

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

Case No 109/2022(b)

In the matter between:

**SWAZILAND AGRICULTURAL AND PLANTATION  
WORKER'S UNION**

1<sup>st</sup> Applicant

**SWAZILAND AGRICULTURAL  
MANUFACTURING AND ALLIED STAFF  
ASSOCIATION**

2<sup>nd</sup> Applicant

**APPLICANTS MEMBERS**

Further Applicants

And

**UBOMBO SUGAR**

Respondent

**Neutral citation:** Swaziland Agricultural and Plantation Workers & Others v  
Ubombo Sugar (109/22(b)) [2022] SZIC 83 (07 July 2022)

**Coram:**

**NGCAMPHALALA AJ**

*(Sitting with Mr. M.P. Dlamini and Mr. E.L.B. Dlamini,  
Nominated Members of the Court)*

**DATE HEARD:** 25<sup>th</sup> May, 2022

**DATE DELIVERED:** 07<sup>th</sup> July, 2022

*SUMMARY: Urgent application- interdicting and restraining Respondent from implementing Covid-19 Vaccination and Testing Policy- Respondent required to negotiate with the Applicants on the policy- Respondent argues that Occupational Health and Safety Act 2001, provides for consultation and not negotiation- Implementation done in accordance with Occupational Health and Safety Act 2001, Disaster Management Regulations (Corona Virus -Covid 19), Public Health (Corona Virus -Covid -19) Regulations-Applicants were consulted and the policy duly implemented therefore the Application should be dismissed.*

*Held – Respondent does not have a duty to negotiate the implementation of the Covid -19 Vaccination or Testing Policy with the Applicant but consult and engage in dialogue– Application dismissed--No order to costs.*

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## JUDGMENT

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[1] The 1<sup>st</sup> Applicant is the Swaziland Agricultural and Plantation Workers Union (SAPWU), a union duly registered and recognized by the Respondent as the sole representative of all employees of the Respondent within the agreed bargaining unit.

- [2] The 2<sup>nd</sup> Applicant is the Swaziland Agricultural, Manufacturing and Allied Staff Association (SAMASA), an organization duly registered and recognized by the Respondent as the sole representative of all members of staff at the Respondent within the agreed upon bargaining unit.
- [3] The Respondent is Ubombo Sugar Limited, a company incorporated in accordance with the company laws of the kingdom of ESwatini, with its principal place of business situated at Big Bend in the Lubombo District.

### **BRIEF BACKGROUND**

- [4] The present proceedings seek to interdict and/or restrain the Respondent from implementing the Ubombo Sugar COVID -19 Vaccination or Testing Policy, and set it aside as unfair, unreasonable and unlawful. Further to declare that the Applicant's members are under no legal obligation to finance and/or bear the costs of undergoing regular COVID -19 testing prescribed and /or imposed by the Respondent. Alternatively, to set aside the COVID -19 Vaccination or Testing Policy.
- [5] The Applicants have now approached the Court under a Certificate of Urgency, seeking an order in the following terms:
- 5.1 Dispensing with the usual forms and procedures and time limits relating to institution of proceeding and allowing this matter to be heard as one of urgency.**

- 5.2** Condoning any non-compliance with the Rules of Court relating to notice and service of court process;
- 5.3** That a *rule nisi* be issued calling upon the Respondent to show cause on a date to be determined by the above Honourable Court, why prayers 5.1 -5.4 should not be made a final order;
- 5.4** Interdicting and restraining the Respondent from implementing the purported Ubombo Sugar COVID -19 Vaccination or Testing Policy pending finalization of the matter;
- 5.5** Declaring that Applicants' members and/or Respondents employees are under no legal obligation to finance and/or bear the costs of undergoing regular COVID-19 Testing prescribed and/or imposed by the Respondent;
- 5.6** Declaring that the Respondent has an obligation to negotiate and not consult with the 1<sup>st</sup> and 2<sup>nd</sup> Applicants prior to implementation of the Ubombo Sugar COVID -19 Vaccination or Testing Policy;
- 5.7** Declaring the purported Ubombo Sugar COVID -19 Vaccination or Testing Policy unfair, unreasonable and unlawful;
- 5.8** An order setting aside the purported Ubombo Sugar COVID-19 Vaccination or Testing Policy;

**5.9 That prayer 5.1 operates with immediate and interim effect.**

**5.10 Costs of this application be awarded against the Respondent.**

**5.11 Further and/or alternative relief as the Court may deem appropriate.**

[6] The Applicants' application is opposed by the Respondent and an answering affidavit was duly filed and deposed thereto by Mr. Jabulani Hlatshwayo Respondent's Acting Human Resources Head. The Applicants thereafter filed their replying affidavit. The matter came before Court on the 13<sup>th</sup> May, 2022, on which date the Applicants applied for an interim order in terms of prayer 5.1 of the notice of application dated the 11<sup>th</sup> May, 2022. The Court accordingly granted the said interim order. On the 13<sup>th</sup> May, 2022 the Respondent proceeded to file an application to anticipate the return date, and this application was argued on the 18<sup>th</sup> May, 2022 and the interim order issued on the 11<sup>th</sup> May, 2022 was set aside. The parties thereafter agreed on timelines for the filing of all pleadings, heads of argument, and agreed on the 25<sup>th</sup> May, 2022 as the date for argument, and judgement was accordingly reserved.

#### **ANALYSIS OF FACTS AND APPLICABLE LAW**

[7] It is common cause that on the 10<sup>th</sup> May, 2022, the Respondent launched the Ubombo Sugar COVID-19 Vaccination or Testing Policy, making vaccination compulsory for all its employees except those exempted from undertaking such medical vaccination for medical reasons or those reasons

as accepted by the company. It is also common cause that such launch took place after consultations which began at Health and Safety Committee level throughout the company. The process then proceeded to a meeting on the 29<sup>th</sup> March, 2022, held by the Covid Task team, and finally a stakeholders consultative meeting on the 20<sup>th</sup> April, 2022.

- [8] It was the evidence of the Applicant that on or about the 20<sup>th</sup> April, 2022, the parties namely Applicants representatives and the Respondent held a meeting at the Respondent's Learning and Development Hall at the instance of the Respondent. The agenda of the said meeting was on the Covid -19 Policy. The Applicants perused the policy and noted that same required current and future employees of the Respondent to vaccinate or submit negative COVID-19 test results on a weekly basis.
- [9] The policy further provided that testing for those who failed to vaccinate must be completed outside working hours, and at the individuals own expense. The policy stipulated further that in the event that an employee refuses and/or continues to refuse to submit to the said testing or to be vaccinated, a summary enquiry procedure, will be followed and the concerned employees' contract may be terminated. It was the Applicants further argument that during the course of the said meeting, the workers representatives raised the concerns of the contested clauses with a view to have the said clauses reviewed /or altered. It was the Applicants submission that the Respondent refused to accede to their request on the issues.

- [10] The meeting concluded with the Respondent informing the Applicants that a memorandum would be issued notifying all the employees about the implementation of the said policy. It was the averments of the Applicants that they refused this suggestion, but the Respondent advised that it implement what had been developed and that changes to the policy may follow in future. Seeing that the Respondent was reluctance, the Applicant then requested the Respondent to withdraw the policy, however the Respondent refused to withdraw the COVID -19 Policy.
- [11] On the 6<sup>th</sup> May,2022 whilst the Applicant was still awaiting a meeting with the Respondent to review the submission of the meeting of the 20<sup>th</sup> April, 2022, the Respondent issued an invite to several stakeholders inviting them to the launch of the COVID-19 Policy. It is the Applicants' case that it is unfair and unreasonable for the Respondent to require its members who refuse to vaccinate to subject themselves to COVID-19 testing every seven days given the that the procedure of testing is an uncomfortable and painful exercise.
- [12] Further it is unfair and unreasonable for their members to be expected to personally pay for the Covid-19 test at a minimum cost of E500.00 weekly, to meet the conditions imposed by the policy. It was the Applicants' averment that the Respondent has no legal right to force its employees to use their wages and salary to fund its health and safety policies. Further the Respondent has failed to commit itself in taking liability for any adverse effects and/ or side effects the vaccine might have on its members, as some vaccines it has been alleged have deadly side effects. It averred that the policy

is not only unfair and unfavourable, but also unjustified as the pandemic no longer poses a serious threat, given that it is now under control. It was its submission that this is evident by the country's ease of restrictions which it had imposed on citizens, meaning the measures as imposed by Government are effective in combating the COVID -19 pandemic.

[13] In closing it was the Applicants' argument that the consultative meetings purported by the Respondent were a sham, in that the Respondent did not consider any of its submission yet the policy has the effect of drastically altering their terms and conditions of employment. Therefore, the policy is unfair and unreasonable as COVID -19 is not/or has not been listed or declared as one Industrial or Occupational disease to justify the Respondent imposing the said policy. Since the policy was further going to have severe financial implications, the Respondent was obligated to submit a proposal to the Applicants as opposed to a fully developed policy document.

[14] It was the Applicants' argument that the Respondent failure to negotiate was in breach of the collective agreement, which requires the Respondent to first negotiate on various issues which include health and safety at the workplace. The contention here being that the Covid-19 Policy, shall change the terms and conditions of its members.

[15] In rebuttal it was the Respondent's submission that in terms of the **Occupational Health and Safety Act, 2001**, the Respondent as an employer is obliged to ensure the safety and health of its employees, and to take reasonable practical measures to minimize against any risk that may be posed



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by either disease or hazard. The same Act goes on to obligate employees to take reasonable care for their health and safety and that of other employees, and further obligated to follow all instructions that are given by the employer.

[16] In response to the Covid -19 pandemic which was declared a national disaster the **Disaster Management Regulations (Corona Virus -Covid 19), Public Health (Corona Virus -Covid -19) Regulations** and the **Guidelines on Employment Contingency Measures in response to the Covid -19 Pandemic** were introduced by government spelling out procedure and measures to fight the spread of the Covid-19 virus. It was the Respondent's argument that the invocation of both the Public Health and Disaster Management Regulations read with the Act, affirm the view that if on a risk assessment it is determined that the workplace is at risk, the employer would be entitled to make vaccination mandatory or in the alternative for the employee to provide valid PCR tests.

[17] It was its submission that in November, 2021, at the height of the 4<sup>th</sup> wave, the Respondent undertook a risk assessment which was conducted by the Covid Task Team which was established to provide guidance to the Respondent on measures required to mitigate the spread of the pandemic. This entailed an analysis of the impact of Covid on the employees, the community and service providers (contractors), and it revealed that the Respondent as a company and community was at high risk.

[18] The risk assessment revealed that the Respondent needed to take pertinent measures for the health, safety and wellbeing of its employees, their families

and surrounding communities. The measures were discussed by the Covid Task Team and a comparison was made with local government policies and other policies developed by risk comparison within the group and it was agreed that a policy for the Respondent be developed. It averred that the development of the policy commenced with consultations within the departmental health and safety committee. The intention was to consult at that level to obtain inputs from the Health and Safety committee on its perspective on the introduction of a comprehensive policy, which was intended to complement the already existing measures.

- [19] Further consultation took place on the 20<sup>th</sup> March, 2022 before the Task Team, which looked at the application of the policy to non-employees, stakeholder engagement, roles and responsibilities, country's legislation and most effective method of implementing the policy. It was the Respondent submission that the final phase of the consultation took place on the 20<sup>th</sup> April, 2022, wherein the first and the second applicants were present and part of the consultation.
- [20] The effective date of the policy was the 1<sup>st</sup> May, 2022. Respondent argued that the introduction of the policy was pursuant to the **Public Health (Corona virus – Covid 19) Regulations, 2020**, read together with the provisions of the **Disaster Management Act, No. 1, of 2006** and the **Disaster Management (Corona Virus – Covid-19), 2020 Regulations**. It was the Respondents assertion that the invocation of the above legislation affirms the view that if on a risk assessment, it is determined that the workplace is at risk, then an employer would be entitled to make vaccination

mandatory or in the alternative for the employer to provide valid PCR tests. It was Respondent averment that the argument by the Applicant that the conduct of the Respondent was an infringement of its constitutional right does hold water.

[21] It was Respondent's averment that the declaration of a natural state of disaster, in terms of **Disaster Management Act, 2006** meant that there was a derogation of rights as contained in the Constitution. The Act invoked limitations to Constitutional and legal rights, in any event it averred that all rights are subject to some form of limitation, provided the limitation is reasonable and justifiable. Further the state of disaster as announced by Government has not yet been lifted and accordingly the legal framework in the country is still subject to the limitations that were imposed for purposes of combating the spread of the virus.

[22] In closing it was the Respondents submission that the development of the policy was a product of a consultative process and in furtherance of national legislation. Various views were sought from various stakeholders, which were invited to express their opinion and make representations on various aspects of the Policy which included the Applicants. The Policy even though it has brought about limitations, it has brought such limitations that are important for the preservation of life. In the absence of a cogent policy on access to the workplace, employees infected with the virus could enter the workplace and possibly infect others with dire consequences. It was Respondents application that the Applicants claim be dismissed and in

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support of its case cited the following judgments, **Solidarity Obo and Another v Ernest Lowe, a division of Hudaco Trading (Pty) Ltd [2-22] JOL**, **Theresa Mulderij v Goldrush group GAJB 24054-21** and **GK v Ndaka Security and Services FSWK 2448-21**.

#### **APPLICABLE LAW**

[23] In the wake of the pandemic the Eswatini government declared a national state of disaster, in terms of the **Disaster Management Act, 2006** and was compelled to introduce policies, regulations and guideline to strengthen the already existing legislation, which comprised of the **Disaster Management Act, 2006**, **Occupational Health and Safety Act, 2001**, the **Environmental Management Act, 2002** to combat the deadly virus, which was adamant to wipe out human existence.

[24] The Deputy Prime Minister office together with the ministry of Health and Ministry of Labour and Social Security proceeded to introduce The **Disaster Management (Coronavirus -Covid -19) Regulations**, **The Public Health (Coronavirus -Covid 19 Regulations, 2020** and **The Guidelines on Employment Contingency Measures**. The aim being to introduce stringent public health interventions, such as quarantines, travel restrictions, national lockdowns, wearing of facemasks, sanitizing, prohibition of public gatherings, suspension of economic activities save for essential services, the introduction of vaccinations and other measures, which posed some limitations on our constitutional rights.

[25] The purpose of such legislation was to manage and mitigate the possible risks relating to the pandemic, and this extended to several spheres which included the workplace. The past few months have seen high level debates and discussion on whether Covid -19 vaccination should be mandatory in the workplace. At the centre of the debate is priorities with ethical and legal considerations balancing public health conflicting constitutional rights, complete with moral and ethical opinion. The Honourable President of South Africa in an address to the nation on the 28<sup>th</sup> November,2021 stated, *“the implementation of any mandatory vaccination policy must be based on mutual respect, which is respect of the rights of the people which achieve the balance between public health imperatives, the Constitutional rights of employees and the efficient operation of the employer’s business. Now that is quite a delicate balance that needs to be struck.”*

[26] What gives rise to the present application is the introduction of the Covid - 19 Policy by the Respondent which was launched on the 10<sup>th</sup> May, 2022. The said policy which had already become effective at the time the Applicants approached the Court on a Certificate of Urgency. Unlike in South Africa, our law is quiet on the implementation of mandatory vaccination in the workplace, whereas neighboring South Africa has introduced the **Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces GNR 4 of June 2021**, to give direction on mandatory vaccination at the workplace. This direction does not however automatically allow for mandatory vaccination in the workplace but is a guideline for employers interpreting **Section 8(1) of the South African Occupational Health and Safety Act, 85,1991** to mean they have a duty to require the

introduction of a vaccine testing mandate in their workplace. It is important to note that, the Direction does not force an employer to do so, it merely sets out procedures and requirements that should be followed by the Employer before the introduction of mandatory vaccination.

[27] The present matter brought by the Applicants, seeks the Courts intervention to declare the Covid-19 vaccination and Testing Policy as unfair, unreasonable and unlawful, in that the Respondent failed to negotiate the policy with itself, but instead consulted on the policy, further that the Respondent failed to consider their concerns raised before endorsing the policy. The argument as raised by the Respondent is that policy implementation falls within the Employers prerogative therefore there was no need for the Respondent to negotiate with the Applicants, but to consult which consultation did take place and the policy duly implemented.

[28] It may be necessary at this stage for the Court to distinguish between negotiation and consultation in the context of industrial relations, then Judge President Dunseith in the matter of, **The Swaziland Agricultural Plantations Workers Union v Usuthu Pulp Company t/a Sappi Usutu (423/06) [2007] SZIC 5** distinguished the two as follows,

*“Negotiation is used synonymously with collective bargaining, and refers to the voluntary process whereby management and labour endeavor to reconcile their conflict interests and aspirations through joint regulation of*

terms and conditions of employment. See *Lewis: Labour Law in Britain (1986) 110*.

Consultation, on the other hand involves seeking information, or advice on, or reaction to, a proposed cause of action. It envisages giving the consulted party an opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented see *Hadebe & Others v Ramtex Industrials (Pty) Ltd (1986) 7 ilj 726 (IC) 735.*”

[29] Dealing with this issue of employer’s prerogative, Dlamini J in the case of **The Workers Union of Swaziland Town Councils & Various Member v Municipal Council of Manzini I/C Case No. 289/2015(b)** stated:

“As a rule, this Court has always, and consistently so, 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 judgment, 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 limitation to the exercise of this exclusive prerogative of the employers are of course those imposed by our labour law and principles of equity and substantial (natural) justice.”

[30] It was a concern of the Court that the Applicant had waited until the launch of the Policy before approaching the Court, seeking its intervention as the policy is now in place and being implemented by the Respondent. It was evident that the Applicants were not completely against the policy, however required their concerns to be addressed, and had same been addressed they would not have approached the Courts.

[31] Whilst the basic duty to engage in collective bargaining can be regarded as established, it is not always easy to determine the scope of the bargaining agenda i.e., to distinguish between management issues which fall exclusively within the employer's prerogative to manage its business, and employment issues which affect the legitimate interests of employees. The question then arises were they required to negotiate with the Applicants on the new policy or consult as it falls within the employers prerogative. Further if consultations took place were they done appropriately.

[32] Dunseith JP as he then was in the case of **The Swaziland Agricultural Plantations Workers Union v Usuthu Pulp Company t/a Sappi Usuthu** *supra* stated:

*“To assert that collective negotiation only applies to issues involving wages and conditions of work, and not to the management of the business, assumes that there is a clear boundary between employment issues and management issues. All decisions that affect the business also affect the workforce. Decisions about technology, means of production, health and safety, and*



*personnel structures may affect the workforce more than any other decisions the employer makes. In fact, the decisions that employers reserve to themselves under the label "management prerogative" may often be the ones in which it is most important for the workers representatives to make their contribution."*

- [33] *He went on to cite Davies & Freedland Labour Law: Text & Materials at 112-3 (quoted with approval by Goldstone JA in the NUM case (supra)), one reads: "By collective bargaining we mean those social structures whereby employers (either alone or in coalition with other employers) bargain with the representatives of their employee about terms and conditions of employment, about rules governing the working environment (e.g. the ratio of apprentices to skilled men) and about the procedures that should govern the relations between union and employer." According to this definition, the scope of compulsory bargaining extends to:*
- terms and conditions of employment;*
  - rules governing the working environment;*
  - procedures governing the relations between union and employer.*

- [34] In essence taking the position that the Employer was required to negotiate instead of consult on the introduction of the Random Alcohol testing policy. On the appeal in the case of **Usuthu Pulp Company t/a Sappi v Swaziland Agricultural Plantation Workers Union and Another ICA Case no 16/06& 17/06**, the Court overruled the decision of the Court a quo and ruled that negotiations were not necessary in the implementation Random Alcohol Testing Policy at the workplace, and further that the Collective Agreement

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as relied upon by the Court when reaching its decision, provided for consultation and not negotiations in matters of health and safety issues.

[35] It is an established principle that the implementation of policies within the workplace fall within the employer's prerogative, and the employer is required to consult with its employees on issues touching on policy and not necessarily negotiate. There can be exceptions however where a collective agreement signed by the parties provides for negotiations.

[36] In the present application the Court was not referred to any provisions of the collective agreement requiring the parties to negotiate in matters involving issues of health and safety, nor was any argument advanced by either part except reliance on legislation and regulations as alluded to above. The guiding law in such instances is **Section 9(3) of The Occupational Health and Safety Act, 2001**, which requires the Respondent to establish a Health and Safety Committee, to serve as a forum for the discussion of matters affecting the health and safety of persons within the workplace.

[37] This committee has an equal number of management and Employee representatives and has the power to make appropriate decisions binding both the employer and employee respectively on safety and health issues at the workplace. This Act clearly envisages that the Safety and Health policies and procedures at the workplace should be the product of meaningful discussion and dialogue, between the stakeholders and safety and Health Committee. This committee is therefore the primary/main forum for such discussions and

dialogue, and its decisions are binding on the employer and stakeholders. This in essence means the parties are not required to negotiate on policies involving Health and Safety at the workplace but are required to engage in meaningful dialogue/ consultation before implementation of a policy.

[38] As previously alluded to earlier, currently our law does not provide for mandatory vaccination in the workplace, in the same breath it does not exclude employers from implementing same where, it is in the interest of curbing the spread of the virus within the workplace. It is abundantly clear that the decision of the Respondent was not taken on a whim and due process was followed. The Health and Safety Committee was engaged, a Covid Task team was set up which comprises of representatives from both Applicants, a risk assessment was conducted, the Applicants and all stakeholders were consulted and then the policy was adopted launched and is now at implementation stage. It is evident that such consultation and dialogue took place between the Applicants and the Respondent before the implementation of the policy, and from evidence adduced further consultations and amendment to the policies will continue to be affected, wherein the concerns as raised by the Applicants in the policy can still be resolved.

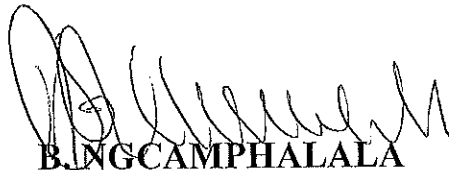
[39] The Court has therefore considered the argument of both parties and the evidence before it, and concludes that even though there is no legislation within our jurisdiction which purports to make vaccination of Covid-19 in the workplace mandatory, the present introduction of Covid -19 Vaccination or Testing Policy came into existence through dialogue and consultations between the Applicant and the Respondent and of all stakeholders affected

by the policy, and was accordingly adopted and implemented on this premise and in good faith.

[40] There is however a need for legislation to be put in place, which will provide guidance on the mandatory vaccination of Covid -19 in the workplace within our jurisdiction, as it is apparent that more stringent measures need to be put in place in the workplace, to ensure the safety of all employees and minimize the spread of the disease in the workplace.

[41] In the premises, the application by the Applicants is dismissed. Each party is to bear its own costs.

The Members Agree.



**B. NGCAMPHALALA**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND**

**FOR APPLICANT:** Mr. A. Fakudze (Alex Fakudze)

**FOR RESPONDENT:** Mr. Z. Jele (Robinson Betram)