



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 363/2023

In the matter between:

**SWAZILAND COMMERCIAL AND
ALLIED WORKERS UNION**

Applicant

And

**OK BAZAARS SWAZILAND (PTY) LTD
t/a OK FURNITURE**

Respondent

Neutral Citation : Swaziland Commercial and Allied Workers
Union v Ok Bazaars Swaziland (Pty) Ltd t/a Ok
Furniture, Case No. 363/2023 SZIC 23 [2024]
(07 March 2024)

Coram : **MSIMANGO - JUDGE**
*(Sitting with Mr. S Mvubu and Ms N. Dlamini-
Nominated Members of the Court)*

DATE HEARD : 8th February 2024

DATE DELIVERED : 7th March 2024

SUMMARY : **The Applicant has brought an application to
Court, seeking the court to compel the Respondent to sign a memorandum
of agreement for salary increases in respect of the years 2023 and 2024 which
excludes sales persons thereof.**

JUDGEMENT

- [1] The Applicant is **Swaziland Commercial and Allied Workers Union**, a Union duly registered in terms of the labour laws of Eswatini with its principal place of business at 2nd Floor, suite No. 302, Lane Street, Mbabane, Hhohho region.
- [2] The Respondent is **OK BAZAARS SWAZILAND (PTY) Ltd t/a OK Furniture**, a company with capacity to sue and be sued in its own name, established as such by laws of the Kingdom of Eswatini carrying its business at Bhunu Mall, Manzini, in the Manzini region
- [3] The Applicant brought an urgent application against the Respondent for an order in the following terms:-
- 3.1 That the Applicant's non-compliance with the forms, time limits and manner of service be condoned and that the matter be heard as one of urgency.**
 - 3.2 Declaring that the Respondent is negotiating in bad faith by including salespersons who fall under the category of commission earners, who do not form part of the Applicant's bargaining unit, in terms of clause 4 of the Recognition Agreement in their salary increase negotiations for the years 2023 and 2024, respectively.**
 - 3.3 Directing and/or compelling the Respondent to sign a memorandum of agreement for salary increases in respect of the years 2023 and 2024 which excludes salespersons thereof.**

3.4 Granting costs of suit in the event of unsuccessful opposition from the Respondent.

3.5 Granting further and/or alternative relief.

[4] The Applicant alleges that on or around June 2023, it approached the Respondent with a view to enter into a wage negotiation agreement for the years 2023 and 2024 in terms of clause 7 of the Recognition Agreement which governs the relationship between the parties.

[5] The Applicant submitted that even though the Recognition Agreement appears to be ex facie between the Shoprite division of the Respondent, the Recognition Agreement applies with equal force to OK furniture, the present Respondent hereof, and that this is qualified by clause 7 (d) which provides as follows:-

“Negotiations will be attended by members of the National Negotiating Team which shall comprise of not more than five (5) Shop Stewards (i.e one from each supermarket region and one from the furniture division who is not a commission earner) and two (2) union officials. The company delegation will be no more than the union delegation and will be representatives nominated by the company or Shoprite International”.

[6] It was Applicant’s argument that the procedure, as envisaged in clause 7 (d) above subsisted from the year 2018 when the Recognition Agreement was concluded until the year 2023 when an amendment in terms of clause 6 of a memorandum of agreement which introduced a salary increase for the years 2021 and 2022 was made to the effect that the Respondent, qua OK Bazaars, will not be part of the collective bargaining process for the company’s supermarket operations, being Shoprite. Further that, clause 6 of the memorandum of agreement expands further to provide that OK

furniture division of the Respondent and Applicant will engage in separate collective bargaining on substantive matters pertaining specially to non-sales staff of the Respondent from the year 2023.

- [7] The Applicant submitted that there has been no separate Recognition Agreement for the OK furniture division of the Respondent, whereas, clause 6 of the aforesaid memorandum of agreement provides that there must be a separate bargaining process for non-sales staff members, for the reason that clause 7 (d) of the Recognition Agreement states that an employee who earns a commission is not entitled to be part of the negotiation team and this is fortified by the fact that a commission earner is not an eligible employee for bargaining unit purposes in terms of clause 4 of the Recognition Agreement read together with clause 5 (a)
- [8] The Applicant submitted further that on or around the 28th July 2023 the Respondent sent a draft memorandum of agreement for salary increases in respect of the years 2023 and 2024 to the Applicant, wherein, they have incorporated sales persons, who also fall under the category of commission earners, whereas, inclusion of commission earners in this manner runs contrary to the spirit and purport of clauses 4, 5 (a) and 7 (d) of the Recognition Agreement.
- [9] Lastly, the Applicant submitted that it stands to suffer some immense prejudice for the reason that its members who are disgruntled by the delay in the finalization of the salary increase negotiations have begun to tender their resignation forms to the Applicant union, and there can be no guarantee that the resigned employees will ever return to be members of the Applicant. Further, if it were to report a dispute with the Conciliation, Mediation and Arbitration Commission in terms of the Industrial Relations Act, 2000 (as amended) by the time the matter comes to court, the unlawful act subject to these proceedings would have proceeded unabated.

[10] The Applicant thereafter prayed that it be granted an order as prayed for in the notice of motion.

[11] The matter is opposed by the Respondent and has further raised a point of law to the effect that the court lacks jurisdiction to hear the matter for the following reasons:-

11.1 The Honourable Court is created by statute which is the Industrial Relations Act, No1 of 2000 (as amended), therefore it does not have the power to conclude agreements for collective bargaining between parties, its jurisdiction and powers is clearly set out in Sections 8, 79 and 85 of Act.

11.2 The Honourable Court's power does not include imposing non-existent rights on bargaining parties, it can only enforce existing rights.

11.3 The Applicant has alleged in paragraph 8 of its answering affidavit that the rights it seeks the Honourable Court to enforce are those contained in the recognition agreement. The Applicant is wrongly advised, it is clear from the Applicant's founding affidavit that it seeks the court to force the Respondent to conclude an agreement which excludes commission earners, whereas the Honourable Court does not have that power.

[12] It must be pointed out that before the Court can deal with a matter before it, it must satisfy itself that it has jurisdiction to hear the matter.

[13] The jurisdiction of the Industrial Court is explicitly established in **Section 8 (1) of the Industrial Relations Act 2000** as amended and provides as follows:-

“The court shall, subject to Sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer’s association, and trade union, or staff association, or between an employee’s association, a trade union, a staff association, a federation and a member thereof”.

[14] The Applicant whose rights arise exclusively from an employer and employee relationship, has approached this court in pursuit of what it perceives to be a dispute of right and not that of interest. The Applicant argued that it seeks to enforce its right as per clauses 4 & 7 (d) of the Recognition Agreement read together with the amendment at clause 21 of the Agreement of the 5th April 2018.

[15] The code of Good Conduct, paragraphs 3.3.1 and 3.3.2 provides as follows on the difference between a dispute of right and dispute of interest.

3.3.1 “A dispute of right may be described as a dispute arising from the breach or contravention of law, contract of employment or collective agreement”.

3.3.2 “A dispute of interest on the other hand cannot be resolved through enforcing legal rights. The parties are, through negotiation, attempting to create a right by agreement with the other party”.

[16] In casu, the dispute is one of interest as opposed to a dispute of right, for the reason that the parties concluded a collective agreement which specifically related to commission earners and their conditions of employment on the 27th February 2020, which agreement recorded that the commission structure for commission earners would remain as is until “the next negotiation between the parties”. The next negotiation between the parties was that which took place in 2023, and which has given rise to this dispute. Wherein, the Applicant in one of its prayers wants the court to direct and/or compel the Respondent to sign a memorandum of agreement for salary increases in respect of the years 2023 and 2024 which excludes salespersons thereof.

[17] The court is of the considered view that this amounts to forcing the Respondent to signing a collective agreement which excludes commission earners, of which the court does not have the power in this regard.

[18] In the case of **Swaziland Railway Staff Association V Swaziland Railway Case No. 345/2012** the court held that:-

“Once the parties reach an agreement, the law says that agreement must be reduced into writing signed by the parties and submitted to the court for registration. The agreement becomes part of the terms and conditions of employment. In terms of Section 57 (1) once registered, the agreement “shall be binding on the parties” that is the document that any of the parties can come to court to enforce...”

[19] The court aligns itself with the sentiments as expressed in the above cited case.

[20] Furthermore, clause 9 of the Recognition Agreement deals with dispute settlement procedures and provides as follows:-

- “(a) A dispute means a serious disagreement or impasse between the parties which has not been resolved through negotiations or consultations or mediation or other mechanisms provided for in this agreement,
- (b) In the event of the parties failing to reach agreement through negotiations or consultations or mediation or other mechanisms provided for in this agreement, either party shall be entitled to invoke this dispute procedure by notifying the other party in writing, stating the nature of the dispute, the reasons for the dispute as well as the proposed terms of settlement;
- (c) Representatives from the National Negotiation Team, set out in clause 7 above, will meet within three (3) weeks or such other period as mutually agreed, upon receipt of the notice to consider the dispute and endeavor to reach a settlement. The parties may agree to hold further meetings;
- (d) Neither party shall engage in any industrial action including any strike or work stoppage, lockout, go slow, work to rule, refusal to work over time, nor any other form of industrial action, until the procedures of this agreement and the procedures required in terms of the IRA Chapter VIII has been fully exhausted.”

[21] As such regard has to be clause 9 of the Recognition Agreement for settlement of this dispute between the parties. This in effect means that before anything else all issues relating to negotiations have to be resolved and settled between the parties through bilateral discussions and negotiations.

[22] Dealing with a similar matter, the court in **SWAZILAND NATIONAL ASSOCIATION OF GOVERNMENT ACCOUNTING V SWAZILAND**

**FOR APPLICANT : MR A. DLAMINI
(BS DLAMINI & ASSOCIATES)**

**FOR RESPONDENT : MR N.D JELE
(ROBISON BERTRAM)**

GOVERNMENT CASE NO. 497/2007, wherein the parties had signed a Recognition Agreement and the relations between the parties were regulated by the provisions of their Recognition Agreement. Article 12 of the Agreement spelt out the procedure to be followed once there was a misunderstanding between the parties. The Respondent did not comply with article 12 of the Agreement. The court held that:-

“In deciding matters before it, the Industrial Court may make any order it deems reasonable which will promote the purpose and objects of the Industrial Relations Act.....We believe that these objects of the Act can best be achieved in the present matter by enforcing compliance with the procedures set out in Article 12 of the Recognition Agreement between the parties”.

[23] In the circumstances the court is of the considered view that the parties should comply with the procedures as set out in clause 9 of the Recognition Agreement.

[24] Based on the afore reasons the point of law challenging jurisdiction is well taken and is upheld. The court will not go into the merits of the matter in the absence of jurisdiction, and the following order is hereby made:-

- (a) The Application is dismissed.
- (b) There is no order as to costs.

The Members agree.



L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI