour Commissioner on the issued in dispute and what the parties eventually agreed upon in order for the dispute to be resolved.*

8. *We further request your office to revert back to the undersigned at your soonest preferably within seven days of receipt of this letter.*

9. *Thanking you in advance for your understanding and rectification of your erroneousness*

Yours faithfully
(signed)

Rodgers Lukhele
Secretary General

cc. 1. Commissioner of Labour
2. CMAC
3. Branch Committee Shop Stewards.

[11] It is clear from this letter that the Applicant had no intention of signing the collective agreement because it *"misrepresents what the parties have negotiated and agreed upon".*

[12] Seeing that the Applicant union did not want to sign the collective agreement, the Respondent by letter dated 28th February 2013 invited the

Applicant to another round of collective bargaining. Again, it is important that the letter is reproduced in its entirety. Its contents are as follows:-

"28 February 2013

The Secretary General/Branch Chairman
SHIAWU
P. O. Box 14
MANZINI.
Re: Collective Agreement

1. *We acknowledge receipt of your correspondence dated 21st February2013 relating to the employer's collective agreement offer.*

2. *We wish to highlight that the employer's collective agreement offer expired at close of business on the 22nd February 2013.*

3. *It is the employer's view that parties have to re-engage each other afresh with a view to conclude a collective agreement for 2012 wage negotiations that will enable both parties to append their signature to the agreement to make it legal and binding.*

4. *That parties need to consult their mandate givers on a new mandate to enable wage negotiations to start afresh.*

5. *That the employer proposes parties should start negotiations on 15th March 2013.*

Yours Sincerely
(signed)

MICHAEL KOEKEMOER
CHIEF OPERATIONS OFFICER

cc. Commissioner Labour
FSE

[13] It is therefore clear from the exchange of the correspondence between the parties that there is a dispute. It is not clear to the court how did this dispute come plague the document if it is a collective agreement. By simple definition the term agreement means the meeting of the minds. The question therefore is: how did the parties come to have a collective agreement if there was no meeting of the minds during the process of collective bargaining. The learned author John Grogan in his book **"Workplace Law" 8th edition at page 355** defines a collective bargaining process as follows:

"Collective bargaining is the process by which employers and organized groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession; its objective is agreement."

On page 366 the learned author states further that;

"The hallmark of good faith bargaining is a genuine desire to reach agreement."

[14] In the present case, the Applicant failed or refused to sign the collective agreement because it stated in paragraph 3 of its letter that "*the alleged*

collective agreement prepared and signed by the employer representatives misrepresents what the parties have negotiated and agreed upon." The parties must therefore re-engage each other and resolve this issue. The court cannot write the collective agreement for the parties. Indeed the Respondent did invite the Applicant to a meeting scheduled for 15th March 2013 at 10:00 hours.

[15] The Applicant did attend this meeting. This was confirmed by the letter that the Applicant wrote to the Labour Commissioner on 15th March 2013. The letter is annexure "MK6" of the Respondent's Answering Affidavit. This letter will also be reproduced in full by the court for specific reasons that will allude to later on herein. The letter appears as follows:-

The Labour Commissioner
P. O. Box 198
Mbabane.

Re: Negotiation Meeting Between SHIAWU and The Clinic Group

This refers to the above subject matter.

1. *We have attended the above foresaid meeting on the set date, which was on the 15th March 2013 at 10:00 a.m.*

2. *The management of the Clinic Group have proposed that we start the negotiating process afresh which we did not accept.*

3. *We requested the management to consider to look at the areas where we don't agree on the initial collective agreement and see if we cannot*

reach compromise or alternatively we sign the agreement and deferred the not agree issues to our 2013/14 negotiation process.

4. *Management refused to accept our proposed settlement of the matter, alleging that their offer has expired and the position of the parties remains as there were.*

Yours Sincerely
(signed)

RODGERS M. LUKHELE
SECRETARY GENERAL

cc. Managing Director – The Clinic Group

[16] The court has deliberately reproduced in full the correspondence between the parties in this judgement because they prove that the Applicant never signed the collective agreement on 21st February 2013 as averred by the deponent in the Applicant's Founding Affidavit. The court says this because of the following reasons:

16.1 The Applicant itself in its letter, annexure "MK3" specifically stated that it will not sign the collective agreement because it misrepresents what the parties have negotiated and agreed upon.

16.2 The Respondent accepted this view taken by the Applicant and therefore invited the Applicant to a further round of negotiations on 15th March 2013.

16.3 The Applicant indeed attended this meeting. (See annexure "MK6" of the answering affidavit).

16.4 The conduct of the Applicant of attending this meeting is further proof that the Applicant had not signed the collective agreement on 21st February 2013. If the Applicant had signed the collective agreement, there would have been no need for it to attend this meeting.

[17] Confronted with this evidence, Mr. Fakudze, the Applicants' representative, told the court that the Applicant's executive changed their minds after having written the letter ("MK3") and signed the collective agreement. Clearly, from the evidence on the papers before the court this was a proposition whose untenability had already been demonstrated taking into account the letters written by the Applicants' own executive members.

[18] Furthermore, the Applicants did not file a replying affidavit to the Respondent's answering affidavit.

[19] The Respondent went further to prove that the collective agreement was never signed by the Applicant on 21st February 2013 by applying to file a supplementary affidavit. Again, the Applicant did not challenge the contents of this document as it never sought the leave of the court to file a response to the Respondent's supplementary affidavit.

[20] On the papers before the court therefore, the Respondent was able to prove on a balance of probabilities that the collective agreement was never signed on behalf of the Applicant on 21st February 2013. The present document

cannot therefore be registered in court as there was apparently no *consensus ad idem* on the issues discussed during the collective bargaining.

[21] The collective agreement must therefore be sent back to the parties to restart the collective bargaining process concerning the issues that they did not agree and work towards reaching an agreement.

[22] What became clear from the papers before the court was that the deponent to the Applicant's Founding affidavit told lies under oath in paragraph 5.7 when he said the collective agreement was signed on 21st February 2013. This conduct by the Applicant's Secretary General prompted the Respondent to apply that the application be dismissed with costs on the punitive scale for the abuse of the court process. The court agrees with the Respondent that ordinarily an order for costs should be granted. The court however using its discretion in such matters will not grant the application for costs against the applicant for the simple reason that the parties will of necessity, and for the sake of peaceful industrial relations have go back to the bargaining table. An order for costs against any of the parties will clearly not create a conducive atmosphere for the bargaining process.

[23] Taking into account all the evidence before the court and all the circumstances of the case, the court will make the following order:-

a) The Applicant's application is dismissed.

b) There is no order as to costs.

The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: **MR. A. FAKUDZE**
(LABOUR LAW PRACTITIONER)

FOR RESPONDENT: **MR. N.D. JELE**
(ROBINSON BERTRAM)