CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT NHLANGANO **NHO 100/10**

In the matter between:-

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION Applicant

And

BUILDERS HARDWARE - BUILT IT NHLANGANO Respondent

Coram:

Arbitrator	**:**	Ms N. Shongwe
For Applicant	**:**	Mr. C. Nene
For Respondent	**:**	Mr. P. Mamba

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The Applicant herein is The Swaziland Manufacturing and Allied Workers Union, a union duly registered in terms of the labour laws of the country. Mr. C. Nene a Union Official represented the Applicant.

2. The Respondent is Builders Hardware – Build it - Nhlangano a company duly registered in terms of the company laws of the country and trading as such in Nhlangano. The Human

Resources Manager Mr. P. Mamba represented the Respondent.

ISSUES TO BE DECIDED.

3. Whether Respondent should grant Applicant recognition.

BACKGROUND TO THE ISSUE

4. The Applicant herein reported a dispute with the Commission, which however remained unresolved after conciliation. The dispute relates to the non-recognition of the Applicant by the Respondent in terms of Section 42 of the **Industrial Relations Act 2000** as amended. The Commission then referred the dispute in terms of section 42(9) of the Industrial Relations Act of 2000 (as amended).

5. The parties were invited for a pre-arbitration on the 18th January 2011, the matter however failed to proceed until the 5th April 2011 after numerous postponements at the instance of both parties.

6. On or about the 5th April 2011 the parties consented to a conciliation within arbitration wherein Applicant undertook to sign an agreement should the results of the verification count exercise prove that the Applicant has the requisite membership within the unit it sought recognition. The process was to be based on the Respondent employees at Builders hardware – Build it Nhlangano. The Respondent however, after the matter was conciliated upon refused to sign, insisting that the matter proceed to arbitration. The matter reverted to arbitration on the 31st May 2011.

7. It was agreed between the parties that the present matter be dealt with in both in papers and arguments and that points of law be decided simultaneously with the merits of the case.

Preliminary points (points in *limine*)

8. The Respondent's initial objection at the inception of the hearing was on manner the certificate of unresolved dispute was issued. Respondent had argued that the Conciliating Commissioner had not conciliated upon the dispute, he merely issued a certificate after an objection was raised on the citation of the Respondent on the Report of Dispute. He however, omitted to pursue the point on the papers and as per the parties' agreement; I will be guided by what has been pleaded on the papers and in support thereof.

9. The Respondent raised Five (5) points in *limine* summarized as follows:

9.1 That the Applicant has no legal right to apply for recognition as it does not satisfy the statutory requirement of 50% membership as per the provision of section 42(5) of the Industrial Relations Act 2000 as amended.

9.2 That Applicant's papers are defective, frivolous and vexatious because Applicant is seeking recognition from a specific department of an undertaking.

9.3 There is an existing recognition agreement, which has members, and therefore Applicant cannot be a sole representative of the workers. The case at hand is distinguishable from the case of **ZHENG YONG AND SMAWU.**

9.4 The matter has been overtaken by events as the Applicant's membership has declined by 2 and therefore the matter is academic.

9.5 The commission has no jurisdiction to entertain the Application which falls within the provision of section 42 (13) of the Act as those powers are still within the jurisdiction of the Respondent. The Respondent prayed that the Application be dismissed.

10. Applicant argued that it has fulfilled the requirement of section 42 of the Act and has a legal right to apply for recognition. The application is not defective as it is in conformity with the Act, which duly authorizes the recognition of more than one trade union.

11. After having considered the parties arguments or submissions, my ruling is as follows;

11.1 **Rule 28** of the **CMAC Rules** provides that an Arbitrator may conciliate the dispute at any time during the arbitration proceeding, provided if parties to the dispute agree. By extension, **CMAC Arbitration Guidelines** in terms of section 109 of the **Industrial Relations Act 2000** (as amended) lays down the procedure to be followed. These Guidelines states that once the parties consent, the rules of conciliation then applies as per clause 13 of **CMAC Conciliation Guidelines.**

11.2 Clause 9 of the **CMAC Conciliation Guidelines** read together with **CMAC Rule 20** clearly states that conciliation proceedings are confidential and on a without prejudice basis. No other person may refer to anything said at the conciliation proceedings during any

subsequent proceedings, unless the parties agree in writing.

11.3 The parties at the inception of the matter consented on record to conciliation, which however failed to yield any fruitful results. This was even before any material evidence was lead. The Respondent has in *casu* without any written consent raised points *in limine* based on evidence obtained during the conciliation.

11.4 It is a general principle of our law that the exclusionary mechanism applies on proceedings conducted on a without prejudice basis which, in other words is said to be 'privileged'. In trying to preserve and foster the conciliation process that depends, for its viability on the confidentiality of communications it requires the suppression of such evidence.

11.5 Base on the aforementioned Respondent's points *in limine* 1, 3, 4 and 5 be and are hereby dismissed.

11.6 With regard to the respondent's second point, Mr. Mamba at the beginning raised the point as it appears on the certificate but later withdrew it prior to the conciliation within arbitration process. I am of the view therefore that this point cannot be dealt with this point as remains withdrawn. It follows therefore that this points fails to succeed as it stands.

SURVEY OF EVIDENCE

12. I have considered all evidence and arguments led by the parties but I will only consider and or refer to the evidence and

arguments that I consider pertinent in substantiating my findings.

APPLICANT'S CASE

13. The Applicant submitted that it applied for recognition with the Respondent in July 2010 after it had attained a membership in excess of the fifty percent at the Respondent's undertaking.

14. According to the Applicant, they had acquired membership of sixteen employees out of the twenty-nine unionisable employees and therefore had acquired more than fifty percent membership, which meant they are eligible to be granted recognition by Respondent interms of Section 42 of the **Industrial Relations Act 2000 (as amended)**. The Applicant further produced fifteen signed stop order forms after withdrawing one which he said was no longer a member.

RESPONDENT'S CASE

15. The Respondent did not dispute the stop order forms but except for two for B. B. Mohamed and Thembi Dlamini, which were however, confirmed after the Respondent's Assistant Manager Soraya Shoulder confirmed knowledge of the two.

16. The Respondent argued that there were 33 employees within the hardware unit. He then produced a list of 26 employees marked **"RD 10 "** but was also quick to point out that the list was incomplete as it was supposed to contain 33 names. He further conceded that two employees have left for one reason or the other and these were Nondumisa Mpanza and Dlamini Rodney. This in essence reduced the number of Respondents membership by two.

17. The Respondent however neglected to indicate the names of employees which he claimed had been omitted from the list marked **“RD 10”.** Mr Mamba stated that some did not appear on the list because they were still casual employees.

18. Mr. Mamba argued that there was an already existing recognized union hence it cannot grant Applicant recognition. In as much as Section 42 of the **Industrial Relations Act 2000 (as amended)** provides for the recognition of more than one trade union in an undertaking, this provision is defective, impractical in the sense of promoting good and harmonious industrial relations in the work place.

19. Mr. Nene argued that it beats logic that the Respondent’s list is incomplete and leaves so much to be desired. Respondent’s contention that casual employees were omitted from the list does not hold water as some of the employees in the Respondent list are casual employees like Lungelo Malindzisa.

ANALISYS OF EVIDENCE

20. The application for recognition of trade unions or staff associations is governed by the provisions of section 42 of the **Industrial Relations Act 2000 (as amended)** and also the case of **Swaziland Processing Refining Allied Workers Union (SPRAWU) v. Palfridge IC NO. 208/07** where the court construed the meaning of Section 42.

21. The Respondent submitted as evidence a conclusive list of twenty-six employees marked “RD 10” and I would rely on this

list in my analysis in the absence of an amendment thereof. On record, there are 15 stop order forms, which have been verified and confirmed by both parties.

22. It remains to calculate the percentage of membership the Applicant has acquired which is fifty seven (57) percent. This clearly indicate that the Applicant satisfies the provision of Section 42 (5) of the **Industrial Relations Act 2000 (as amended)** which provides as follows;

> "The employer shall recognize a trade union or staff association that has been issued with a certificate under Section 27 if _
>
> a) Fifty percent of the employees in respect of which the trade union or staff association seeks recognition are fully paid up members of the organization"

23. The Respondent's contentions that it cannot grant Applicant recognition because it is applying for recognition from a particular department yet there is an already existing recognized union are inexplicable. In **Swaziland Pulp and Paper Manufacturing and Allied Workers Union v. Usuthu Pulp Company Limited and others IC No.6/00** the learned judge observed that the trade union as defined in the 2000 Act has revoked the restriction imposed by the definition of an industry union in the 1996 Act. The consequence of the lifting of this restriction is that a trade union may represent any category of employee under one employer if the employees fall within a clear classification or division, whether or not that are engaged in a similar service or produce a similar product.

24. In *casu* the Applicant has applied for recognition under the hardware section which according to the above cited case is permissible as long as it falls within a clear classification or division. The Respondent submitted as evidence a trading

license for the year 2011 for the hardware department marked "RD 4" situate at plot no. 288 Nhlangano. This contradicts his evidence that the hardware and supermarket are all under one roof because the supermarket and bakery trading licenses marked "RD 5 and 6" reveal that the later are situate at plot 246 Nhlangano.

25. In my view the present application is in order in light of the observation the Industrial court made in the case of **Zheng Yong v. SPRAWU IC case No. 206.06.** The court observed that there two unions were granted recognition on the same day and there was no demarcation as to which category of employees each union would represent. That according to the court was clearly a recipe for chaos and confusion.

26. It is without a doubt that the Applicant has the requisite membership to be granted membership, I am incline to make the following order having dismissed the points raised by the Respondent.

AWARD

27. The Respondent's points of law are dismissed.

28. The Respondent is hereby ordered to forthwith grant the Applicant recognition as the representative of its employees within the bargaining unit.

29. There is no order as to costs.

THUS DONE AND SIGNED AT MANZINI ON THIS…….DAY OF OCTOBER 2011

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NONHLANHLA SHONGWE
CMAC COMMISSIONER