IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No 252/2023

In the matter between:

GUARD ALERT SECURITY SERVICES Applicant

And

THE EMPLOYEES OF THE APPLICANT 1st Respondent

LISTED IN ANNEXURE "A"

SWAZILAND AMALGAMATED TRADE UNION 2nd Respondent

Neutral citation: Guard Alert Security Services v The Employees of Applicant and Another 252/23 [2023] SZIC 05 (30th January, 2024)

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

Date Heard: 23rd August, 2023

Date Delivered: 30th January, 2024

SUMMARY – ***The Applicant has moved an application before this Court seeking a declaratory and interpretation order of the Clause 6 of the Wages Regulation Order for Security Services industry, Legal Notice No.102B of 2022 -Respondents have filed a notice to oppose the application and raised points of law that the matter was prematurely before Court- failure to follow Part VIII of the Industrial Relation Act 2000 (as amended)- doctrine of unclean hands.***

Held – 1) The matter is referred to oral evidence.

2) There is no order to costs.

JUDGMENT

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[1] The Applicant is Guard Alert (Pty) Ltd, a company duly registered in terms of the Company Laws of the kingdom of Eswatini with its principal place of business at Gwamile Street, opposite the Mbabane Golf Club, carrying on business of Security Company.

[2] The 1st Respondent are the employees of the Applicant who are employed as Security Guard and whose names appear in Annexure "A" hereto and whose full and further particulars are to the Applicant unknown.

[3] The 2nd Respondent is Swaziland Amalgamated Trade Union (SATU), an employee representative union duly registered in terms of **Section 27 of the Industrial Relations Act 2000 (as amended).**

[4] The present application came by normal application on the 20th April, 2023, wherein it was postponed on several occasions to allow for the 2nd Respondent who had not been cited at the time to file an application for intervention. The Applicant after filing of the 2nd Respondent's intervention did not oppose the application, and the parties agreed on the filing of all pleadings in the matter. The parties upon filing of a book of pleadings agreed to have the matter argued on the 23rd August, 2023, on which date the matter was argued and judgment reserved. The application as brought before the Court seeks for an order in the following terms:

4.1 Declaring that overtime for the Respondents is only payable if they are required to work in excess of twelve [12] days in a period of fourteen [14] days or if they are required to work hours in excess of a hundred and forty-four [144] hours in a period of twelve [12] days.

4.2 Declaring that overtime is not payable automatically to the Respondents if they work a twenty- seventh shift in a period of

one calendar month, unless that shift gives rise to them exceeding a hundred and forty-four [144] hours in a period of twelve [12] days or working consecutively for more than twelve [12] days without taking the two [2] days off.

BRIEF BACKGROUND

AD POINTS *IN LIMINE*

[5] The Respondents have raised two points of law, **matter prematurely before Court/ failure to follow part VIII of Industrial Relations Act 2000(as amended),** and **Doctrine of dirty hands.** During the hearing of the matter, parties agreed to argue the matter holistically the Applicant was first to make submission.

APPLICANT'S SUBMISSION

AD MERITS

[6] It was the Applicant's submission that the application before Court is to seek a declaratory order on the payment of overtime in terms of Regulation 5 of the Wages Regulation Order (Security Services Industry) 2021. It was its averment that in terms of the Wages Regulation in particular Regulation 5:

"The basic week shall consist of seventy- two [72] hours spread over a period of six [6] days."

In accordance with Regulation 5 the Respondents are required to work six days on duty and one day off duty. This was the position until August 2006, when the Respondent, requested the Applicant that instead of working six [6] days on and only one day off on a seven [7] day cycle, that they rather work twelve [12] days, on and be off for two days, which gave them more time to be with their families without interruption. It was the Respondent submission that it was implicit in the agreement that overtime would be payable if the employees worked more than one hundred and forty hours over a period of twelve days, or if they worked days in excess of twelve days over a period of two weeks fourteen days [14]) where two days are off duty.

[7] It was its averment that according to its calculations, the 1st Respondent will typically work an average of twenty-six shifts per month. However, there are those months wherein the 1st Respondents will work twenty-seven shifts per month due to the length of the month, also depending on which days theirs shifts fell. It was the Applicant's submission that through an error in interpretation of the Regulations it automatically treated the twenty seventh shift as overtime and paid it at the overtime rate, notwithstanding that an employee will not have worked in excess of the agreed normal time of twelve hours per day spread over twelve days, followed by two days off.

[8] This has given rise to overpayments of the employees. It was its argument that the over payments were mainly due to a misinterpretation of Regulation 6 (2) in that the Applicant failed to understand Regulation 6(2) which needs to be read with regulation 6(1), which reads:

> *"An employee who is required to be on duty and work in excess of the hours specified in Regulation 5 shall be entitled to be paid for such overtime at the rate of one and a half times the normal hourly rate of wages. Payment shall be calculated or the basis of the overtime would each day in excess of the daily working hours.*
>
> *6 (2) Normal hourly rate shall mean the employees monthly rate of wages divided by three hundred and twelve."*

[9] It was the Applicant's averment that upon realizing its error, it ceased to automatically pay twenty-seven shifts in one calendar month, and is now only doing so when the employee has worked more than one hundred and forty-four hours in a fourteen-day period in accordance with the agreement between the parties, and as read with the Wages Regulation Order.

AD POINTS *IN LIMINE*

[10] In dealing with the points *in limine* as raised by the Respondents, it was the Applicant's argument that the matter before Court constitutes a pure question of law and the correct application of the Wages Regulation Order, and no material dispute of facts arise or have been anticipated herein. It was its argument that the Court is empowered to entertain the proceedings in terms of Rule 14 (1) of Rules of Court. It was its averment that there is no agreement between the parties, which provides that the interpretation of the Wages Regulation, would be a subject of negotiation between the parties.

[11] It was the Applicant's submission that the interpretation of a legal provision, in particular a provision granting a right to an employee, is not a matter for negotiation, in that all issues emanating from a right cannot lead to a strike action or lockout, such issues are adjudicated by the Courts. Therefore, the Applicant coming to Court, is in compliance with Rule 14 (1) of the Rules of Court. In support of this argument the Court was referred to the case of **ADVENTURES IN MISSION SWAZILAND V WISILE LANGWENY (18/2019) SZICA 18.** It was its averment that in the present matter, there are no dispute of facts present, and therefore the matter is correctly before this honourable Court. In support of this averment the Applicant referred the Court to Rule 14 (6) (b), which excludes questions of law from going the CMAC route.

[12] Furthermore, it averred that if they were to lodge a dispute, CMAC with its power of conciliation cannot determine the matter, it can only seek to conciliate. This being an important question of law, the answer to which can affect the entire security industry, and which has not been previously decided by the Court will create a precedent to be followed, it is in the interest of justice that the matter be decided authoritatively by the Court.

[13] It was its averment that a delay in the determination of the matter may result in industrial strife and it is in the interest of all the parties and consistent with the aims and objectives of the Industrial Relations Act to promote industrial peace that the matter be speedily resolved.

[14] On the question of unclean hands it argued that same simply does not find application to the set of facts before Court, as the Applicant has not taken the law into its own hands. It averred that it simply has been miscalculating the employee remuneration due to a misunderstanding of legislation, upon consultation and advise it was brought to its attention that it was misinterpreting the law. The Applicant however upon being advised of the proper interpretation, it has corrected itself without deducting the past wages paid in error. It was its argument that this does not amount to a deduction of salary which would have required prior consultation. It was its further argument that there has never been an agreement that the twenty seventh shift would be counted as overtime automatically, even if it did not exceed the one hundred and forty-four hours within a period of twelve days. It was its averment that it just unilaterally treated the twenty seventh shift automatically as overtime, even where it did not exceed one hundred and forty-four hours within the twelve days and two days off. It was its argument in closing of this point that it unilaterally misapplied the law and has now rectified the position, it was its prayer therefore that the points *in limine* as raised by the Respondent be dismissed and that an order be granted in its favour.

RESPONDENT'S SUBMISSION

AD MERITS

[16] In rebuttal the Respondents began the argument by addressing the merits of the case, and concluded by dealing with the points *in limine*. It was the Respondents argument that an agreement was entered into between the

Respondents and the Applicant, wherein it was agreed that the 27th shift would be considered overtime. The Respondents referred the Court to paragraph 13 on page 7 to affirm that there was an agreement between the parties. It was the Respondents averment that without notice the Applicant decided to reconsider its position and reneged from the agreement

[17] It was the Respondents submission that the reason why the Applicant was treating the twenty seventh (27th) shift in a calendar year as overtime, was because of the agreement between the parties. It was its averment that without notice the Applicant reconsidered its position unilaterally without consultation with it to no longer consider the twenty seventh (27th) shift as overtime. The Respondents relied for its argument on Regulation 5 and 6 of the Regulation of Wages as appears on page 51 of the book of pleadings. The Regulation was read by the Respondents into the record. It was its submission that in terms of the calculation, the Applicant is correct that employees are required to work six days in a given week, and the seventh day is taken as a day off. Thus, if the employee works on the seventh day the employee is entitled to payment of overtime.

[18] It was the Respondents submission that in a period of two weeks employees will work twelve days and two days off of those twelve days which is considered off days. In a period of a month, which comprises of four weeks, the 1st Respondents are entitled to four days off. When taking into consideration the twenty-four days (24) that the 1st Respondent will work in a month, and the four (4) days that the 1st Respondent is entitled to as days off, means in essence that the 1st Respondent will work twenty-eight (28)

days in a month. However, where the month has thirty-one (31) days, the 1st Respondents will work one (1) extra day giving rise to the overtime.

[19] It was the Respondents argument that this is the joust of the matter before Court. It averred that in a thirty-one (31) day month the twenty seventh (27th) day should be paid as overtime. Further that this was agreed between the parties that the twenty seventh (27th) shift in a thirty-one (31) day period will be paid as overtime.

[20] It was the Respondents further submission that the Applicant also seeks declaratory relief. It was the Respondents submission that it struggles to understand why the Court needs to issue out a declaratory order, wherein the regulations specify that overtime will be paid where an employee has worked in excess of a period of twelve days in a fourteen-day period, or one hundred and forty-four (144) hours. it was its averment that there is no need for the Court to issue out a declaratory order as Regulation 5 suffices on its own.

[21] It was its argument in closing on the merits that on the basis of this provision of Regulation 5, and the agreement between the parties the 1st Respondents are entitled to the overtime payment. Further that if the Court permits a spreadsheet could be provided to the Court to assist it, as it issues out its judgment.

[22] The Respondents then proceeded to deal with the points in limine, it was their argument that the Applicant has prematurely approached the Court,

and has failed to follow **Part VIII of the Industrial Relations Act 2000 (as amended).** It was its averment that the Applicant has prematurely moved the present applications, and failed to recognize the 2nd Respondent a trade union, which is the sole bargaining unit for the Applicant employees. The Applicant as a consequence is required by law to negotiate with the 2nd Respondent before approaching the Court.

[23] Further if the negotiation hit a deadlock, the Applicant could still utilize the remedies which are provided for under Part VIII of the Act, for a speedy and less expensive dispute resolution mechanism. In support of this argument the Respondents referred the Court to the case of **NATIONAL ASSOCIATION OF GOVERNMENT ACCOUNTANCY PERSONAL V MINISTY OF PUBLIC SERVICE & OTHERS SZIC 50.**

[24] It was the Respondents averment that by the Applicant moving the present application directly before the Court, the Applicant has deprived the union of its statutory right to regulate the relations between the Applicant and its employees, who are its members. Further that the role of the 2nd Respondent will be diminished if the Court allows for the matter to proceed simply by way of Rule 14, and grant a declaratory order without the matter beginning at the negotiation table. It was the Respondents further averment that the Applicant has failed to proffer any reason to the effect that it has attempted to engage the 2nd Respondents and encountered hardship, and to date they are still open to negotiations.

[25] The Respondents then proceeded to the second leg of its argument, under this *point in limine*, and averred that had the negotiations taken place and rendered a deadlock, the Applicant could have still used **Part VIII of the Act** and approached the **CONCILIATION, MEDIATION, and ARBITRATION COMMISSION (CMAC)** and reported a dispute under section 76. The Commission would have endeavored to resolve the dispute wherein the matter would be resolved, or a certificate of unresolved dispute issued wherein the matter is not resolved.

[26] It was its further submission that on the Applicant's argument that the matter before Court is on a point of law, and no need for negotiations and its reliance on the case of, **ADVENTURES IN MISSION SWAZILAND V WISILE LANGWENY (18/2019) SZICA 18,** in the above case the issue of trade unions was not canvassed. The Court only dealt with the issue of a dismissed employee, and whether such employee can approach the Court directly. The Court held that if there are no dispute of facts and the matter involves only a question of law, that party may approach the Court directly. In the present matter before Court, there is a trade union involved, which requires that a dispute be reported with CMAC before the matter is brought before Court.

[27] It was the Respondents submission that there is an alternative argument, on the issue of Recognition and Procedural Agreement, the Applicant contends that even though there is a Collectives Agreement same has not been signed, however it has not been signed by the Applicant. Further even though the agreement has not been signed, the Applicant has already acted

in terms of same, as it has allowed its employees to join the 2nd Respondent. It has further allowed the 2nd Respondents members to convene meetings on its premises and hold elections. Further it transmits union subscriptions to it and also allows the 2nd Respondent to negotiate for salaries and conditions of employment. This is in terms of clauses 6.2, 6.3, 7.1.1, 9.4.1 and 12 of the unsigned agreement. It was its argument that the Applicant can therefore not be seen to reprobate and approbate by acting in terms of the Agreement on the above issues, whilst avoiding the same agreement on the part of negotiation. Further when the matter was first registered the 2nd Respondent had not been cited, however when an application to intervene was filed, the Applicant had no issue in acknowledging the inclusion of the 2nd Respondent. There is also an award in its favour.

[28] On the point *in limine* of dirty hands, it was its submission that the Applicant has conceded that it unilaterally ceased to pay the twenty seventh (27th) shift in a calendar month as overtime, without affording the affected employees their right to make representations yet such decision has an adverse effect. It was its argument that this amount to self-help and by extension, a violation of the *audi alteram partem* rule. In support of its argument the Respondents referred the Court to the case **of MULLIGAN V MULLIGAN 1925 WLD 164 at 167-168**, and the case of **DIESEL ELECTRIC SWAZILAND (PTY) LTD V SWAZILAND REVENUE AUTHORITY (400/15) [2015] SZHC 130**. In this principle

"Before a person seeks to establish his right in a court of law, he must approach the court with clean hands. Where he himself, through his own conduct makes it impossible for the process of the court (whether civil and

criminal) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interest were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets the law and order into defiance."

The key principle being that where a litigant through its own conduct makes it impossible for the process of the Court to be given effect, cannot thereafter be protected by the Court.

[29] It was the Respondents submission that for doctrine of dirty hands to pass master, the conduct of the Applicants should be unlawful and illegal. In the present case the Applicant has unilaterally, and on its own accord stopped the overtime payment without engaging the Respondents who have been affected. This is in sheer violation of the *audi alteram partem* rule, and in support of this argument the Court was referred to the case of, **NKOSINGIPHILE SIMELANE V SPECTRUM (PTY) LTD V MASTER HARDWARE CASE NBO. 681/06 SZIC.**

[30] It was the Respondents submission that to rectify this position, the Applicant can still elect to reimburse the affected employees the withheld overtime payments, before approaching the Court. It was its application in closing that the application before Court be dismissed and the matter be referred to negotiations, only thereafter if the negotiations fail, the matter can then be referred before this Court.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[31] Before the Court can deal with the merits of the case, the Court must first deal with the question whether the Applicant has properly approached the Court by instituting application proceedings, under Rule 14 of, **THE INDUSTRIAL COURT RULES, 2007**. Rule 14 of the Court Rules makes provision for a party to institute motion proceedings before Court. Sub Rule 1 provides that;

> *"Where a material dispute of fact is not reasonably foreseeable a party may institute an application by way of notice of motion supported by affidavit."*

The operative phrase in this sub rule is "where a material dispute of fact is reasonably foreseen."

[32] The law in our jurisdiction dictates that if a Court is unable to decide an application on paper it may dismiss the application or refer it to oral evidence or refer the matter to trial. Overreachingly, unless the application is dismissed the Court should adopt the procedure that is best calculated to ensure that justice is done with the least delay. In every case the Court should examine the alleged dispute of facts and determine whether there is a real issue of facts that cannot be satisfactorily resolved without trial.

[33] **Rule 14 (6)(a) and (b) of the Rules of the Industrial Court**, prescribe that where no dispute of fact that is reasonably foreseeable in the sense that the application is solely for the determination of a question of law, the procedure laid down in **Part VIII of the Industrial Relations Act,2000 (as amended)** can be dispensed with. The inherently level form and nature of

evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on paper in the absence of oral evidence.

[34] In honour of this trite principle of law, the learned author, **HERBESTEIN AND VAN WINSEN: THE CIVIL PRACTISE OF THE SUPREME COURT OF SOUTH AFRICA (4TH EDITION)** page 234 the following is stated;

> *"it is clearly undesirable in cases which facts relied upon are disputed to endeavor to settle the dispute of facts on an affidavit, for the ascertainment of true facts is affected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event, it is more satisfactory that evidence should be led and that the Court should have the opportunity of seeing and coming to its conclusion."*

[35] It is thus judicially settled that where the material facts upon which the claim between the parties is founded are disputed, then motion proceedings are inappropriate.

[36] It was the Applicant evidence that the matter before Court is purely for the interpretation of the legal provision of the **REGULATION OF WAGES ORDER (SECURITY SERVICES INDUSTRY)**, in particular clause 6 thereof that deals with overtime. This follows a misinterpretation by itself

of clause 6 (2), which needs to be read clause 56 (1). In particular that the said provision does not suggest that all shifts of more than twenty-seven in any given month should be paid as overtime. Upon realizing error, it then seized to automatically pay the overtime as had been done previously. Then on its own accord to ensure that there is no industrial unrest within the workplace has approached the Court to assist on the interpretation of the said clause.

[37] The Respondents in their evidence on the other hand, argue that there is no need for the interpretation of the clause as it is unambiguous, and needs no interpretation. The Respondents dispute that the payment of overtime was due to the misinterpretation of the Wages Order by the Applicant, however thar aver that there was an agreement between the parties that they would deviate from the norm, and instead of working six days on and taking one day off in a seven-day circle, the parties agreed that they would work twelve days on and be off for two days. It was further the Respondents submission that as a consequence thereof, it was agreed between the parties that the 27th shift in a long month (31-day month) would be paid as overtime.

[38] The Applicant confirms part of the Respondents averments, in particular that there was an agreement that the 1st Respondents would work a twelve-day shift system with two days off. However, there was no agreement that the 27th shift would automatically be construed as overtime in a long month. From the evidence as adduced by both parties it seems the parties are in agreement on the wording of Wages Order; however, the point of departure appears to be on the calculation of hours which warrant the payment of

overtime in the new shift system as agreed by the parties, in particular when does the new start month start and end in a given shift. Further if indeed, there was an agreement between the parties proving for the automatic payment of the twenty seventh shift as overtime.

[39] Even though both parties acknowledge thar certain agreements were entered into between the parties, none of the parties provided the Court with documentary proof of the said agreements during the hearing of the matter. Further during the hearing of the matter both parties conceded that there may be a need for oral evidence to be led to determine whether indeed agreements were entered into, and acknowledged the need for further documentary evidence in the form of spreadsheets, for the Court to be able to properly determine the matter.

[40] As previously stated in case law that has been cited above, it is clearly undesirable in cases where facts relied upon are disputed or ambiguous to endeavor to settle the dispute by way of motion proceedings/ affidavit. Both parties have alluded to the significance of this case, and the effect the pronouncement of this Court will have on the entire security and guarding services industry. The Court can therefore not take the pronouncement it may make in this matter lightly, and the need to have enough evidence before it to make a sound, fair, just and lawful determination of the matter before it. With the evidence as presently brought before it the Court cannot properly determine the matter.

[41] It was evident during the proceeding that in order for the Court to be able to properly determine the matter, there will be a need for oral evidence to be lead. On papers before Court, the Court was left confused with more

questions than answers, in particular on how the shift system works, and further the extent of the agreement entered into the parties, and whether indeed just like the twelve-day shift system, it was further agreed that the twenty seventh shift would be paid as automatic overtime. These are the questions that the Court needs answers to. It is on those grounds that in the interest of justice and fairness that the Court is of the conclusion, that there is a need for oral evidence to be lead, in order to ensure, a fair and just determination of the matter. Further the leading of oral evidence will dispel the dispute of facts which are evident before Court.

[42] As a consequence thereof, the Court finds that on the evidence as adduced before Court, there is clearly a need for the matter to be referred to oral evidence. Accordingly, the Court makes the following Order:

1) The matter is referred to oral evidence.
2) There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. M. Nsibande (Mongi Nsibande & Partners)

For Respondent: Mr. B. Khumalo (Thwala & Associates)