



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 31/18**

In the matter between:

**WORKERS UNION OF SWAZILAND**

**TOWN COUNCILS**

1<sup>st</sup> Applicant

**EMPLOYEES OF THE 1<sup>ST</sup> RESPONDENT**

**WHO FALL UNDER THE BARGAINING**

**UNIT OF 1<sup>ST</sup> APPLICANT**

Further Applicants

**And**

**MUNICIPAL COUNCIL OF MANZINI**

1<sup>st</sup> Respondent

**THE LABOUR COMMISSIONER**

2<sup>nd</sup> Respondent

**ATTORNEY GENERAL**

3<sup>rd</sup> Respondent

**Neutral citation:** Workers Union of Swaziland Town Councils v Municipal Council of Manzini and 2 Others (31/18) [2018] SZIC 16 (14 March 2018)

**Coram:** Nsibande S. (Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

**Date Heard :** 13<sup>th</sup> February 2018

**Date Delivered:** 14<sup>th</sup> March 2018

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## JUDGMENT

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[1] On 25<sup>th</sup> January 2018 the Municipal Council of Manzini (hereinafter referred to as the Council) launched an urgent application against Mduduzi Gina (hereinafter referred to as Mr Gina), the Worker's Union of Swaziland Town Council (hereinafter referred to as WUSTC) and the Trade Union Congress of Swaziland (Tucoswa) seeking an order in the following terms:

*1.1 Dispensing with the rules of court regarding service and time limits and directing that the matter be heard as one of urgency.*

*1.2 A rule nisi do hereby issue returnable on a date to be determined by this Honourable Court calling upon the Respondents to show cause why an order set out in the terms hereunder should not be made final:-*

*1.2.1 Interdicting the 1<sup>st</sup> Respondent from participating in internal ongoing Joint Consultative Committee meetings being held between the Applicant and Respondent.*

*1.2.2 That the Respondent is neither a member nor an officer or official of the 2<sup>nd</sup> Respondent.*

*1.3 That prayer 2.1 operate with immediate and interim effect.*

*1.4 Costs of suit if opposed.*

*1.5 Further and/or alternative relief.*

[2] The application was set down for hearing on 31<sup>st</sup> January 2018 at 9:30 am.

[3] On 30<sup>th</sup> January, 2018 WUSTC and some further Applicants launched an urgent application of their own against the Council, the Labour Commissioner and the Attorney General. This application was also set down for 9:30 am on 31<sup>st</sup> January, 2018.

WUSTC sought an order:

*2.1 Dispensing with the usual requirements as to form, time limits, service and institution of court proceedings and to hear the matter as an urgent one.*

- 2.2 *Condoning the Applicants' non-compliance with the Rules of Court.*
- 2.3 *That the 1<sup>st</sup> Respondent be and is hereby interdicted and restrained from implementing and/or rolling out a turnaround strategy of its operations and the Voluntary Exit Scheme Proposal.*
- 2.4 *That the 1<sup>st</sup> Respondent be and is hereby ordered to engage the Applicant in consultations on both the turnaround strategy and the Voluntary Exit Scheme Proposal.*
- 2.5 *That the 1<sup>st</sup> Respondent be and is hereby ordered to comply with and adhere to the Recognition and Procedural Agreement and the Terms of Reference of the Joint Consultation between the parties on the Turn Around Strategy and the Voluntary Exit Scheme Proposal.*
- 2.6 *That prayers 3,4 and 5 above operate with interim and immediate effect pending final determination of these matters on a date to be appointed by the above Honourable Court.*
- 2.7 *Costs of suit.*
- 2.8 *Granting any further and/or alternative relief as the Honourable Court may deem appropriate.*

- [4] Both matters came before court on 31<sup>st</sup> January and it was agreed between the parties that the applications be consolidated and treated as an opposed application with a counter-application. Further the parties made undertakings to maintain the status *quo* pending finalisation of the application before Court, doing away with the need for any interim relief. After the exchange of all the necessary legal documents the matter was set down for argument on 13<sup>th</sup> February 2018.
- [5] For the sake of clarity we shall refer to the applications as (1) the Gina application and (11) the Voluntary Exit Scheme application.

We shall also refer to the parties by their name as designated in paragraph 1 above.

### **I. THE GINA APPLICATION**

- [6] In March 2017, the Council and WUSTC sought to form a Joint Consultative Committee for purposes of consultation on the ongoing Turn-Around Strategy of the Council. A meeting was held on 9<sup>th</sup> March for these purposes and the parties agreed to draft terms of reference for the Joint Consultative Committee (the JCC). Thereafter and between April and May 2017, three (3) more meetings were held between the parties culminating in the finalisation and adoption of the Terms of Reference of the JCC.
- [7] It is common cause that Mr. Gina took part in all the four meetings between March and May 2017, inclusive of the 1<sup>st</sup> one on 9<sup>th</sup> March.

- It is common cause also that he is not employed by the Council nor by any other City or Town Council in Swaziland.
- [8] It is also common cause that at a consultative meeting of 24<sup>th</sup> August 2017, the Council brought up, for the first time the issue of the eligibility of Mr. Gina to take part in the consultative meetings.
- [9] It appears that sometime in August, it came to the attention of the Chief Executive Officer of the Council that Mr. Gina had attended the previous consultative meetings. The eligibility of Gina to attend the consultative meetings was then raised at the 24<sup>th</sup> August meeting with the management team asking for his credentials. No credentials were forwarded.
- [10] It is again common cause that Mr. Gina did not attend two (2) meetings after his eligibility to attend was questioned in August but that he has attended subsequent meetings thereafter, or at the very least, attempted to attend. These subsequent meetings were unable to proceed in the presence of Mr. Gina following that the Council questioned his right to attend.
- [11] The failure to continue with the consultative meetings whereas there was a need to finalise the Voluntary Exit Scheme proposal as part of the Council's Turn Around Strategy, resulted in Council approaching the Court to interdict Mr. Gina from continuing to participate in the meetings.

[12] The Council bases its refusal to accept Mr. Gina's participation at the consultative meetings on the following:-

12.1 That the consultative meetings and the consultation process as a whole, is an internal process that should be between Council and its employees as represented by WUSTC and the staff association (SWACICOSTA)

12.2 That Mr. Gina does not qualify to attend the consultative meetings on three grounds –

(a) He is not a member of WUSTC and does not qualify for membership because in terms of articles 4 (1) and (II) of the WUSTC constitution membership is open only to eligible employees of Swaziland Town Councils.

(b) That in terms of the Recognition Agreement, the parties agreed that where there are to be consultative meetings between them, the employees would be represented by two (2) Union officials and two (2) shop stewards and Council would be represented by no more than four (4) representatives.

In terms of the Recognition Agreement **“union official”** is defined to mean a constitutionally elected and authorised official.

(c) The Terms of Reference of the Joint Consultative Committee allow WUSTC to be represented by a maximum of five (5) representatives being two union officials and three shop stewards.

[13] As already alluded to it is common cause that Mr. Gina is not an employee of any Town/City Council or a member of WUSTC or a union official or shop steward within the definition of the Recognition Agreement. WUSTC in its replying papers did not seriously make any allegations of Mr. Gina's eligibility to attend in terms of the Recognition Agreement, the WUSTC constitution or the Terms of Reference of the Joint Consultative Committee. In fact WUSTC's position was that the Council had allowed Mr. Gina to attend four (4) meetings, with full knowledge of his status and role and was now estopped from refusing to allow his participation, that by allowing Mr. Gina to attend and contribute in the previous meetings, Council had waived its right to change its mind about his participation.

[14] It is WUSTC's case that Mr. Gina was introduced to the meeting of 9<sup>th</sup> March 2017 as the lead negotiator from TUCOSWA; that thereafter he was allowed to take full participation in all deliberations regarding the Turnaround Strategy; that he was allowed to be part of the WUSTC team that formulated the Terms of Reference for the consultations and in fact led the discussions on its behalf. They contend that WUSTC made full disclosure of Mr. Gina's status and that the Council elected to allow him to be a part of the consultative forum; that by allowing him to sit in those meetings and contribute



therein, the Council waived its right to protest at his continued participation as part of WUSTC team.

[15] The principle of estoppel by election or waiver has been confirmed to be applicable in the field of labour relations.

**See: 1. South African Revenue Services v CCMA and Others Case No. JR 515-04**

**2. Chamber of Mines of SA v NUM 1987(1) SA 688 (A)**

**3. Maluti Transport Corporation v Mr Tawu & Others [1999] 9 BLLR 887(LAC).**

[16] The onus rests on the party alleging waiver to allege and prove the waiver on a balance of probability. And, while waiver is a matter of fact, the authorities require a clear evidence of waiver. In assessing the probabilities the factual presumption that a party is not lightly deemed to have waived her or his rights should be borne in mind.

**1. Laws v Rutheford 1924 AD 261**

**2. Feinstein v Niggli 1981(2) SA 684 A**

The party alleging waiver must show that the other party, with full knowledge of its rights decided to abandon the right, whether expressly or by conduct plainly inconstant with an intention to enforce it.

[17] In the matter before court, it appears from the minutes of 9<sup>th</sup> March 2017 that at that initial meeting WUSTC “**introduced Vusi Simelane,**

**president of WUSTC National and Mr. Mduduzi Gina from Tucoswa as a member of the National WUSTC, who will form part of their team”.**

At the next meeting in which Mr. Gina participated, on 19<sup>th</sup> April 2017, the minutes of that day capture the register of members present. Where Mr. Gina is concerned it reads -

<b>NAME</b>	<b>DESIGNATION</b>
10.	
11. Mduduzi Gina	WUSTC National
12.	

[18] WUSTC’s representative in court stated that full disclosure of Mr Gina’s particulars was given from inception and that because of that the Council would have known he was not eligible to sit in the consultative meetings but elected to allow him to take part.

The minutes however tell a different story. If Mr. Gina was from WUSTC National he would have been eligible to sit in the said consultative meetings as an elected and authorised union member. The minutes of 9<sup>th</sup> March and 19<sup>th</sup> April 2017 certainly create the impression of Mr. Gina being from WUSTC National thus a union member, when that is not the position. It becomes difficult to say that the Council, with full knowledge of who was eligible to sit in the consultative meetings abandoned the right to hold WUSTC to strict compliance with the attendance arrangements, by allowing Mr. Gina to sit and participate in those meetings.

[19] A further difficulty with Mr. Gina attending the consultative meetings arises from the Terms of Reference for the JCC, that he assisted in crafting. In terms of clause 4 of the Terms of Reference of the Joint Consultative Committee, WUTSC can be represented by two (2) Union officials and three (3) Shop Stewards. As is common cause, Mr. Gina is neither a union official nor a Shop Steward. Going forward into the next meetings held after the adoption of these terms of reference can it be said that the Council waived its right to enforce the provisions of these terms of reference? The Terms of Reference were adopted on 3<sup>rd</sup> May 2017 and the Council protested Mr. Gina's presence at the meeting of 24<sup>th</sup> August 2017, there having been another meeting on 18<sup>th</sup> May 2017. In our view and on the facts of this matter we find that it cannot be said that the Council waived its rights and is therefore estopped from protesting Mr. Gina's presence.

[20] As things stand these are consultative meetings between an employer and its employees and should in our view be allowed to proceed without outside influence at this stage. It would surely not be in the interests of the workers themselves for the employer to be more pre-occupied with the unwanted presence of a single delegate than to have its full attention directed to the consultation agenda. In the circumstances we find that the Council can not be estoppel from protesting the presence of Mr. Gina at the JCC meetings. Mr. Gina can not be part of those meetings. He does not qualify as set out above.

## II. THE VOLUNTARY EXIT SCHEME APPLICATION

[21] The essence of this application was to interdict and restrain the Council from implementing and/or rolling out the Turn Around strategy of its operations and the Voluntary Exit Scheme Proposal and to direct it to consult with the WUSTC on both programs prior to their implementation.

[22] It was not necessary to issue an interim interdict as sought by WUSTC, when the matter was first heard, due to the undertakings entered into between the parties. The Council did however raise a point *in limine* with regard to the WUSTC Secretary General, Zakhele Simelane, being authorised to bring the application to court by virtue of his office. The contention by Council was that the WUSTC constitution vests the power to bring or defend legal proceedings in the Executive Committee and not in the Secretary General. Since the deponent to the founding affidavit, Zakhele Simelane had made no allegation of being authorised by resolution of the Executive Committee to institute the legal proceedings against Council then he had no authority, despite his position as Secretary General, to bring the application and that the application should be dismissed for lack of the requisite authority.

[23] It is our view that it is not necessary to make a ruling on this point, the Council having indicated that it was not, in essence, opposed to the application. The Council only prayed for the Court to grant the order within strict parameters. This was because Council, intimated, it had always been willing to consult but had had difficulties with the WUSTC delegation containing a delegate without accreditation.

In the circumstances and with regard to the application and counter application before Court and the Court Orders as follows:

- 1. Mr. Mduduzi Gina is hereby interdicted from participating in the ongoing Joint Consultative Committee meetings being held between Council and WUSTC.**
- 2. The Parties are directed to engage each other in consultations on both the Turn Around Strategy and the Voluntary Exit Scheme Proposal before the implementation of these programs. In this regard the parties are directed to hold a minimum of four (4) meetings within two weeks of this directive.**
- 3. Each party to pay its own costs.**

The members agree.



**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT**

**For Applicants** : Mr. M. Sibandze

**For Respondent** : Mr. N. Hlophe