IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 245/2021E

In the matter between:-

SWAZILAND AGRICULTURAL PLANTATIONS WORKERS UNION — **APPLICANT**

AND

UBOMBO SUGAR LIMITED — **RESPONDENT**

Neutral citation	:	*SAPWU v Ubombo Sugar Limited (245/2021E) [2022] SZIC 61*
CORAM	:	**DLAMINI J,** *(Sitting with **A.S. Ntiwane & S.P. Mamba** Nominated Members of the Court)*
Last heard	:	**18 March 2022**
Judgement Delivered	:	**24 May 2022**

Summary: Labour Law *– Applicant Union and Respondent Employer engaged in wage negotiations but could not agree on final increment percentage. After the parties had deadlocked the Respondent then unilaterally implemented an 8% across the board increment backdated to 01 April 2021.* ***Held:*** *When negotiations reach an impasse the duty to negotiate is suspended and an Employer may unilaterally implement its final offer as a means to end the impasse.*

1. This matter was filed accompanied by a certificate of urgency by the Applicant Union seeking orders as follows;

- *Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency*
- *Condoning any non-compliance with the Rules of Court relating to notice and service of court process.*
- *That a rule nisi be issued with immediate and interim effect calling upon the Respondent 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;*
- *That pending finalization of this application, the Respondent be and is hereby interdicted and restrained from dealing directly (bargaining and/or consulting) with Applicant's members on wages, hours of work and all other terms and conditions of employment;*
- *Interdicting and restraining the Respondent from implementation and/or effecting 8% wage increase on Applicant's members for a period of two years;*

- *Declaring that the Respondent has an obligation to preserve the status quo with respect to all terms and conditions of employment including wages even after the expiration of the latest Collective Agreement annexed hereto marked "A"*
- *Declaring any deal and/or agreement reached between Respondent and Applicant's (sic) unlawful and of no force and effect.*
- *Leave of Court to file Supplementary Affidavit to upraise this Honourable Court on the latest developments.*
- *That prayers 3.1 and 3.2 operate with immediate and interim effect.*
- *Costs of this application be awarded against the Respondent.*
- *Further and/or alternative relief as the Court may deem appropriate.*

2. This matter has quite a history. Its genesis is a dispute that was initially reported to the Conciliation Mediation and Arbitration Commission (CMAC) at the end of June 2021. Amongst the issues in dispute between the parties was a demand for a wage increase of 12% by the Applicant Union on behalf of its members. CMAC brought the

parties together and attempted to have them agree on the issues in dispute but failed to have them strike some form of compromise through the conciliation process. As a result of the failed conciliation process CMAC then issued a certificate of unresolved dispute to indicate that the conciliation process had been unsuccessful.

3. Upon receipt of the certificate of non-resolution of the dispute between the parties the Applicant wasted no time in issuing a strike notice. But the Respondent Employer ran to Court and successfully challenged the strike notice, and it was set aside. The union though was unrelenting. It issued a second strike notice, for strike action to commence at 7am on 30 September 2021. Synchronously, the Employer also issued a lockout notice which was to start 2 hours after the strike action, at 9am, on the very same date of 30 September 2021. All this time the union maintained its demand of a 12% (which was later reduced to 11.45%) salary increment whilst the employer maintained a 5% counter offer.

4. On 19 October 2021, the Employer suspended its lockout action. The union however persisted with strike actions for a period of just over 6

weeks, 48 days to be precise, up to 17 November 2021, when it then decided to suspend it. For the duration of the strike action the Employer decided to implement the *'no work no pay'* principle. This effectively means that the employees lost almost 2 months of remuneration.

5. Whilst the strike action proceeded, a number of behind the scenes meeting were made by the parties in an attempt to reach an amicable resolution of their differences, but all these were without success. There was even an intervention by the Government, through the respective Ministers of Agriculture and Labour and Social Security to broker peace between the parties. The Ministerial intervention seems to have yielded positive results because after the strike action had been halted, the union wrote to the employer and made certain proposals towards settling the impasse of the parties. Amongst the proposals was one for 8% salary increase, effective for 2 years, across the board.

6. The employer bought into the idea of settling the dispute of the parties in terms of the proposal by the union, because it says it accepted the

proposal and thereafter prepared an agreement for consideration and signature by the union. However, the union refused to sign the agreement. In its pleadings however, the union informs the Court that the Employer rejected the 8% settlement proposal and maintained the initial offer of 5%. The union further states that after the rejection of the 8% settlement proposal it also reverted to its initial 11.45% offer.

7. In January 2022, seeing that there was still no resolution to the dispute of the parties, even though both the strike and lockout actions had been suspended, the employer then decided to unilaterally effect the 8% cost of living adjustment on wages and salaries of the employees. In this regard, the Respondent states that before effecting the cost of living adjustments, it first convened a meeting with the Applicant Union wherein it communicated its intention to unilaterally effect the 8% salary increase.

8. In justifying its unilateral decision to effect this now contentious 8% increase on the salary of the workers, the Respondent contends that it has a moral obligation to act in a manner that is to the benefit of the

employees. Further, the Respondent states that with the strike action over, there is a need for operations in the company to return to normality and that part of this process includes trying to address some of the consequences flowing from the elongated strike action. The Respondent states as well that its decision to unilaterally effect the 8% increase was also informed by the fact that post the strike action, the morale of the employees is at its lowest and that they are facing huge debts which in turn affects productivity. This especially because for such an elongated strike action, 48 days, they still had nothing to show for it. It is the Respondent's contention therefore that its unilateral decision was therefore part of management's measures meant to mitigate the long term effects of the strike action.

9. Principally, the case of the Applicant in this present application is that the Respondent's decision to unilaterally implement the 8% cost of living adjustment violates the collective agreement of the parties. The Respondent however, states that it accepted the proposed 8% proposal at the meeting of the parties of 11 November 2021, and that it even communicated its acquiescence thereto.

10. However, the Court notes that there seems to be some goal posts shifting by the Applicant Union in respect of this issue of the 8% increment. This I say because in their letter addressed to the Managing Director, dated 09 November 2021, headed ***'SAPWU Proposed Settlement Offer'***, Obed Jele, the Branch Executive Secretary of the Union, made a proposal of 8% across the board increment for a period of 2 years, amongst other offers towards settling the dispute of the parties. Interestingly though, the same Obed Jele in the Applicant's replying affidavit now seems to be disowning the 8% offer when he now states that the 8% over a period of 2 years is worse that 5% for one year.

11. Clearly this change from the initial clearly articulated offer of ***'8% across the board 2 years'*** is meant to drag out the dispute and make the success of settling same more difficult. It is meant to frustrate the negotiations of the parties. What the Applicant Union is doing in this matter is to play hardball, hoping to secure the best possible benefits for its membership. But when the Respondent implemented the 8% increment, an increment which the Applicant had proposed itself, it (Applicant) had to accept that it had failed in its strategy.

12. Perhaps one needs to point out that the issue of the wage increment is a classical instance of a dispute of interest as opposed to a dispute of right. That being the case, it is susceptible primarily to the collective bargaining process and the power play that comes with it. If it is not settled through the collective bargaining process, then other means of breaking the impasse should be explored.

13. It should be stated as well that when negotiating wages and conditions of service, Employers may decide when to call off further negotiations and to unilaterally implement their final offer when the parties reach a deadlock. And such unilateral implementation should be without fear of judicial interference, especially when the parties have all along been engaged in good faith bargaining but nonetheless deadlock. (See: ***South African Union of Journalists v South African Broadcasting Corporation (1999) 20 ILJ 2840 (LAC).***

14. In this matter the Court has noted that the parties were engaged in serious bargaining until they reached an impasse. After reaching the impasse the Respondent then took the drastic measure of unilaterally implementing the 8% increment as a means of resolving the impasse.

The evidence before Court indicates that the Respondent never negotiated directly with the employees, as alleged by the Applicant, instead they were simply informed that the Employer had taken the unilateral decision to implement the 8% increment.

15. It has been previously stated that unilateral implementation is one of the lawful means by which an employer may seek to resolve such impasse. Drastic as it is, if it is meant to resolve an impasse and in fact does achieve the intended purpose, a Court will not interfere with such decision. A condition attached to the use of this unilateral action though is that it is to be utelised only when the parties have exhausted the duty to bargain in good faith and have deadlocked. Nduma JP, as he then was, in ***Swaziland National Association of Teachers and Others v Swaziland Government (67/99) [1999] SZICA 5*** had this to say;

> ***"...after an impasse is reached in good faith, the employer is free to institute by unilateral action, changes which are in line with or which are no more favourable than those prior to the impasse."***

16. The ***SNAT v Swaziland Government (supra)*** judgement further states that in the event of a genuine impasse, the Employer may unilaterally implement a change in wages provided that ***a)*** such changes are implemented in respect of all employees represented by the union and ***b)*** such changes are no more favourable than those offered prior to the impasse. This effectively means that employers are limited to the confines of the pre-impasse offers or proposal in unilaterally implementing the wage increment.

17. In *casu,* since the parties had deadlocked it follows therefore that there was no longer a need to bargain since it was an exercise in futility. There was therefore nothing to impede the Respondent in unilaterally implementing the 8% increment as a means resolve the impasse, especially because this change was implemented to all the employees and that it was no more favourable than what was offered or proposed prior to the impasse.

18. With that said, it is therefore a finding of this Court that the Applicants have failed to make out a case for the granting of the

orders they seek, with the result that the application fails and it is accordingly dismissed with no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 24th DAY OF MAY 2022.

For the Applicant : *Mr. A Fakudze (Alex Fakudze Labour Consultants)*
For the Respondent : *Attorney Mr. Z. Jele (Robinson Bertram Attorneys)*