IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE CASE NO: 300/23

In the matter between:

SWAZILAND AGRICULTURAL AND PLANTATIONS WORKERS UNION Applicant

AND

UBOMBO SUGAR LIMITED Respondent

Neutral citation: Swaziland Agricultural and Plantations Workers Union v Ubombo Sugar Limited 300/23 [2023] SZIC (07 December 2023)

Coram: **L.L. HLOPHE–JUDGE**
(Sitting with Mr. M.P. Dlamini and Mr. EL.B. Dlamini – Nominated Members of the Court)

DATE HEARD: 15th November 2023

DATE DELIVERED: 7th December 2023

SUMMARY: ***Urgent application- order inter alia compelling the Applicant employer to enter into collective bargaining negotiations for the year 2023-2024 sought- application opposed by the Respondent who raises two points in limine, which are the contention that the Applicant's application needs to be stayed pending the outcome of***

an application filed by the Respondent seeking it to have the Applicants recognition by the Respondent as a representative of its employees within the bargaining unit cancelled on the ground that the Applicant is highly factionalised which makes it impossible for the Respondent to know with certainty which is the faction that it has to deal with. The other point is that the matter is not urgent and that such urgency as sought to be relied upon is of the Applicant's own making.

Held: The point of law on urgency has been overtaken by events, hence it is dismissed. The matter succeeds on the second point for stay of the current proceedings pending the determination of an application filed by the Respondent for the cancellation of the Applicant's recognition by the Respondent as a representative of its employees within the bargaining unit.

JUDGEMENT

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[1] Applicant instituted these proceedings under a certificate of urgency seeking the following reliefs:-

1. 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.

2. Condoning any non-compliance with the Rules of Court relating to notice and service of court process.

3. 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.

3.1 That pending finalisation of this application, the Respondent be and is hereby compelled to commence collective bargaining process with Applicant for the year 2023/2024;

3.2 Declaring that the Respondent has an obligation to engage with the Applicant on issues for collective bargaining in terms of the Recognition Agreement;

3.3 Declaring that the decision by the Respondent to refuse and/or suspend engagement with the Applicant on collective bargaining is unlawful;

4. That prayer 3.1 operate with immediate and interim effect.

5. Costs of this application to be awarded against the Respondent.

6. Further and/or alternative Relief as the court may deem appropriate.

[2] The Applicant's application was founded on the affidavit of Obed Jele, who described himself as the Secretary General of the Applicants Union and also as the Secretary General of the Applicants Big Bend Branch Executive Committee.

[3] The parties to the matter are otherwise described by the deponent to the founding affidavit as in the case of the Applicant, a labour union duly

registered in terms of the country's labour laws and also as a party with whom the Respondent company concluded a recognition agreement in terms of which the said union was recognised as the employee representative of all the employees of the Respondent who fell within the bargaining unit. The Respondent was itself described as a company duly registered in accordance with the company laws of this country, carrying on business at Ubombo Sugar in Big Bend, in the Lubombo Region. It is otherwise clear that the Applicant is the labour union recognised by the Respondent as a representative of its employees in among other matters those of collective bargaining at the workplace, whilst the Respondent company is involved in sugar milling, and its employees are the main members of the Applicant union.

[4] It is common cause that the relationship between the Applicant and the Respondent has span over many years having commenced in 1993 when the Applicant was recognised by the Respondent for the purpose as explained above. It appears from the papers that this relationship is currently undergoing a strain. It seems that the strain concerned manifested itself in the parties failing to meet and enter into collective bargaining negotiations for the 2023/2024 year. Whilst in terms of its papers, the applicant suggests that it was taken by surprise when the Respondent refused to enter into collective bargaining negotiations for 2023/2024; The latter averred that it could not enter into such negotiations with the Respondent because it had a problem determining which faction to entertain between the two competing factions of the Applicant's union competing two factions of the applicants union, each claiming to be the properly mandated one to enter into the said negotiations.

[5] Otherwise the factual background is like stated as follows; it is common cause that sometime in February 2023 the Applicant wrote a letter to the Respondent proposing that the two parties meet over a list of issues stated in the said letter for purposes of collective bargaining negotiations for the year 2023/2024. The Respondent allegedly responded to the said proposal by complaining that the recognition agreement between the parties was outdated as it violated certain provisions of the **Industrial Relations Act** 2000 and certain provisions of The Constitution particularly those relating to freedom of association.

[6] A response from Applicant allegedly reminded the Respondent that it was duty bound to enter into the said collective bargaining negotiations as provided for in the existing recognition agreement. This response seems to have only compounded the problem as the Respondent reacted by issuing a memorandum dated 28th March 2023 which it caused to be published on its notice board so much so that all the employees could have access to it. In the said memorandum and in a nutshell the Respondent allegedly informed the employees who are the Applicant's members that whereas it has a recognition agreement with the Applicant, that recognition was based on the understanding that the latter was going to adhere to its Constitution. It was allegedly noting that the union was failing to comply with its own Constitution by, *inter alia,* failing to hold leadership elections at both the national and branch levels. This it said, it was viewing seriously as it had a direct bearing on the relationship between them. It clarified that it had since taken a decision to engage with the union to have these issues resolved before embarking upon the necessary and their imperative annual wage negotiations. Whilst hoping that a solution to resolve the problems so as to avoid an undue delay of the negotiations would be found. It clarified that

it was committed to ensuring that the interests of its employees were carried out by legitimate and mandated employees' leaders.

[7] The applicant reacted to the said memorandum by, whilst acting through its Branch Executive Committee, instituting proceedings at the Industrial Court in terms of which it sought, in the main, an order compelling the Respondent to enter, into collective bargaining negotiations. These proceedings could however not be finalised because the Applicants' aforesaid branch executive committee withdrew them. This apparently happened at the verge of the matter being heard in court but after the Respondent had raised a point for the joinder of some parties it contended needed to be joined. The Applicant clarified that those proceedings were withdrawn because there already had been held national executive committee's elections which would have rendered the branch executive committee unsuited to hold the discussions on behalf of the union.

[8] After the withdrawal of the application in question, the Applicant received its call on the Respondent to meet in order to engage on the collective bargaining negotiations for the year 2023/2024. Once again the Respondent refused to so engage; advising the Applicant to put its house in order by among other things holding elections at both the national executive and branch executive level. The Respondent further threatened to institute proceedings within a period of five days calling for the cancellation of the recognition agreement as a result of the factionalism unless elections were.

[9] It was allegedly this ultimatum which according to the Applicant led to it instituting the current proceedings under a certificate of urgency, allegedly fearing what it termed an imminent cancellation of recognition by the Respondent who according to it, had a duty to hold collective bargaining discussions or negotiations. It clarified that by that time it had already and at a great expense, concluded elections for its National Executive Committee.

[10] Whilst the Respondent filed an answering affidavit in which it did not deny the factual accuracy of the Applicant's contention except that the Applicant was so factionalized that it did not know with certainty which faction it was required to negotiate with particularly in light of the Applicant's failure to hold elections.

[11] Respondent clarified further that it had on the same day as the one on which the Applicant issued and served its application, also issued and served its own application, asking the court to cancel the recognition agreement between the parties.

[12] Because of this development, it raised points of law asking firstly that the Applicant's application be stayed pending the outcome of the application it had filed seeking the cancellation of the recognition of applicant as a worker representative. This it said it had sought in terms **of Section 42 (11) (b) of the Industrial Relations Act 2000 (as amended).** Respondent contended that because of the issues raised in the application for cancellation of the recognition agreement, and its overall impact on the current matter it was prudent in the interest of justice to let the determination of this application wait for the outcome of that other one that

is the application brought by the Respondent. **Section 42 (11) (b) of the Industrial Relations Act 2000 (as amended)** reads thus:

> ***"An employer may make an application to the Industrial Court for the withdrawal of recognition if –***
>
> ***(a)....***
>
> ***(b) The organisation has materially breached its obligations under a recognition agreement or an award of recognition under subsection (9)***

[13] The other point of law raised was that of lack of urgency. Respondent contended that the matter should not be entertained as one of urgency, this is because the issues raised in the current proceedings are similar to those raised in the withdrawn application without the issues having been addressed, or resolved by the Court. It was also argued that the Applicant had failed to satisfy the requirements of **Rule 15(2)(a) of the Rules of this Court.**

[14] We shall therefore commence with the current application having to be stayed pending the outcome of the one filed by the Respondent contending that the recognition of the Applicant union by the Respondent be cancelled. We shall revert to that of the urgency or otherwise of these proceedings.

WHETHER THESE PROCEEDINGS SHOULD BE STAYED

[15] Whether or not proceedings should be stayed in law is a matter of the discretion of the court seized with the matter. The court exercises its discretion in realisation of the fact that courts have inherent power to stay proceedings. Whether it is in the interest of justice to do so the

requirements it was submitted on behalf of the Respondent's was that the party seeking the stay of proceedings has a reasonable prospect in the other matter. It is also a requirement to answer to the question whether it is in the interest of justice to stay the proceedings, and lastly, whether the balance of convenience favours the granting of such stay. Generally it has been stated that the courts will exercise their inherent jurisdiction to stay proceedings, where a similar action is pending in another forum.

[16] It was submitted that the granting of the stay of the proceedings will be in the interests of justice. **In Mokone v Tassas Properties (Pty) Ltd 2017 SA 89**, the court said the following on this requirement;

"Courts may regulate their own process taking into account the interests of justice I will say nothing about equity, but based on this, do not see why proceedings may not be stayed on grounds, dictated by the interests of justice. What justice requires will depend on the circumstances of each case."

[17] It seems to us that whatever else may be said on the propriety of staying these proceedings pending the outcome of the other proceedings, nothing defeats, the fact that it will be crucial for the taking forward of the matter to first determine who the parties are, that the Respondents should engage with in such negotiations.

[18] Assuming, without necessarily, deciding that indeed the purpose of the proceedings would be to determine who the proper executive of the Applicant is, who should, legitimately engage with the Respondent in the interest of the Applicant and its members. We should agree that it would be in the interests of justice to stay the current proceedings where it is going

to give the Court the opportunity to decide on the appropriate party to engage with the Respondent in the negotiations.

[19] We are of the view that we do not necessarily have to decide whether as a matter of fact, the Respondent is the one to challenge the determination of the proper faction to deal with between the existing ones in the Applicant's union, that question may be one for determination by the Court hearing the application filed by Respondent. It would be fair in our view for the current proceedings to be stalled temporarily for the Court to answer that question. We are convinced the balance of convenience favours the granting of the stay. There is no clear irreparable prejudice that will occasion the Applicant were these proceedings to be stayed.

URGENCY

[21] On the question whether or not these proceedings are urgent given that they are founded on the same proceedings as those that which were withdrawn, the answer is simply that it cannot realistically be said that the said proceedings are not urgent. Considering that they were filed after a threat of an application was made by Respondent for the cancellation of the recognition agreement, unless the matter was somewhat resolved during the five (5) day period given in Respondent's memorandum.

[22] Even if we were wrong in taking the pragmatic view we have taken on urgency qua. We are of the view that in the peculiar circumstances of this matter, the question of urgency in that sense has been overtaken by events, given that all the papers that needed to be exchanged have indeed been so exchanged, the matter is ripe for hearing. It is for these reasons we will not

uphold the point ***in limine*** on there being no urgency warranting that it be prioritised and heard as an urgent one.

[23] Accordingly, we have come to the conclusion with regards the above matter namely, that although it does not succeed, on the point of urgency, it does succeed on the point that the current proceedings be stayed pending the outcome of the application filed by the Respondent

[24] Consequently, we make the following order;

24.1 That the current proceedings instituted by the Applicant be stayed and are hereby stayed, pending the outcome of the application instituted by the current Respondent, seeking to have the recognition agreement cancelled.

24.2 That the point challenging the urgency of the matter does not succeed, it is hereby dismissed.

24.3 Each party is hereby called upon to pay its own costs.

The Members agree.

L. L. HLOPHE

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT: Mr. Alex Fakudze
(SAPWU)

FOR RESPONDENT: Mr. Z.D. Jele
(Robinson Bertram Attorneys)