

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

CMAC REF NO: SWMZ 56/08

In the matter between:

SCAWU

APPLICANT

AND

**JUDY'S PRIDE (PTY) LTD
T/A FASHION WORLD**

RESPONDENT

CORAM

**ARBITRATOR
FOR APPLICANT
FOR RESPONDENT**

**VELAPHI DLAMINI
MUSA REUBEN NDLANGAMANDLA
SIKHUMBUZO SIMELANE**

ARBITRATION AWARD

DATES OF ARBITRATION: 25TH NOVEMBER 2008, 17TH FEBRUARY 2009

NATURE OF DISPUTE: REFUSAL TO GRANT RECOGNITION

1. DETAILS OF THE HEARING AND REPRESENTATION

1.1 The hearing of this matter was held at the Conciliation, Mediation and Arbitration Commission offices (CMAC or Commission) situated at 4th Floor, SNAT Cooperatives House in Manzini, the district of Manzini, on the 25th November 2008 and the 17th February 2009 respectively.

1.2 The Applicant is SCAWU, an acronym for Swaziland Commercial and Allied Workers Union, a trade union registered in terms of the Industrial Relations Act 2000 (as amended), of P. O. Box 2524 Mbabane, having the capacity to sue and can be sued in its own name. SCAWU was represented by Mr Musa Reuben Ndlangamandla, its official.

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1.3 The Respondent is Judy's Pride (Pty) Ltd trading as Fashion World, a limited company, having the capacity to sue and can be sued in its own name, of P. O. Box 3702 Manzini. Judy's Pride was represented by Mr Sikhumbuzo Simelane, an Attorney.

2. BACKGROUND FACTS OF THE DISPUTE

2.1 SCAWU reported a dispute for "refusal to grant recognition agreement" on the 21st April 2008 at the Commission's offices at Enguleni House in the city of Manzini.

2.2 CMAC attempted to resolve the dispute by conciliation, however, it remained unresolved such that on the 25th July 2008, a Certificate of Unresolved Dispute No: 437/08 was issued by the Commission.

2.3 The parties agreed to refer the dispute to arbitration under the auspices of the Commission in terms of Section 85 (2) of the Industrial

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Relations Act 2000 (as amended). I was appointed an arbitrator to determine the dispute.

2.4 At a pre-arbitration conference, the issues could not be defined because the Respondent failed to appear in a meeting held for that purpose on the 3rd November 2008. However, when the arbitration was held, representatives for the parties narrowed the issues for determination as will be shown

below.

3. ISSUE(S) IN DISPUTE

3.1 The issue in dispute was that the Applicant alleged that the Respondent was refusing to grant it recognition as employee representative despite meeting the fifty per cent requirement in terms of the Industrial Relations Act, 2000 (as amended).

3.2 Notwithstanding the fact that the parties verified the total number of union members, the company refused to grant the union recognition.

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3.3 During arbitration Mr Simelane for the Respondent elucidated the company's grounds for refusing to grant the recognition to SCAWU. According to the Respondent, it is in dispute whether or not the Union's members are fully paid up.

3.4 In the company's view, whether or not SCAWU's members are fully paid up determines whether it should be recognized by the Respondent.

4. COMMON CAUSE ISSUES

4.1 The number of employees who are in the bargaining unit is not in dispute. There is consensus that the Respondent has a workforce compliment of eighteen (18) employees, inclusive of four (4) managers and assistant managers.

4.2 It is agreed that the Respondent's undertaking has fourteen (14) unionisable employees and the Applicant declared that nine (9) of these are its members.

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5. ISSUE(S) FOR DETERMINATION

5.1 The issue for determination is whether or not the nine (9) employees are fully paid up members of the Applicant.

5.2 In the event I find that the workers are fully paid up members of the union, then I should order the Respondent to recognize SCAWU as the sole representative for all unionisable categories of all employees.

5.3 However, if I find that Applicant's members are not fully paid up, then the application should be dismissed.

6. SUMMARY OF EVIDENCE

6.1 Only the Applicant led evidence in support of its case. The Respondent simply challenged the authenticity of the receipts for membership subscriptions and joining fees for the nine employees, without leading any evidence.

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6.2 Applicant's case

6.3 The testimony of Telephone Gama

6.4 The Applicant called Mr Telephone Gama as its sole witness. He was sworn and introduced himself as SCAWU's Treasurer and was employed by Bradlows J D Group, Manzini branch.

6.5 It was Gama's testimony that the Applicant had nine members who were employees of the Respondent. The Treasurer, worked in close proximity with the employees because Bradlows,

Manzini branch and Fashion World, Manzini branch were adjacent .

6.6 Gama stated that his position with the Union entitles him to keep a receipt book to record joining fees and subscriptions paid by SCAWU's members who are in Manzini.

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6.7 The Treasurer's evidence was that the nine members names are : Ishmael Carlos, Gladys Dlamini, Paul Dlamini, Winile Mabuza, Joshua Matse, Nonhlanhla Mazibuko, Nelsiwe Motsa, Babazile Ngwenya and Thobile Shabangu.

6.8 Telephone Gama testified that he issues one receipt for a lump sum that is paid by these employees per month, which is a sum of E270.00 (Two Hundred and Seventy Emalangeni) and since the Applicant's office is in Mbabane, he then sends the finances there for reconciliation and/ or analysis.

6.9 According to Gama's evidence, SCAWU's office has a list of the members' names. It then analyses and or reconciles the account and issues individual receipts to these members after endorsing the Union's stamp. For those receipts that do not bear the Union's stamp, it was an oversight on his part otherwise all the nine employees were fully paid up from February 2008 when they joined up to February 2009, the month when the arbitration was held.

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6.10 It is the Treasurer's evidence that the February 2009 receipts for Gladys Dlamini and Paul Dlamni are the ones that do not bear the Union's stamp, however, these employees did pay the joining fee in February 2008 and to contend otherwise, just because the official stamp has not been endorsed, would be tantamount to denying them membership status of the Applicant.

6.11 Gama then submitted stop order forms, receipts from February 2008 to February 2009 for each of the nine employees named above as part of his evidence. These documents were collectively marked exhibit "A1".

6.12 Under cross-examination by Mr Simelane, the Treasurer stated that he did not personally know all the nine employees as they did not make payment individually, but as a lump sum for analysis by the Applicant's office in Mbabane.

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6.13 Telephone Gama denied that the receipts that were not stamped were dubious. He reiterated his evidence in chief that it was an oversight on his part not to scrutinize the documents to ensure that all receipts were stamped.

6.14 When asked by Mr Simelane, how much was paid by each member per month, he sated that it was E20.00 (Twenty Emalangeni). However; he could not reconcile the lump sum of E270.00 (Two Hundred and Seventy Emalangeni) paid with the nine employees if each paid E20.00 (Twenty Emalangeni) per month. It was his evidence though that the collective subscriptions paid has been consistent at E270.00 (Two Hundred and Seventy Emalangeni) per month.

7. CLOSING SUBMISSIONS

7.1 The parties made oral submissions on the same day.

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7.2 Applicants

7.3 Mr Ndlangamandla submitted that according to the evidence led by the Applicant, the nine employees were fully paid up. The two employees' receipts that were not stamped do not nullify their membership status, because the Treasurer testified that these members paid and it was an oversight

on Gama's part not to endorse the stamp.

7.4 Further Mr Ndlangamandla argued that in the event it is found that the two receipts are not authentic, still the Applicant would remain with seven members. Since the Respondent has fourteen unionisable employees, if the Union has seven then it means SCAWU meets the fifty per cent threshold required for recognition by the Respondent.

7.5 Finally, Mr Ndlangamandla prayed that the arbitrator orders the Respondent to grant recognition to the Applicant.

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7.6 RESPONDENTS

7.7 Mr Simelane submitted that the Applicant had failed to prove that it met the fifty per cent requirement for recognition to be granted recognition by the Respondent. This was so because some of the receipts submitted were not authenticated **a fortiori** that these employees were not fully paid up members of the trade union.

7.8 Finally, Mr Simelane submitted that Respondent left the determination of the issues to the arbitrator.

8. ANALYSIS OF EVIDENCE AND THE LAW

8.1 The determination of the issues in dispute necessarily involves the navigation of the legislative shores of the subject of trade union recognition. I propose to do so in earnest.

8.2 The application for recognition of Trade Unions or Staff Associations is governed by the provisions of

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section 42 of the Industrial Relations Act 2000 (as amended).

8.3 Section 42 may be summarized as follows;

- (a) A Trade Union that has a Registration Certificate in terms of Section 27 (IRA) may apply in writing to an employer for recognition as a collective bargaining representative for such categories of employees as listed in the application, concerning all terms and conditions of employment including wages and hours of work. Such application shall be copied to the Commissioner of Labour.
- (b) The employer shall reply to the application for recognition within twenty one (21) days and serve a copy to the Conciliation Mediation and Arbitration Commission.
- (c) In the event the employer fails to reply or refuses to grant recognition, the dispute may be referred to the Commission, which shall appoint a Commissioner who shall attempt to

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resolve the dispute through conciliation. If the dispute remains unresolved, it is referred to arbitration for determination.

- (d) The employer must recognize the trade union if fifty (50) percent of the employees in respect of which the trade union seeks recognition are fully paid up members.
- (e) Verification of the required fifty percent may be proved by signed stop-order forms or, in the case of disagreement regarding validity of the forms, by a head count.
- (f) If less than fifty percent of the employees in respect of which the trade union seeks recognition are fully paid up members of the organization, the employer has a discretion to recognize the organization or not. The employer must within thirty (30) days of the application, reply in writing to the Trade Union.

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8.4 In a plethora of judgments, the Industrial Court has applied the provisions of Section 42 in determining recognition disputes.

See *Smawu v Tuntex Textiles (Pty) Ltd* (IC No: 53/00).

Staff Association of Swazispa Holdings v Swaziland Holdings Limited (IC No: 100/03).

Lidlelantfongeni Staff Association (L.I.S.A.) v Swaziland National Provident Fund (IC No 50/04).

Swaziland Processing Refining Allied Workers Union (Sprawu) v Palfridge (IC No: 208/07).

8.5 The stop order forms for the nine employees are not disputed by the Respondent. There is consensus that there are fourteen (14) unionisable employees at Respondent's undertaking in Manzini and Mbabane branches.

8.6 The Respondent has challenged two receipts that of Gladys Dlamini and Paul Dlamini for joining fees dated February 2008, on the grounds that they

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have not been endorsed with the Trade Union's stamp and as such, these employees are not fully paid up members.

8.7 The question as to when is an employee a fully paid up member of a trade union or staff association is a vexed one.

8.8 Section 42 (5) stipulates that the employer must recognize a trade union if fifty percent of the employees in respect of which the organization seeks recognition are fully paid up members.

8.9 According to section 42 (6), stop order forms duly signed by the employee shall be sufficient proof that the employee is a full member of the union in determining whether that organization represents fifty percent of the employees in respect of which it seeks recognition.

8.10 In my view, the inquiry of union membership of an employee for purposes of recognition is two - fold. The employee must be fully paid up and must have signed the stop - order form.

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8.11 It is my opinion that the above subsections cannot be read in isolation of section 30 (1) of the Industrial Relations Act 2000 (as amended), which provides;

"a person eligible for membership in an organization under this Act has a right to membership in that organization if that person pays any fees that are properly payable to it, and has a right to remain a member as long as the person complies with the rules of the organization".

8.12 I hold the view that an employee who is a fully paid up member is a person who pays any fees that are properly payable to that organization and retains such membership so long as he complies with that union's constitution.

8.13 If for example, a trade union constitution stipulates that membership fees shall be payable quarterly, then an employee is fully paid up if he is up to date in terms thereof. On the other hand if the constitution provides that a person shall pay

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monthly fees, then one is a fully paid up member if he is up to date accordingly.

8.14 Unless a trade union constitution provides otherwise, an employee should not wait until stop-

order forms are effected by an employer before paying the requisite membership fees to his organization. The obligation is placed on the member to pay the required fees.

8.15 Returning to the facts of this matter. The Applicant did not present its constitution to show when one is a fully paid up member, however joining fees and subscription receipts for the nine employees from February 2008 to February 2009 were submitted.

8.16 Telephone Gama, the Union's Treasurer testified that all nine employees were up to date with their subscriptions and joining fees, albeit Gladys and Paul's not bearing the office stamp.

8.17 Even though Gama's arithmetical aptitude was tested by Mr Simelane, I found him to be an honest and reliable witness.

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8.18 From the submitted documents it has been proved by the Applicant that the nine employees are fully paid up. A reasonable inference may be drawn that the union's constitution requires a monthly payment of subscriptions by its members because SCAWU has annexed the receipts sequentially from February 2008 to February 2009.

8.19 If I were to hold that the two receipts for Gladys and Paul are not authentic and therefore these are not fully paid up members it would lead to an absurdity and contradict the proven facts.

8.20 The only receipts that were challenged are for February 2008 which were for joining fees. Gladys and Paul's subsequent receipts together with the rest have been stamped. It is an unlikely event that these employees never joined the union, because they have been religiously paying the subscriptions since March 2008 to February 2009.

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8.21 Even if Gladys and Paul's February 2008 joining fees receipts may be disqualified, rendering these employees to be non members, with the remaining seven employees as its members, the union still meets the fifty percent requirement. It is common cause that the Respondent has fourteen employees who are eligible to join a trade union.

8.22 The Applicant has a membership of nine employees out of fourteen who are unionisable. This represents sixty four percent of the employees of the Respondent.

9. CONCLUSION

9.1 It is my finding that the Applicant has sixty four percent membership of the Respondent's employees and has fulfilled the requirement of section 42 (5) of the Industrial Relations Act 2000 (as amended).

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9.2 For the above reasons, the Respondent must grant recognition to the Applicant as the sole representative for all unionisable categories of all employees.

9.3 I make the following order.

10. AWARD

10.1 The Respondent is directed forthwith to grant recognition to the Applicant as the sole representative for all unionisable categories of all employees at its undertaking.

10.2 No order as to costs.

DATED AT MANZINI ON THIS 26th DAY OF MAY 2009

VELAPHI DLAMINI

CMAC COMMISSIONER