IN THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane **CASE NO. 454/2013**

In the matter between

SWAZI POULTRY PROCESSORS Applicant

And

SWAZILAND MANUFACTURING & ALLIED

WORKERS UNION 1ST Respondent

UNIONISABLE EMPLOYEES OF THE APPLICANT Further Respondents

Neutral citation: Swazi Poultry Processors VS Swaziland Manufacturing & Allied Workers Union and Unionisable Employees of the Applicant

(454/2013) [2014] SZIC 7 (6th March 2014)

CORAM: D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa) (Members of the Court)

Heard : 30th October 2013

Delivered : 6TH March 2014

Summary: *Labour law. Overtime work: provided for in Collective Agreement. Collective Agreement gives two divergent versions on overtime work. Overtime work said to be voluntary. Employees also warned not to unreasonably refuse to work overtime when requested. Communication; employer obligated to communicate its request for overtime work to the employees alternatively union. Employer failed to communicate request for overtime work. Workers not aware of request for overtime, therefore fail to report for overtime work. Worker's conduct justified.*

Ultimatum; employer issues an ultimatum for workers to work overtime or face dismissal. Ultimatum deliberately misrepresents facts in order to get workers to work overtime. Contents of ultimatum calculated to mislead workers, to give employer an unfair advantage over employees. Held, ultimatum was unfair.

Communication; employer fails to communicate ultimatum to workers. Held, failure to communicate ultimatum is fatal to the purpose it was issued.

Illegal conduct; ultimatum intended to persuade workers who are engaged in an unlawful industrial action to desist from such conduct. Ultimatum not applicable to employees engaged in lawful conduct.

Recognition and Procedural Agreement; terms and conditions in the agreement are binding on the parties. Failure by a party to comply with agreement renders the party's conduct unlawful.

Procedure; Applicant must disclose all material facts necessary to establish a cause of action in the founding and supporting affidavits. Failure to establish cause of action is fatal to the application.

1. Applicant is Swazi Poultry Processors (Pty) ltd, a private limited liability company incorporated according to the company laws of Swaziland, trading as such in Matsapha- Swaziland. The Applicant's founding affidavit is deposed to by a certain Philisiwe Hlatshwayo – Gama, who stated that she is Human Resources Officer of the Applicant. The Applicant has chosen not to file a replying affidavit. With the leave of Court the Applicant filed a supplementary affidavit whose contents will be addressed later in this judgement.

2. The 1st Respondent is Swaziland Manufacturing and Allied Workers Union, a trade union registered according to the Industrial Relations Act No. 1/2000 (as amended). The answering affidavit of the Respondents is deposed to by a certain Zweli Sihlongonyane (a union official). The answering affidavit is supported by two other affidavits.

3. The 1st Respondent is the recognised representative of the unionised employees of the Applicant. The Applicant has presented before Court a Collective Agreement which was concluded between the parties on the 19th July 2013, and is marked annexure PG2. The Applicant has further attached to its founding affidavit a Recognition and Procedural Agreement dated 23rd February 1999, which was concluded between the Applicant and the 1st Respondent.

This agreement is marked annexure PG3.

4. The parties have acknowledged that both agreements are binding on them. Both parties have referred to each of the agreements in support of their arguments.

5. The further Respondents are the unionised employees of the Applicant, their names are listed in annexure PG 1, which is attached to the Applicant's founding affidavit, and are hereinafter referred to as the workers. The workers are employed on individual contracts of employment with the Applicant.

6. The Applicant has moved an urgent application before Court for relief as follows:

> *"1. Dispensing with the usual forms, procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
>
> *2. That a Rule nisi be issued with immediate and interim effect, calling upon the Respondents to show cause on a date to be appointed by the above Honourable Court, why an Order in the following terms should not be made final;*

2.1. That the Further Respondents conduct of refusing and /or failing to work overtime as required within the established system amounts to breach of contract.

2.2. That the Secretary General of the 1st Respondent is required to communicate the contents of this Order to the Further Respondents and to report to the Honourable Court with an Affidavit on the return date that he has done so.

2.3 That the service upon the 1st Respondent be deemed to be sufficient service upon the Further Respondents.

*3. That the prayers in **2.1, 2.2** and **2.3** above operate with immediate and interim effect pending finalisation of this application.*

4. Costs be awarded against any party opposing this application.

5. Further and / or alternative relief."

7. In the course of the year 2013, the Applicant and the 1st Respondent engaged in wage negotiations. The Applicant offered the 1st Respondent a wage increase of 6% (six percent). This offer was rejected. Instead, the 1st Respondent made a counter offer of 10% (ten percent) wage increase. The parties failed to reach an agreement,

and they resolved to refer their wage dispute to CMAC for arbitration or mediation. By CMAC is meant the Conciliation, Mediation and Arbitration Commission established in terms of Section 62 (1) of The Industrial Relations Act. This referral was made in accordance with section 5.3 of the Collective Agreement (annexure PG3).

8. The gravamen of the Applicant's complaint before Court is that: the workers have refused to work overtime when requested by the Applicant. According to the Applicant, the refusal by the workers to work overtime was contrary to the employment contract, and further contrary to standard procedure.

9. The Applicant has cited several incidences in the conduct of the workers and the 1st Respondent which led her (Applicant) to conclude that there is deliberate and unreasonable refusal to work overtime**.**

    9.1. On the 25th September 2013, representatives of the Applicant and those of the 1st Respondent met for a discussion of the wage dispute. Mr Derrick Dlamini, a Field Officer of the 1st Respondent, was also in attendance. The Applicant alleges that Mr Dlamini declared at that meeting that: as result of the failed negotiations, the workers will refuse to work overtime until such time that the resolution of the pending wage dispute is found.

9.2. On the 27th September 2013 the Applicant obtained an interim order in terms of prayers 1.2 and 3 of the Collective Agreement (annexure PG2).

9.3. Upon obtaining the interim Court order, the Applicant expected the workers to work overtime in the evening of the 27th and the morning of the 28th September 2013. On the contrary, a few workers reported for overtime work on the dates mentioned.

9.4. Also on the 30th September 2013, a few workers reported for overtime work.

9.5. According to the Applicant, the workers had been notified regarding the interim Court order, and had also been given a written ultimatum on the 30th September 2013, to do overtime work or face dismissal. Their refusal to work overtime led the Applicant to conclude that their conduct was contrary to the interim Court order, the employment contract as well as the Collective Agreement (annexure PG2).

9.6. On the 1st October 2013, the Applicant summarily and *en masse* dismissed the workers who did not report for overtime work on the 30th September 2013.

9.7. When the matter came before Court on the 27th September 2013, the legal representatives of the Respondent requested for time to file opposing papers. The Applicant asked for an interim order while the Respondents prepared their affidavits. An interim order was granted *inter alia:* That the Respondents are directed to comply with clauses 1.2 and 3 of the Collective Agreement.

10 As aforementioned, Mr Derrick Dlamini who is the 1st Respondent's Field Officer also filed a supporting affidavit. Mr Dlamini has denied the allegations made concerning him in the Applicant's affidavit, especially the statement which it is alleged Mr Dlamini made in a meeting of the 25th September 2013.

10.1 The Applicant made the following allegation in its founding affidavit.

> *" During a meeting held by Representatives of the Applicant and 1st Respondent on the 25th September 2013, one Derrick Dlamini, who is a Field Officer of the 1st Respondent declared that as a result of the failed negotiations, the Further Respondents will refuse to work overtime until such a time when a resolution to the pending wage dispute is found . "*

(Record page 9)

10.2 Mr Derrick Dlamini stated the following in his supporting affidavit concerning the allegations made against him:

"I confirm that I never said that employees will not work overtime."

(Record page 96)

10.3 Mr Dlamini's response was a clear denial of an allegation that had been made concerning him. The Respondents' affidavits were filed on the 3rd October 2013. The Applicant had therefore, been made aware as at the 3rd October 2013, that Mr Dlamini had raised a dispute of fact concerning a crucial detail that was central to the application before Court.

10.4 The matter was argued on the 30th October 2013. That means the Applicant has had sufficient time as from the 3rd to the 30th October 2013, to prepare the necessary evidence in order to support the allegation that had been made concerning Mr Dlamini. Notwithstanding availability of time, the Applicant failed to provide the requisite evidence.

10.5 The allegation concerning Mr Dlamini is the only fact in the founding affidavit on which the Applicant has based its claim: that the workers will refuse to work overtime. The Applicant's failure to support this allegation means that the Applicant has also failed to support its principal claim in the notice of motion.

Accordingly, the Applicant's claim fails due to lack of evidential support. The application is therefore fatally defective and is hereby dismissed.

10.6 The deponent to the Applicant's founding affidavit namely Philisiwe Hlatshwayo – Gama (hereinafter referred to as Ms Gama), does not state whether or not she was present at the meeting of the 25th September 2013 (when the alleged statement was made). Ms Gama does not say that she heard Mr Dlamini utter the alleged words. Alternatively, Ms Gama does not state how she came to know that Mr Dlamini uttered the alleged statement. A witness or a deponent to an affidavit cannot be allowed to be evasive in his or her evidence.

10.7 The Applicant is a juristic person. The fact that Ms Gama has been appointed to represent the Applicant in instituting the application that is before Court, does not *ipso facto* mean that she has personal knowledge of each and every allegation that has been made in the Applicant's founding affidavit. It is possible that other facts or details may be personally known to other witnesses and/or officers of the Applicant other than Ms Gama. It was therefore necessary for Ms Gama to state clearly in the affidavit those allegations that are personally known to her as opposed to those that are not.

10.8 Ms Gama has stated the following in paragraph 2 of the founding affidavit

> *"The facts deposed to herein are within my personal knowledge and are true and correct."*

(Record page 6)

10.9 Even though the Applicant has made the aforementioned general declaration in the opening paragraph of the Applicant's founding affidavit that declaration on its own is insufficient to persuade the Court that therefore, all the contents of the Applicant's affidavit are personally known to Ms Gama. Every allegation of fact must be sufficiently supported by the circumstances and evidence which undoubtedly point to one conclusion: that Ms Gama has personal knowledge of the particular facts alleged; alternatively some other identifiable person has such knowledge. That other person must also file a supporting affidavit confirming his/her personal knowledge of the fact alleged. As a result, the Court is not persuaded that Ms Gama was present at the meeting of the 25th September 2013, and that she heard Mr Derrick Dlamini utter the alleged statement. In the absence of that clear declaration from Ms Gama, which should be properly supported, Ms Gama's statement does not amount to evidence. At best such a statement can be viewed as hearsay, at worse as conjecture.

10.10 Even if Ms Gama were to state in the affidavit that she was present at the meeting of 25th September 2013, and further that she heard Mr Dlamini utter the alleged statement, still that evidence would not be sufficient for the purposes of this case. Mr Dlamini's clear and unequivocal denial would still stand in her way. It would be Ms Gama's word against Mr Dlamini's. The matter would still be subject of dispute. The Applicant would have failed on a balance of probabilities to persuade the Court that her evidence should be accepted and that of Mr Dlamini should be rejected. The Applicant bears the onus to prove the allegation it has made. The old maxim applies: *he who alleges must prove*. The Applicant has failed to provide that proof. The application would accordingly, have been dismissed for this reason as well.

10.11 Ms Gama filed a supplementary affidavit dated 2nd October 2013. In her supplementary affidavit Ms Gama did not refer to the statement aforementioned, concerning Mr Dlamini. The Applicant therefore stands and falls by the allegation made in its founding affidavit (which the Court has already found to be inadequate to prove the Applicant's case).

11 The Court has already dismissed the application on account of a technical defect aforementioned. It is in the interest of justice that the Court should consider the remaining aspects of the case.

The Applicant's principal prayer as contained in the clause 2.1 of the Notice of Motion is that –

11.1. the workers (Further Respondents) are refusing and/or failing to work overtime as required (by the Applicant), and which is established practice within the Applicant's business system, and

11.2 that, the Court should find that the workers' refusal to work overtime, amounts to a breach of contract.

12. There is neither allegation nor evidence in the founding affidavit –

12.1 that the Applicant made a demand or request on the workers to work overtime,

12.2 and, that the workers failed or refused to obey that demand or request. Ms Gama's evidence is silent on that issue. The founding affidavit is therefore missing certain crucial facts that are necessary to establish a cause of action. The Applicant cannot succeed in its prayers in the absence of a cause of action.

13 The Applicant has relied solely on a statement allegedly made by Mr Dlamini at a meeting of the 25th September 2013, in order to support its application. That statement was introduced in the founding affidavit of the Applicant, by Ms Gama.

The Court has already dealt with that statement. The Court has also made a finding that Ms Gama's allegation is not supported by the evidence. The Court's finding means that, there is no evidence in the founding affidavit to support the relief that the Applicant is seeking in the Notice of Motion.

14 The Applicant's founding affidavit was followed by a supplementary affidavit dated 2nd October 2013. The supplementary affidavit makes allegations about events that took place between the parties after the interim order had been issued. The interim order was issued on the 27th September 2013. The crucial facts that are missing in the founding affidavit and which are necessary to establish a cause of action are also missing in the supplementary affidavit. As a result of the Applicant's failure to establish a cause of action, the relief claimed in the Notice of Motion is baseless, and is accordingly dismissed for this reason as well.

15 It is established procedure based on authority, that the affidavit/s in support of a Notice of Motion must set out a cause of action, failing which the application is defective and liable to be dismissed. This principle is aptly stated by the authorities as follows:

15.1 *"The supporting affidavits must set out a cause of action. If they do not, the respondent is entitled to ask the Court to dismiss the application on the ground that it discloses no basis on which the relief can be granted."*

HERBSTEIN and VAN WINSEN: THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA: 5th edition, volume 1, 2009 (Juta &Co),

ISBN 978 0 7021 7933 4 at page 439.

15.2 *"It is clear, therefore, that an application not only takes the place of a declaration in an action but also of essential evidence to be led at trial. An application must include facts necessary for determination of the issue in the applicant's favour."*

ibid on page 439

15.3 *"The necessary allegations must appear in the supporting affidavits,..."*

ibid at page 439

15.4 This principle is trite law and is confirmed by other authorities, as follows;

"In application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial."

ERASMUS: SUPERIOR COURT PRACTICE

(Juta & Co) 1994 ISBN 0 7021 3011 7 at page B 1-39.

16. The Applicant has argued extensively on the implementation of the interim Court order, and it is apposite therefore, at this stage to focus on that aspect of the Applicant's case. The Court did not issue an interim order in accordance with the prayers sought in the Notice of Motion. In particular, the Court did not order the workers to work overtime. Instead, the Court ordered the workers to comply with clauses 1.2 and 3 of the Collective Agreement, which was already binding between the parties at the time the Court issued the interim order. In other words, the interim order did not introduce a new obligation on the workers, over and above that which already existed in the Collective Agreement.

17. The relevant clauses in the Collective Agreement (annexure PG 2) read as follows;

"*1. HOURS OF WORK*

1.1 The normal working hours for all employees shall not be more than 45 hours a week – Monday to Friday.

1.2 Workers will not unreasonably refuse to work overtime during a working week.

1.3 Workers will not unreasonably refuse to work Saturdays and when this occurs; Management will endeavour to ensure it takes place on Saturdays mid-month.

2.....

3. OVERTIME

Overtime is voluntary."

(Record page 19)

17.1 Clause 3 of the Collective Agreement declares that; overtime work is voluntary. That means it is open to every employee who has been requested to work overtime to either say yes or no, without incurring any penalty for his decision. An employee is expected to work overtime; only if he chooses to. An employee who is interested in working overtime can also approach the Applicant to request such work. The employer is not obligated to give voluntary work even if requested. Overtime work is therefore voluntary to both employer and employee.

17.2 The word voluntary has been interpreted to mean:

17.2.1 *"done willingly, not because you are forced"*
Oxford Advanced Learner's Dictionary

ISBN 0-19-431658-0

7th edition at page 1647

17.2.2 *"done, given or acting of one's own free will"*

Concise Oxford English Dictionary, 11th edition ISBN 978-0-19-954841-5

at page 1619

17.2.3 *"Acting without compulsion, doing by design."*

WHARTON'S LAW LEXICON, 11th edition

(Stevens and Sons) 1911 (ISBN not available)

at page 894.

17.3 Clause 1.2 as read with 1.3 of the Collective Agreement calls upon employees not to unreasonably refuse to work overtime when called upon to, between Monday and Saturday. It means that an employee who refuses to work overtime when called upon to, must have a justifiable reason for his refusal. This clause further means that an employee who refuses to work overtime when called upon to, and without justifiable reason, may be penalised for his refusal.

17.4 It appears that clauses 1.2 and 3 in the Collective Agreement contradict each other. Since overtime work is voluntary in terms of clause 3, it does not make sense then to require a worker to have a good reason for his refusal to work overtime.

Clause 1.2 takes away from the worker the element of voluntariness; when he decides whether or not to do overtime work. A worker should not be penalised for refusing to do work which he is legally entitled to refuse.

17.5 In light of the provision of clause 3 of the Collective Agreement, the Applicant's principal claim as contained in clause 2.1 of the Notice of Motion cannot succeed. The Applicant has prayed in clause 2.1 that the Court should find that the workers are in breach of the employment contract for refusing to work overtime. It would be a contradiction in terms to say that overtime work is voluntary; but a worker who refuses to do overtime work is in breach of the employment contract, and liable to be dismissed for his refusal.

17.6 The Court has already made a finding that the application is dismissed on two grounds, namely:-

17.6.1 the absence of crucial evidence in Ms Gama's affidavit to support the allegation made by her concerning Mr Dlamini, which Mr Dlamini has denied, and

17.6.2. the absence of an allegation as well as evidence in the founding affidavit that the workers had been requested to work overtime and that they refused.

17.7 If the application had not been dismissed on the grounds aforementioned, still it would have been dismissed for being contrary to clause 3 of the Collective Agreement.

18. The Applicant has stated in her supplementary affidavit, that almost all the employees refused to work overtime in the evening of Friday the 27th September 2013. Then again on Saturday the 28th September 2013, most of the employees failed to report for overtime work. According to the Applicant, the conduct of those workers who did not report for overtime work was in furtherance of an 'overtime ban' which the Respondents had adopted.

18.1 According to Ms Gama, the Applicant's supervisors informed the workers around or just after 15h00 that they are required to work overtime in the evening of Friday the 27th September 2013. The evidence of Ms Gama reads as follows;

"5 Mr Sibandze verbally conveyed the interim Order to me and thereafter at around just after 15h00 our Supervisors informed the Further Respondents that they will be required to work overtime on the evening of the 27th September and from morning of Saturday the 28th September 2013.

6 Almost all of the Further Respondents except a very small number did not work overtime and the employees walked out en masse at 16h30 on the 27th September 2013"

(Record page 74)

18.2 Ms Gama introduced herself in both affidavits as Human Resources Officer. She does not claim an additional position of Supervisor. If she is also a Supervisor, she would have said so. The Court can safely conclude that Ms Gama is not a Supervisor at the Applicant's workplace. The Applicant has however referred in her affidavit, to a certain request allegedly conveyed by Supervisors to the workers for the latter to do overtime work.

18.3. Ms Gama does not say who exactly are the Supervisors who allegedly conveyed to the workers a request to do overtime work, and how was that request conveyed.

18.4. Ms Gama does not say how she came to know that this particular request was in fact conveyed to the workers, as alleged by her.

18.5 Ms Gama does not say which worker or group of workers received the said request and where exactly were the workers when the said request was conveyed.

18.6 The Court has noted that there is no one among the Applicant's Supervisors who has filed an affidavit in support of the allegation made by Ms Gama. Ms Gama's allegation is either hearsay or conjecture; in either case this allegation is inadmissible as evidence.

Legal authorities have expressed the principle on hearsay evidence as follows:

> "Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated..."
>
> HOFFMAN LH AND ZEFFERT DT:
>
> THE SOUTH AFRICAN LAW OF EVIDENCE,
>
> 4th edition (Butterworths) , 1988
>
> ISBN 0 409 03324 3 at page 124.

19. The Respondents have denied that they have an obligation to work overtime.

As aforementioned, the Respondents have interpreted the issue of overtime work in accordance with clause 3 of the Collective Agreement (annexure PG2). With that principle in mind, the Respondents have proceeded to respond to the allegations in the Applicant's affidavits. In particular, the Respondents have denied that they have refused or failed to work overtime as alleged or at all.

19.1 According to Mr Zweli Sihlongonyane (the Secretary General of the 1st Respondent), there is a procedure that has all along been followed at the workplace when the Applicant required the workers to work overtime. The procedure is that the Applicant would inform the Shop Stewards about the request to work overtime.

The Shop Stewards would then go from one department to another to convey the message to the employees. The employees who have opted to work overtime would then be registered. Mr Sihlongonyane stated further that the registration is based on the principle that overtime work is voluntary.

19.2 Mr Sihlongonyane added that;

"6.4 It is also worthwhile to point out that the underlying principle in so far as overtime is concerned and as per the law and the Collective Agreement is that overtime is voluntary (see clause 3 of the Collective Agreement).

6.5. It is on that basis that Respondents also agree with the Applicant that working overtime has always been done without a problem. There has been a set procedure to regulate the issue [of] overtime and employees have never unreasonably refused to work overtime."

Read page 85

19.3 The answering affidavit of Mr Sihlongonyane was supported by Mr Sabelo Masondo (a Shop Steward) and Mr Derrick Dlamini (the Field Officer). The evidence of these gentlemen has not been disputed.

According to Mr Masondo, the message sent for the workers to do overtime work was received by him about 16h15 on the 27th September 2013. Mr Masondo indicated to the Applicant's representative that the notice period was too short for him to convey the message to all the employees.

19.4 The evidence of the Respondents reads as follows;

"17.5 I must mention that what also contributed to the failure to inform every employee of the overtime issue was that the Applicant refused to allow a mass meeting on the [premises] when the overtime issue was communicated and this is what also contributed to the confusion on the said date since whenever there is need to work overtime shop stewards are

allowed to hold a mass meeting so as to inform the employees of the communication from the [employer] as well as to register all employees that voluntarily accept to work overtime."

(Record page 89)

The Court has again noted that this evidence has not been disputed.

19.5 Ms Gama had stated in paragraph 6 of her supplementary affidavit that the working day ended about 16h30 on the 27th September 2013. Practically, this means that the Shop Steward (Mr Masondo) had 15 (fifteen) minutes or less to inform the employees about the request to work overtime and to register those who were available to work overtime.

19.6 The Respondents added that the process of conveying to the employees the Applicant's request for overtime work was further frustrated by the Applicant. The Applicant refused the employees permission to meet in order for the Supervisors to convey the Applicant's request for overtime work.

On previous occasions employees were permitted to hold a meeting on the Applicant's premises in order to facilitate the announcement and the registration for overtime work.

19.7 The employees that registered and worked overtime on 27th and 28th September 2013 are those that received the message and had opted to work overtime. A majority of the employees could not be reached because of shortage of time. Those employees who could not be reached by the Supervisor, did not therefore receive the message, hence they did not report for overtime work, but left for home at 16h30.

20. There is undisputed evidence that the Shop Steward (Mr Masondo) was given approximately 15 (fifteen) minutes to inform the workers about the Applicant's request for overtime work. There is no allegation that the said shop steward failed to act diligently in conveying the message to employees. The Applicant has confirmed that some employees did report for overtime work on the 27th and 28th September 2013. That fact supports the Respondents' argument that the Shop Steward managed to reach some of the employees, who agreed to work overtime. This evidence confirms that the Respondents cooperated with the Applicant in the latter's request for overtime work, and not the other way round.

21. The Applicant has further complained that most workers did not report for overtime work on Saturday the 28th September 2013 and did not give reasons for their absence. The evidence reads thus;

"13 Most of the further Respondents did not avail themselves for work on Saturday, giving no reasons, apparently still continuing their 'overtime ban.' "

(Underlining added)

(Record page 76)

21.1. The union representatives have stated on affidavit that the Applicant failed to give the Shop Steward adequate notice that it required the employees to work overtime on the 27th September 2013.

The workers therefore who did not report for overtime work are justified, since they did not receive the notice, either on time or at all. In the circumstances, the workers cannot be said to have unreasonably refused to work overtime. Furthermore, it cannot be said that the workers' conduct amounts to a breach of their employment contract. There is no illegality that can be imputed to the workers.

21.2 According to the Applicant, the workers who failed or refused to work overtime on the 27th and 28th September 2013, failed to give reasons for their failure to work.

There is no indication however that the Applicant enquired from the workers for their reasons for failing to report for overtime work. It is not clear therefore, as to how the Applicant arrived at that conclusion. The

correct position is not that the workers failed to give reasons for their absence, but that they were not asked for reasons. The evidence does not support the Applicant's argument as well as the prayers as contained in the Notice of Motion.

22. Even if the Collective Agreement did not have clause 3, (whose effect has been discussed above), still the Court is not persuaded that the workers failed to comply with clause 1.2 therein. In clause 1.2 the workers are required <u>not to unreasonably refuse to work overtime</u> when called upon to. The Applicant still has a duty to prove that there was a refusal to work overtime and that, that refusal was unreasonable.

22.1 In the absence of consultation with the workers concerned, the Court has a difficulty in understanding how the Applicant came to a conclusion that the workers have unreasonably refused to do overtime work on the 27th and 28th September 2013. The unreasonableness or otherwise of the alleged refusal or failure to work overtime, would have been determined from the reasons given, if the consultation had taken place.

22.2 The fact that workers did not report for overtime work on the 27th and 28th September 2013, does not *ipso facto* mean that they have refused unreasonably to work overtime. The Applicant's conclusion is not therefore

based on fact but on speculation, and is accordingly rejected.

22.3 The failure by the workers to work overtime on the 27th and 28th September 2013 was caused by the Applicant. The Applicant gave the Shop Steward short notice (15 minutes) to notify the employees and to register those who were willing to work overtime. There is undisputed evidence that within the 15 minutes given, the Shop Steward was only able to reach a few of the employees who registered and actually worked overtime as required.

22.4 There is undisputed evidence also that the employer refused the employees - permission to hold a meeting at the Applicant's premises. The proposed meeting was intended to convey to the employees the Applicant's request for overtime work. The conduct of the Applicant denied a majority of the employees a chance to decide on the request for overtime work. The Applicant has therefore created the state of affairs which it is now complaining about before Court. It was the Applicant's conduct that was unreasonable in relation to the issue of overtime work.

22.5 The Court finds that the failure of the workers to work overtime on the 27th and 28th September 2013, does not amount to either a breach of the employment contract or

a breach of the Collective Agreement. The Applicant's claim especially prayer 2.1 accordingly fails.

23. Ms Gama has stated further in the supplementary affidavit that all the workers were given an ultimatum on the 30th September 2013, which stated that they will be terminated if they refused unreasonably to work overtime. The evidence reads as follows;

> *"15 On the 30th September all employees were given notices after the balloting, given an ultimatum in unequivocal terms that should employees refuse unreasonably to work overtime on the 30th September their services would be terminated without further notice. A copy of the notice is attached hereto marked A."*

(Record page 76)

23.1 The Court has noted that Ms Gama does not say that she gave some or all the workers notice in terms of annexure A. If Ms Gama had carried out this exercise in person, she should and could have said so clearly in her affidavit.

23.2. Ms Gama does not say who exactly is alleged to have distributed the notice (ultimatum) to all the workers (as alleged) and how Ms does Gama know as a fact,

that this exercise was carried out. The service of an ultimatum on the concerned workers is a critical step toward validating the implementation of the ultimatum.

However, the Applicant did not see the need to supervise the service of the ultimatum and the need to provide the Court with evidence which proves that service was effected on all the workers, as alleged by Ms Gama.

23.3 There is no affidavit from any of the Applicant's officials, employees or representative who claims to have served the ultimatum on any worker or group of workers. The conclusion that Ms Gama has drawn is not supported by the facts.

23.4 There is no evidence therefore that the workers were served with an ultimatum as alleged or at all. Ms Gama's allegation is mere speculation which is accordingly rejected by the Court.

24. Ms Gama further stated in the supplementary affidavit that on the 30th September 2013, the Applicant's supervisors informed the Applicants that they will be required to work overtime that evening. The evidence reads thus;

> "*17. On the afternoon of the 30th September the Applicant's Supervisors advised the Further Respondents that they will be required to work overtime on the evening of the 30th September 2013."*
>
> (Record page 76)

24.1. Ms Gama does not state who allegedly advised the workers to work overtime on the 30th September 2013. Ms Gama does not claim to have personally conveyed that message to the workers.

24.2. Ms Gama does not state how and when exactly the alleged message was conveyed to the workers.

24.3. Ms Gama does not state which identifiable worker or group of workers received the instruction to work overtime.

24.4. There is no affidavit from the Supervisors that was filed to confirm the allegation made by Ms Gama concerning them.

24.5. There is no evidence that the alleged instruction was conveyed to the workers or any one of therm.

Ms Gama's allegation is mere speculation and is accordingly inadmissible.

24.6. If the need for overtime work was important to the Applicant, the Applicant had the means to ensure that the instruction is conveyed to the 1st Respondent as the recognised representative of the workers. The Applicant does not appear to have given this matter the attention it deserves, as seen from the evidence of Ms Gama.

24.7. Again Ms Gama's allegation is not supported by evidence. It is therefore inadmissible.

25. The Applicant's ultimatum (annexure A) reads as follows:

"Notice to Employees

Employees are hereby advised that the Industrial Court of Swaziland has ordered that Employees are obliged not to refuse to work overtime unreasonably.

On Friday, 27th September 2013, Employees without giving any reason, refused en masse to work overtime, apparently, and according to the information available, because of the pending wage dispute.

The on-going refusal to work overtime is a breach of contract. Any further refusal to work overtime, without individual reasonable excuse, from Monday 30th September 2013 will result in immediate dismissal from employment without further notice.

MANAGEMENT"

25.1. The ultimatum (annexure A) is clearly misleading in that it has failed to genuinely convey the interim Court order which was issued on the 27th September 2013. The Court order is two (2) pronged.

The Respondents are directed in the Court Order to comply with clause 1.2 as well as clause 3 of the Collective Agreement.

25.2 While clause 1.2 requires the employees not to unreasonably refuse to work overtime, clause 3 declares to the employees that overtime work is voluntary. The Applicant failed to convey this fact to the employees, in annexure A. The details of the interim order have already been dealt with above.

25.3. The Applicant has conveyed in annexure A the substance of clause 1.2 of the Collective Agreement, and clearly left out the substance of clause 3. As a result there is no indication in annexure A, that overtime work is voluntary.

There is however a declaration that the Court has ordered that employees are obliged not to unreasonably refuse to work overtime.

25.4. Though annexure A is not in itself a Court Order, it purports to convey the contents of the Court Order. Annexure A was drafted in this manner purposely, in order to intimidate the employees to obey its contents at the risk of being dismissed, if they do not. Any employee who read annexure A, and had no access to the correct Court order,

would be misled into believing that Annexure A accurately conveys the Court Order. Clearly, annexure A misreported the Court Order.

25.5. The purpose of an ultimatum is for the employer to inform (and not misinform), the employees about the factual and legal consequences of their conduct and the decision that the employer will take, if the employees' misconduct is not immediately corrected.

An ultimatum is therefore an instrument of communication and not a weapon of oppression which the employer may use against employees.

25.6. The Applicant abused the Court Order for its financial gain. The Applicant manipulated the drafting of the ultimatum and misreported the interim Court Order in order to gain an unfair advantage over the employees. The advantage is that the ultimatum compels the employees to work overtime at the fear of being summarily dismissed, if they do not. It was in the Applicant's interest that employees should work overtime, in order to maximise production and minimize loss at the Applicant's factory. An increased production would result in an increase in the Applicant's profit.

The Applicant was admittedly at risk of loss of business and therefore profit, in the event that the employees did not work overtime.

25.7. When an employer issues an ultimatum to his employees, he must ensure that, that ultimatum is both legally and factually correct, as well as fair. There comes a point where there is no difference between a person who blatantly tells lies and another who deliberately tells half the truth and withholds the remainder in order to mislead.

In both cases there is an element of dishonesty. The Applicant fits into the latter category in the manner it drafted the ultimatum (annexure A). Annexure A does not qualify to be an ultimatum in the eyes of the Court. The Court therefore rejects annexure A, for being an unfair and dishonest directive issued by the Applicant against its employees. No worker could be penalised for disobeying the ultimatum (annexure A).

26. On the 1st October 2013 the Applicant summarily dismissed the workers allegedly for refusing to work overtime on the 30th September 2013 and/or for failing to comply with the ultimatum (annexure A).

27. The Courts as well as learned authors have consistently cautioned employers to exercise a prudent approach when issuing and/or implementing an ultimatum against their employees. In particular, certain guidelines have been

developed to assist employers in the correct use of an ultimatum. Some of those guidelines, particularly those that are relevant to the matter before Court are listed below;

27.1 Firstly, before an employer takes a decision to dismiss his employees for failing to obey an ultimatum,

he must ensure that he has acted fairly toward his employees. This stipulation requires a three (3) stage enquiry:

27.1.1. The purpose for which the ultimatum is issued, is to notify the workers that they are engaged in an unlawful conduct.

27.1.2. The contents of the ultimatum must be fair.

27.1.3. The reasons for dismissal following an ultimatum must also be fair.

27.2. Various learned authors have expressed the principles in clearer terms as follows;

27.2.1 *"Both logic and fairness therefore require that strikers be afforded an opportunity to reconsider their positions before the employer pulls the trigger. This is why the determination of the fairness of the dismissal of the strikers is a two-stage process.*

The first enquiry is directed at establishing whether the ultimatum was fair; the second at whether the dismissals pursuant to the ultimatum were fair."

GROGAN J: WORKPLACE LAW, 10th edition, (Juta & Co), 2009.

ISBN 13: 978-0-7021-8185-6 at page 403

27.2.2. *"As a general rule an employer should issue an ultimatum before dismissing unprotected strikers, although there may be circumstances in which dismissal without an ultimatum is justified. The object of an ultimatum is to give the striking workers the opportunity to reconsider their unprotected action."*

(Underlining added)

DU TOIT D, WOOLFREY D, MURPHY J, GODFREY S, BOSCH D and CHRISTIE S: LABOUR RELATION LAW, (Butterworths), 3rd edition 1999 ISBN (not available)

at page 412

27.2.3. *"An employer must issue a fair ultimatum to striking employees before dismissing them, that is:*

(aa) the ultimatum must be in writing and clearly formulated;

(bb) it must indicate to the employees the sanction of dismissal, and

(cc) it must allow sufficient time to employees to consider it and to consult with their union.

The purpose of an ultimatum is to attempt to persuade the striking employees to return to work"

*(*Underlining added)

VAN JAARSVELD AND VAN ECK:

PRINCIPLES OF LABOUR LAW, 2nd edition

(Butterworths), 2002 ISBN 0 409 06012 7

at page 400

27.3. Secondly, the ultimatum must be communicated to the employees concerned, in writing and in a language that they understand. Alternatively the ultimatum should be translated for the benefit of the employees.

In circumstances where workers are represented by a union, communication to the union will suffice.

27.4. The requirement for the employer to communicate the ultimatum to the concerned employees is an essential element towards achieving fairness in that process. The employer cannot therefore dispense with the requirement to communicate the ultimatum. Failure to communicate the ultimatum will consequently defeat the purpose for which it was issued. Legal authorities are unanimous on the requirement for communication of the ultimatum.

27.4.1. *"The main purpose of an ultimatum is to inform the workers that they are breaching their contracts of employment and that they face dismissal if they continue to do so. The employer must therefore make reasonable attempts to ensure that the ultimatum actually reaches all the strikers or, if that is not possible, their representatives. If the strikers speak a language other than that generally used in the workplace, the ultimatum should be in their language, or at least translated to them in their language."*

(Underlining added)

GROGAN J: DISMISSAL (Juta & Co), 2010

ISBN 13: 978-0-7021-8486-4 at page 482

27.4.2 *"Although it is advisable to convey the ultimatum to both striking employees and their union, the Labour Court has held that communication of an ultimatum to a union official or union representative is sufficient and that, absent special circumstances, an employer may legitimately assume that the ultimatum will be conveyed to the employees*."

(Underlining added)

DU TOIT et al, ibid, at page 412.

See also Triple Anchor Motors (Pty) Ltd & another v Buthelezi & others (1999) 20 ILJ 1527 (LAC).

28. As aforementioned, the Applicant has failed to prove that it distributed the ultimatum (annexure A) either to the workers or the union. The Applicant has therefore failed to communicate its ultimatum to the workers.

28.1 An ultimatum which has not been communicated to the concerned workers is invalid and therefore unenforceable. Employees cannot be accused of failing to obey an ultimatum which has not been communicated to them. In other words, employees cannot be held liable for refusing to obey an ultimatum, of which they are unaware.

28.2. The Applicant's argument in defence of the dismissal of the workers fails also on the ground that the Applicant failed to communicate the ultimatum to the workers.

28.3 The Court has further noted that the Applicant has issued the ultimatum irregularly. The workers have not been engaged in any unlawful conduct whether by commission or omission. The failure of the workers to work overtime on the 27th, 28th and 30th September 2013 has been explained above.

The Court has exonerated the workers from any wrongdoing. There was no justification therefore, for the Applicant to issue an ultimatum against the workers. The ultimatum was in the circumstances issued irregularly.

28.4. An ultimatum which was issued irregularly is invalid and unenforceable. For this reason also, the Court sets the ultimatum aside.

28.5 However, even if the ultimatum had been issued for a valid reason, it would still be set aside on account of the Applicant's failure to communicate it to the workers.

28.6. The Court has further declared the ultimatum invalid, on account of its contents which are *mala fide*, dishonest and unfair.

29. The Applicant has based its decision to dismiss the workers on the ultimatum. The Court has already set aside the ultimatum for being an invalid document. The Applicant has no further basis on which to defend the dismissal of the workers. The Court declares therefore, that the dismissal of the workers is unfair and it is hereby set aside.

30. The Applicant has stated in the supplementary affidavit that a majority of the employees (particularly referring to the workers),

failed or refused to work overtime on the 30th September 2013, without any reason. The Applicant has failed to state the facts upon which it based its conclusion that the workers failed or refused without any reason to work overtime.

30.1. The Applicant did not enquire from the workers or union representatives - the reason the workers did not do overtime work on the 30th September 2013. The Applicant has therefore based its conclusion purely on speculation and conjecture that the workers had no reason for failing to do overtime work.

30.2 On the 1st October 2013, the Applicant proceeded to summarily dismiss the workers without consultation with the union or the workers concerned.

The Applicant was not interested in determining whether or not the workers had a justifiable reason for not working overtime on the 30th September 2013. This fact appears in the Applicant's supplementary affidavit which reads thus;

> *"18. Apart from the few employees who had worked overtime on the 28th September, the great majority of the employees again <u>without any reason</u> walked out at 16h30 and refused to work overtime.*
>
> *19. In accordance with the ultimatum, these employees were given notice of termination of their services on the 1st October 2013."*
>
> (Underlining added)
>
> (Record page 77)

30.3. Even if the Collective Agreement (annexure PG2) did not have clause 3 and the matter fell to be decided only in accordance with clause 1.2, still the Applicant failed to comply with clause 1.2. The Applicant had a duty to enquire whether:-

30.3.1. the workers' conduct in failing to work overtime on the 30th September 2013 was consistent only with a refusal to work overtime and,

30.3.2. if so, was that refusal unreasonable or could it be justified?

The Applicant failed to discharge that duty. The Applicant's failure to comply with the requirements of clause 1.2 of the Collective Agreement vitiates its justification for the dismissal.

30.4. Without an input from the workers, the Applicant could not have answered these two questions fairly and honestly. The Applicant cannot therefore say that the employees refused <u>without reason,</u> to work overtime on the 30th September 2013. The correct position is that at the time the Applicant dismissed the workers, the Applicant did not know and further did not bother itself to know, whether or not the workers had a justifiable reason for not working overtime on the said day.

31. The Respondents have advanced another reason for challenging the dismissal of the workers. According to the Respondents, the dismissal was further illegal for contravening section 5.5 of the Recognition and Procedural Agreement (hereinafter refused to as the Recognition Agreement).

31.1 The Court has already made a finding that there was no wrongdoing on the part of the workers in relation to the events of the 27th, 28th and 30th September 2013.

This is one of the various reasons the dismissal of the workers was declared unjustified and therefore unfair.

31.2 Section 5.5 of the Recognition Agreement applies in a case where there was wrongdoing on the part of the workers. The Respondents' argument is that even if the workers had been engaged in some unlawful conduct (which is not the case), the Applicant was not entitled to dismiss the workers without compliance with section 5.5 of the Recognition Agreement.

31.3 It is not in dispute that the Recognition Agreement is binding on the parties and that compliance with section 5.5 therein is compulsory. This clause contains a mandatory condition which should precede a decision to dismiss the workers for an unlawful industrial action. Section 5.5 gives the workers extra protection (over and above the protection provided for in law) against summary dismissal in the event that the workers have engaged in an illegal industrial action.

31.4 In the event that the workers are engaged in an unlawful industrial action,

the Applicant is obligated by section 5.5 to take the following procedural steps in order to resolve an impasse at the workplace:

31.4.1 The employer (Applicant) must report in writing the unlawful conduct of the workers to the union (1st Respondent).

31.4.2 The employer must serve the report on the union by telex or hand delivery.

31.4.3 The employer must give the union an opportunity to intercede with the workers, in order for the latter to desist from the unlawful industrial action complained of.

31.5 It is apposite to reproduce section 5.5, which reads thus:

> *"5.5 The Union agrees not to authorise, cause, encourage, support or sanction any unlawful industrial action. In the event that any unlawful industrial action occurs in contravention of this clause, the Union undertakes to take immediate steps to end such action as expeditiously as possible. The Company undertakes to inform the Union by telefax or hand delivery,*
>
> *that such illegal action has been taken by its members and further undertakes not to dismiss workers without giving the Union and opportunity to intercede."*

(Underlining added)

(Record page 35)

31.6 There is no dispute between the parties regarding the procedural steps which the Applicant is obligated to take before dismissing the workers, for an unlawful industrial action. The Applicant's argument is that it has complied with all the procedural steps as required in section 5.5.

31.6.1 In particular the Applicant argued that it gave the 1st Respondent (union) a report in writing concerning the unlawful conduct of the workers. When referring to a report, the Applicant meant the Notice of Motion, founding and supplementary affidavits which the Applicant has filed before Court to institute the present application (which the Court is currently dealing with). The Applicant argued that the Court papers serve a dual role;

of instituting an application before Court as well as compliance with section 5.5 of the Recognition Agreement.

31.6.2 The service of the Court papers was hand delivered on the 1st Respondent on the 26th September 2013. According to the Applicant, the requirement of section 5.5 regarding service was thereby satisfied.

31.6.3 The Applicant added that from the time service was effected on the 1st Respondent to the date of dismissal of the workers (1st October 2013), the 1st Respondent had sufficient time to intercede.

31.7 The effect of section 5.5 is twofold.

31.7.1 It has deprived the employer the power to exercise arbitrary decision to dismiss its employees, in the event that the employer concludes that the employees are engaged in an unlawful industrial action.

31.7.2 It further gives the union a chance to assess the facts regarding the employer's complaint. If the union finds that the industrial action taken by the employees is unlawful, it would intervene and intercede by restraining the workers from continuing with such conduct. If however the union finds the conduct of the workers to be lawful, it would engage both the employer and employees in finding a

compromise. The role of the union in this instance is to restore good relations between employer and employee. A negotiated solution is likely to restore lasting peace and order at the workplace than a summary dismissal of the employees which has been decided arbitrarily.

31.8 The Applicant has clearly misunderstood the provisions of section 5.5. The Applicant has failed to distinguish between litigation and intercession. The section compels the Applicant to refer a matter or dispute to the union (1st Respondent) for intercession, instead of litigation in Court.

31.8.1 Since the Applicant has referred the matter to Court, the union can no longer intercede because it has to defend itself as the 1st Respondent. The intercessor is meant to remain neutral in order to play an effective intercessory role.

31.8.2 The purpose of an intercession is to bring about reconciliation between the parties without finding fault. The purpose of litigation is to persuade the Court to find one party guilty of misconduct or illegality and the other party be declared innocent.

31.8.3 In a successful intercession both parties achieve some measure of success; yet in a successful litigation one party will win and other will lose. The loser will be legally penalized.

31.8.4 When the parties agree to an intercession, they make their own rules regarding service of documents and procedure; as they have done in section 5.5. When the parties refer their dispute to Court, they follow the procedure and the rules as determined by Court.

31.9 The Court finds that section 5.5 clearly intended the employer (Applicant) to refer the dispute it had with the employees to the union for intercession. The Applicant failed to comply with the Recognition Agreement by referring the dispute to Court for litigation. The point raised by the Respondents is upheld.

31.10 Even if the employees were engaged in an unlawful industrial action (which is not the case), the application before Court would have been dismissed for contravening section 5.5 of the Recognition Agreement.

32. The Respondents have raised a counter claim in the answering affidavit as follows;

"a) That the dismissal of the 2nd Respondent be and is hereby declared null and void and that the 2nd Respondent [be] reinstated to employment."

(Record page 93)

32.1. Technically this counter- application has already been decided in the preceding paragraphs. The Court has declared both the founding and supplementary affidavits to be defective to the extent that they do not disclose a cause of action. On that basis the Court has dismissed the application.

32.2. Notwithstanding the order dismissing the application, the Court has gone further to consider the merits of the matter. The application failed on the merits as well. The Court has given several reasons for finding the dismissal of the workers unfair and unlawful, as a result of which the Court dismissed the application. The counter application succeeds for the same reasons.

33. The general rule is that costs follow the event. The Respondents have incurred substantial costs in defending this matter. It is fair that they be awarded an order for costs.

34. The workers have expressed their willingness to return to work. Where the employer –employee relationship has not been destroyed, the Court is inclined to grant an order for reinstatement. There is no evidence that the employer –employee relationship has been destroyed in this case.

See Triple Anchor Motors at page 1538 paragraph 20.

35. Therefore the Court orders as follows:

35.1. The application is dismissed.

35.2 The counter application succeeds.

35.3 The dismissal of the workers (Further Respondents) is set aside and they are hereby reinstated.

35.4 The Applicant is to pay the costs of suit.

The members agreed.

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D. MAZIBUKO

INDUSTRIAL COURT JUDGE

Applicant's attorney Mr M Sibandze

Musa M Sibandze

Attorneys

Respondent's Attorney Mr L Mzizi

Lloyd Mzizi Attorneys