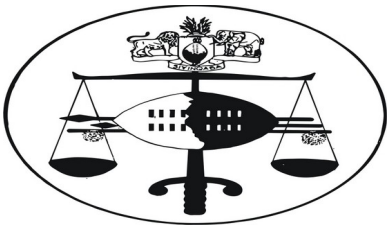

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 289/2015(B)

In the matter between:-

THE WORKERS UNION OF SWAZILAND **1ST APPLICANT**
TOWN COUNCILS
VARIOUS MEMBERS OF 1ST APPLICANT **2ND APPLICANT**

AND

MUNICIPAL COUNCIL OF MANZINI **RESPONDENT**

Neutral citation : *The Workers Union of Swaziland Town Councils & Another v Municipal Council of Manzini [2016] SZIC 15 (13 April 2016)*

CORAM : **DLAMINI J,**
*(Sitting with **P. Thwala & P. Mamba***
Nominated Members of the Court)

Heard : **08 MARCH 2016**
Delivered : **12 APRIL 2016**

Summary: ***Labour law – Industrial Relations –*** *Applicants seek to interdict implementation of Performance Management and Development policy –* ***Held*** *– matter not urgent –* ***Held –*** *Matter afflicted with too many disputes of fact which Court cannot ignore.* ***Held –*** *Employers have inherent right to regulate all aspects of employment according to their own discretion and judgement.* ***Held –*** *Application dismissed.*

1. This matter was filed before this Court on a certificate of urgency and the Applicants seek the following relief;

1. *Dispensing with the normal forms and time limits relating to the institution of proceedings and allowing this matter to be heard as one of urgency.*
2. *That the Applicants' non-compliance with the above said forms and services be condoned.*
3. *That pending finalization of the present application the Respondent be and is hereby interdicted and restrained from implementing on Applicant's members the Performance Management and Development policy (PDMS).*
4. *That pending finalization of the present application the Respondent be and is hereby interdicted and restrained from taking action against Applicants' members for failure to sign the PDMS forms as narrated in Respondent's letters to the said members (annexure **B** of the Founding Affidavit).*
5. *That the intended implementation of the Respondent's Performance Management and Development System policy be and is hereby declared an unfair labour practice and accordingly that Respondent be and is hereby interdicted and restrained from implementing same to the Applicants' members.*
6. *That the Respondent be and is hereby directed to engage in and to finalise the consultation process of the Performance Management and Development system policy with the Applicant prior to implementing the said policy.*

7. *That a rule nisi do hereby issue calling upon the Respondent to show cause on a date and time to be determined by the honourable court why an order in terms of prayer 5 and 6 should not be made final.*
8. *That the 1st Respondent be and is hereby ordered to pay costs of suit.*
9. *Granting Applicant further and / or alternative relief.*

2. The founding affidavit in this matter is deposed to by the Secretary General of the Applicant union, Sipho Sibandze. He states that this matter has been brought to this Court in such haste for relief in the form of an interdict against Manzini City Council to prevent it from effecting a Performance Management and Development System (PDMS) pending the completion of a consultation process with the Applicant union.

3. Giving a background on the dispute between the parties, Sibandze states that the Respondent has written to all its Employees instructing them to sign PDMS Agreement forms. This PDMS agreement is apparently to be used by the Employer as a tool of appraisal and monitoring. These letters written to the individual Employees of the Council also threaten them and is designed to force them to sign the

PDMS forms. He states that the conduct of the Respondent of attempting to force the employees to sign the PDMS forms, thereby putting into effect the Performance Management and Development System is not only unlawful but also contrary to the recognition agreement of the parties.

4. The Secretary General also states in his affidavit that in the year 2013 the Respondent called the Applicant's executive to a meeting wherein the union was informed of the intended introduction of the PDMS. At that meeting the union was given a draft policy to go and have a look at. However, the Secretary General further states, to date the union has never been called back by the Council to a meeting in order for it to present its input as per the initial meeting. He states further that in December of 2014, the Respondent attempted to introduce the PDMS but that these attempt was thwarted by the union after it sought the intervention of the Labour Commissioner who apparently ordered the parties to discuss the matter further. This never happened, according to the Secretary General, instead the Respondent has now resorted to forcing the introduction and implementation of the PDMS with the threats of disciplinary action if the employees do not sign the forms.

5. The Applicant union further contends that the implementation of the PDMS is in breach of clauses 8.02 to 8.09 of the collective agreement of the parties. Clause 8.03 is said to oblige Council to first negotiate with the union on various employment issues including issues of wages and productivity of the employees. The contention here being that the PDMS which shall change the terms and conditions of employment of the employees, in particular issues of salaries as well as productivity, hence the need for consultation.

6. In relation to clauses 8.04 and 8.07, the submission was that these afford a right to submit proposals in writing by the union to the Respondent. Therefore, the failure by Council to allow the union the right to meet it concerning the introduction of this PDMS for purposes of receiving and negotiating on its (union's) proposals is an infringement of its right to be heard.

7. Another complaint is that according to the PDMS, the employees have to be trained in the mechanisms of the system, whereas there has been none such training for them. They further complain that as a union they have not even been allowed an opportunity to endorse this PDMS

policy. Hence this present application in which the union seeks this Court's intervention in interdicting and restraining the Respondent Council from proceeding with the implementation of this PDMS policy.

8. The Respondent opposes this urgent application and in so doing has filed an affidavit in answer to the Applicants' allegations deposed to by the Chief Executive Officer, Lungile Dlamini. The CEO raises points *in limine* on *lis pendens,* urgency, requirements of an interdict and disputes of facts. She also pleads to the merits of matter.

9. On the merits, she starts off by giving a background of the matter. She states that in or about January 2013, the Manzini City Council introduced its strategic plan to the employees and that within this plan was introduced the idea of this now contentious Performance Management Development System. The purpose of this PDMS was to align employee performance with the strategic plan that had been introduced, the idea being that individual employees of the Council would prepare, on an annual basis, their work plans which would be reviewed and approved by each employee's direct supervisor.

Thereafter, and once the work plan had been agreed and approved, it would then become a working tool for the employee and a basis upon which the employees' performance would be assessed on a quarterly basis.

10. Then in April 2013, the CEO continues, the union was invited to an introductory workshop wherein the concept of the PDMS was fully explained. Further to this, on 09 August and again 09 September 2013, the Respondent held consultations with the union on the PDMS. She states though that the union at such consultations did not wait to address the substance of the system but sought instead to divert the discussions.

11. The CEO clarifies that this PDMS is a management tool and method of production as opposed to a term and condition of employment. As such, she contends, it is therefore within the discretion of management to formulate and implement same, subject to consultation with the union. She submits as well that the Respondent Council was under no obligation to negotiate the Performance Management and Development System, instead, she contends, the obligation was

merely to consult with the union before implementation. This consultation, she further contends, was duly done and the union however failed to use that consultative forum, choosing instead not to give meaningful input by diverting the discussions.

12. Following the failure by the union to give meaningful input to the process, the Respondent adopted the PDMS at a meeting of Council on 30 January 2014. Then from 06 January 2015, training was conducted on the PDMS by the Human Resources Manager, Mr. Nhlanhla Dlamini together with the Personnel Officer, Ms. Fikile Mkhonta. Since then the system has been activated in every department and implementation is ongoing. She finally states that in terms of the system employees are being required to develop their work plans and finalise them with their supervisors. She clarifies that the agreement they are being asked to sign is merely an agreement on the particular job upon which the individual employees would be appraised and the manner and framework of the appraisal.

13. The CEO maintains that consultations with the union were conducted and points out that the point of departure was that the union had been

of the view that the Respondent was obliged to negotiate the terms of the PDMS as opposed to consulting on same. She clarifies that the Applicant union is not entitled to 'endorse' the system of performance appraisal but is rather merely entitled to be consulted before the system is implemented. She confirms the reporting of the matter to the Labour Department and that the Labour Department referred the matter back to the parties for discussion. Instead of discussing the matter, she alleges, the union simply demanded that the whole process be stopped, as such they failed to substantive submissions on how the policy should be changed. She goes on to submit that Respondent cannot be expected to consult the union *ad infinitum* and be held at ransom by union that refuses to make submissions but resists the implementation of the policy. To date, the union has failed to make input on the system hence it has waived its rights to do so and that the employees are now bound by the implemented system which was adopted by Council.

14. She states as well that all managers, including those represented by the staff association and members of the staff association have been assessed using the PDMS and deserving employees who had

performed well awarded bonuses. Apparently on learning about this payment of bonuses members of the Applicant were disgruntled, to the extent of even threatening a work stoppage. This was in January 2016. Ultimately this work stoppage did not take place. But the CEO emphasizes that this threat of a strike indicates that it is in the best interests of the employees of the Respondent that they submit themselves to appraisals so that they too can be paid bonuses as would be calculated according to this Performance Management and Development System.

15. Then in relation to the implementation of the PDMS being in breach of clauses 8.02 and 8.09 of the collective agreement of the parties, the CEO disputes this, submitting instead that issues for compulsory negotiations, in terms of clause 8.02, are minimum wages, hours of work and collective working conditions. She further submits that in terms of clause 8.03 the Manzini City Council may negotiate the following terms and conditions of employment with the union; wages, salaries, productivity, overtime, annual vacation leave, sick leave, healthy, medical aid, safety, public holidays, hours of work etc. These,

she argues, may be negotiated upon but negotiation is not compulsory as alleged by the union.

16. On the date set for the hearing of the matter both the preliminary points, raised by the Respondent, and the merits of the matter were argued by agreement of respective Counsel for the litigants. The point of law in relation to *lis pendens* though was no longer pursued by the Respondent. On the urgency of the matter, Attorney Mzizi maintained that the matter of his clients was urgent because in terms of the letter written to the employees by management, failure to comply with the directive of management within the stipulated deadline would lead to disciplinary action against them. It would seem though the employees are conveniently ignoring the fact that it has always been clear that the Respondent viewed their refusal to commit to the performance objectives and standards as a misconduct and that this would be followed by disciplinary action for insubordination. This is not something new. They were aware of this fact as far back as July 2015 when they deposed to their affidavits under case 289/2015(A). They cannot then, some six months later, still rely on the threat of discipline as still constituting a ground of urgency.

17. Another hurdle for the Applicant employees is in relation to the principle that was expounded by this Court per Dunseith JP in the ***Maswati Dlamini v Swaziland Development & Savings Bank IC case no. 174/2007.*** The then Judge President stated as follows in that matter;

> *"The Applicant can avoid the threat of disciplinary action by simply accepting the transfer under protest and reserving his rights with respect to the pending section 26 proceedings."*

18. This means therefore that the Applicants cannot use the threat of discipline as a ground of urgency. They can comply under protest and reserve their right to challenge the legality of this performance management and development system. It cannot be said therefore that they are without alternative remedy. Yet another hurdle for the Applicants is that it is clear that this matter is afflicted with numerous material disputes of fact which they clearly ought to have foreseen. These cannot be ignored by this Court.

19. On the merits of the matter, perhaps as a starting point we need to point out that the 'attitude of this Court has always been that it

recognizes that that there are various laws that impose a lot of obligations upon employers in relation to their employees. And yet as a rule however, the Court has always, and consistently so for that matter, upheld the employers' inherent prerogative to regulate their businesses. Under the doctrine of management prerogative, every employer has the inherent right to regulate, according to their discretion and judgement, all aspects of employment relating to employees' work, including hiring, work assignments, working methods, time, place and manner of work, supervision, transfer of employees, lay-off of employees, discipline and dismissal of employees. The only limitations to the exercise of this exclusive prerogative of the employers are of course those imposed by our labour laws and the principles of equity and substantial (natural) justice.' (See ***Dumisa Zwane v eZulwini Municipality & 3 Others IC case no 33/2014***).

20. This Court reiterates the sentiments expressed in the ***Dumisa Zwane*** case (supra) that;

> *"…while the law imposes many obligations on the employer, nonetheless, it also protects the employers' right to expect from its employees not only good performance, adequate work and*

diligence, but also good conduct and loyalty. In fact labour laws do not excuse employees from complying with valid company policies and reasonable regulations for their governance and guidance." (Court's emphasis.)

21. Now coming to this matter at hand, it is not in dispute that in the year 2013, the Manzini City Council introduced its strategic plan to its employees and their unions. This strategic plan was introduced together with the Performance Management and Development System, whose purpose was to align employee performance with the strategic plan. The PDMS is designed to assist with performance management of all employees of Council, from the CEO to the lowest ranked employee within the organization. With the strategic plan as a basis, the idea is to enable the Manzini City Council to be able to identify high level priorities and specific objectives to be achieved by its various departments.

22. The performance agreements to be signed by the employees are meant to enable the Municipal Council to assign specific performance objectives and targets to its employees. This in turn also enables the individual employees to participate meaningfully in the management of their own performance. In this regard therefore, the observation of

this Court is that this is a valid policy for the governance and guidance in respect of what is expected of all employees of the Manzini City Council in the execution of their duties. It is meant to get the best out them, so to say. Through this PDMS, the performance of each employee, without exception, is continuously monitored for purposes of identifying performance barriers and changes so as to address development and improvement needs.

23. Another observation by the Court is that performance that is up to the required standard is rewarded. Average and satisfactory performance for instance is rewarded by means of the annual salary, a thirteenth cheque, annual salary adjustment and salary notch progression. Good and excellent performance on the other hand qualifies employees for performance awards. Employees not performing according to what they agreed to in the performance agreements are allowed an opportunity, together with their supervisors, to identify remedial steps to be taken to eliminate factors which might have hampered the employee's performance. To determine and gauge the performance of employees is a Moderating Committee that evaluates the summarised analysis of the outcome of performance ratings. This assessment is

done in a realistic, consistent and fair manner. Even before this process each employee has an opportunity to assess his/her own progress according to his/her own performance agreement and work plan. So that the assessment of individual employees is done with their full involvement and participation.

24. It is therefore a finding of this Court that this PDMS is not a monster to be feared after all. It is, for all intents and purposes, meant to elevate the Manzini City Council to a world class Municipality in terms of service delivery to the City's rate payers, in line with the country's vision for first class world status by the year 2022. Indeed this is a valid policy meant for the good of Council and it was therefore unfair and reasonable of the employees to expect the employer to consult *ad infinitum*. In that regard, it is the considered view of this Court that the Applicants have failed to make out a case on the basis of which the Court should intervene in their favour, even on the merits of the matter.

25. When the matter was argued before this Court, Counsel for the Applicant union and the employees, Attorney Mzizi, indicated that the

main complaint of the union and employees was that they had not been consulted before this policy was implemented and that they still expressed the desire and wish to be so consulted. But from the evidence before this Court, it would seem they are the ones who had been obstructive in this regard. They feared this PDMS, thinking it was only meant to get rid of them for non - performance. But that is not the case. Their fears are unfounded and should therefore be allayed. For the reasons afore mentioned it is the considered view of this Court that the present application of the Applicant cannot succeed and it is accordingly dismissed.

26. Be that as it is however, it cannot be ignored that in line with the Industrial and Labour laws of our country, this Court is duty bound to promote harmonious industrial relations, fairness and equity in the field of labour relations. To that end therefore, the Court considers it just, fair and equitable that the employer, using its discretion, gives the union and employees one last opportunity to be engaged on the PDMS policy so that they fully comprehend and appreciate its purpose and objectives. In fact, Attorney Sibandze indicated to this Court that the Respondent is willing to listen to its employees, and it

is with assertion in mind that the Court recommends that they be engaged. This is certainly not to say the process should be reversed. The union and employees are to understand that the Manzini City Council has the inherent right to regulate, according to its own discretion and judgement, how the Council is to function to effectively carry out its statutory mandate to the rate payers of Manzini City. They should fully understand that to consult is certainly not to negotiate! The Court makes no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 13th DAY OF APRIL 2016

For the Applicants : Attorney Mr. L. Mzizi (Lloyd Mzizi Attorneys)
For the Respondent : Attorney Mr.M. Sibandze (Musa M. Sibandze Attorneys)