



**CONCILIATION, MEDIATION & ARBITRATION COMMISSION
(CMAC)**

HELD AT MBABANE

SWMB

385/13

In the matter between:-

**SWAZILAND AGRICULTURE & PLANTATIONS
WORKERS UNION (SAPAWU)**

APPLICANT

And

SWAZILAND PLANTATIONS (PTY) LTD

RESPONDENT

CORAM:

Arbitrator

: Mr B.S Dlamini

For Applicant

: Mr Archie Sayed

For Respondent

: Mr Goodman Dlamini

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

1.1. The Applicant is the Swaziland Agriculture and Plantations Workers Union (SAPAWU), a duly registered and recognized union within the Respondent's undertaking, based at King Mswati III Highway, Matsapha, District of Manzini. During the arbitration hearing, the Applicant was represented by its Secretary General, Mr Archie Sayed.

1.2. The Respondent is Swaziland Plantations (Pty) Ltd, a company registered and incorporated as such in terms of the Company laws of the Kingdom of Swaziland. The Respondent has one of its main business units in the Hhohho District and this is where the present dispute between the parties arose. During the hearing, the Respondent was duly represented by Mr Goodman Dlamini who is the HR Manager within the company.

2. **ISSUES IN DISPUTE**

2.2. In its Report of Dispute, the Applicant has categorized the nature of dispute as being a "*deadlock in annual negotiations (2013)*". In essence however, this case is about the proper interpretation to be attached to a

Collective Agreement entered into and signed by the parties on the 16th October 2012.

- 2.3. The parties do not dispute that they reached an agreement on certain issues during their 2012/2013 annual wage negotiations but they differ on the correct interpretation to be attached to the issue of a FUNERAL SCHEME which had been slated as one of the issues to be discussed in their agenda during the negotiations.
- 2.4. The matter was first reported to the Conciliation, Mediation and Arbitration Commission (CMAC) on or around the 6th June 2013. In the Dispute Form, the Applicant sought to have CMAC conciliate on the following issue;

“To have the Respondent compelled to deduct the agreed

Percentage in respect of a funeral scheme”

- 2.5. After the matter had gone through conciliation, a Certificate of Unresolved Dispute was issued by the Commission in respect of the alleged failure by the Respondent to deduct an agreed fee towards a funeral scheme that had been agreed upon by the parties.

2.6. The Commission appointed me as Arbitrator on the 9th April 2014. The first hearing in the matter was on the 27th May 2014 and the last hearing was on the 5th June 2014. The parties opted to make their both written and verbal submissions on the last day of arbitration. Both parties applied themselves fully to the issues and this is to be highly commended and encouraged.

2.7. In this award, I am required to determine and make findings of fact and the law based on the Report of Dispute, the facts and the evidence presented during the hearing by both parties.

3. NATURE OF EVIDENCE PRESENTED DURING HEARING

3.1. The parties relied on documents as their main source of evidence in substantiating their respective cases. Only the key aspects of the evidence are summarized herein, reference being made only to those facets that have influenced the ultimate award.

3.2. THE APPLICANT'S SUBMISSION

The Applicant's submission was that one of the issues on the agenda during their negotiations for the 2012/2013 salary negotiations was the issue of a

funeral scheme for its members. According to the Applicant, the initial proposal was that the Respondent should be 100% responsible in catering for the funeral scheme at SAFRICA Funeral Scheme. This proposal was however rejected by the Respondent. Another proposal was presented by the Applicant requesting the Respondent to assume at least 50% of the fee required by the funeral scheme. Again this proposal was rejected by the Respondent.

The parties then ended up agreeing that the responsibility of paying up the requisite fee for joining the funeral scheme would rest entirely upon the members of the Applicant. The Respondent was expected to deduct the requisite fee for joining membership from the salaries of the Applicant's members for payment to the administrators of the funeral scheme.

The Applicant submitted that the Respondent had defied the agreement entered into by the parties by insisting that each individual member of the Applicant should indicate their intention of joining the funeral scheme by endorsing a consent form after which the required fee would then be deducted from that employee's salary by the company.

The Applicant submitted that when it embarked on negotiations with the Respondent's management team, it was doing so on behalf of all its members and therefore that whatever decision or agreement was concluded during the negotiations was binding on all its members. The Applicant argued that it is wrong for the Respondent to require consent from the individual members of the Applicant. The argument was that the Respondent should simply implement the agreed terms on all the members as opposed to requiring consent from the individual members of the union.

In advancing its arguments, the Applicant relied on the principle alluded to by Grogan, J, WORKPLACE LAW (10th ed) at p. 355 wherein the author states the law as follows;

"When individual employees consent either expressly or impliedly to a Collective Agreement, its terms are deemed at common law to have been incorporated into their individual contracts...The LRA confirms this principle by giving statutory force to all collective agreements, irrespective of the individual consents"

The above author further states that, *" specific consent by individual employees or employers who are members of the parties is therefore no longer a*

precondition for their being bound by collective agreements.”

Mr Sayed thus strongly argued that based on the above cited principle, it is wrong and unlawful for the Respondent to seek individual consent from the Applicant’s members as the agreement reached between the parties applied to all its members without any further restriction or conditions.

3.3 RESPONDENT’S SUBMISSIONS

The Respondent’s submissions was briefly that in order to deduce the true meaning of the parties when the collective agreement was signed, it was imperative to have recourse to the minutes captured during the discussions.

In this regard, Mr Dlamini for the Respondent referred me to minutes of the 10th July 2012 wherein on the issue of the funeral scheme, the Chairman had stated as follows; *“The company is not prepared to contribute to a scheme but anyone willing to join a scheme, the company is prepared to facilitate the deductions..”*

Mr Dlamini submitted that from the above statement, it is clear that the intention of the parties was never at any stage that the company would apply the terms of the agreement in relation to the funeral scheme to all the members of the Applicant.

Mr Dlamini submitted that it would be unlawful for them as a company to apply the terms of the agreement to all members of the Applicant without obtaining consent from them as this was not a benefit to the affected employees but rather was a deduction from their salaries.

The Respondent's contention was further that there was no prejudice at all to Applicant's members in that all that was required by the company was consent after which the latter would then effect the deductions as agreed between the parties. The company submitted that there were very few employees who came forth to give their consent to the deductions from their salaries which meant that in principle, the majority of the employees were against this arrangement.

4. ANALYSIS OF FACTS AND THE EVIDENCE

It is quite clear and evident from the facts presented during the hearing that the parties herein entered into

an agreement with regards to the issue of the funeral scheme. The parties recorded in their agreement as follows;

" 9. FUNERAL SCHEME:

The company shall assist with the deduction of the premiums

to SAFRICAN Funeral Scheme;

Company shall continue to give out the current funeral Benefits

Shall consider cashing in the current benefits once the Funeral scheme has proven itself to be viable."

The law cited by the Applicant is indeed the correct law in relation to the legal status of collective agreements. The starting point would therefore be to examine the legal status of unions in the relationship between employers and employees. It is provided in Section 42 (1) of the Industrial Relations Act, 2000 (as amended) as follows;

"A trade union or staff association which has been issued with a certificate under section 27, may apply in writing to an employer for recognition as the employee

representative for such categories of employees as are named in the application concerning all terms and conditions of employment including wages and hours of work.” [Underlining my emphasis].

It is common cause and not disputed that the Applicant, namely, SAPAWU is a duly recognized “employee representative” for the category of employees “named in the application.” The latter phrase simply means that when an application is made to the employer by a union that wishes to be recognized in a particular undertaking, the application must contain a list of the employees which the union has recruited and who it wishes to represent concerning “ *all terms and conditions of employment*”

When the negotiations took place between the Applicant and the Respondent in relation to the funeral scheme arrangement, the union was acting as a recognized employee representative for the category of employees named in the application (and ultimately collective agreement) as agreed between the parties. This therefore means whatever agreement is reached during the negotiations between the two parties (union and employer representatives), the terms of that agreement, however favourable or prejudicial, apply

without condition to the principals whom the negotiating parties represent.

In the case of NEDBANK (SWD) LIMITED v SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION [2006] SZIC 60, the Court stated the law as follows;

“A recognition agreement is the means by which a union acquires the right or authority to speak on behalf of the workers in an undertaking. The recognition agreement was signed by both parties. It follows therefore that each party is bound by the provisions of the collective agreement. The bargaining unit was defined in the agreement as meaning all permanent employees of the applicant excluding staff members.”

In the present matter, the Applicant, in its representative capacity for all employees known by the Respondent, agreed to have a certain percentage deducted from the salaries of the said employees towards the funeral scheme. In a way, requiring a consent form from the employees concerned prior to implementing the terms of the agreement reached between the parties is equal to engaging the individual employees afresh. Such an act departs from the basic

tenets of collective bargaining and seeks to undermine the legitimacy and authority of the duly recognized union in that undertaking.

I am therefore inclined to agree with the submissions and legal authorities presented by Mr Sayed in the matter. The Respondent is obliged to implement the terms of the agreement without attaching conditions that have the effect of undermining the agreement reached between the parties during negotiating. The Respondent ought not to concern itself with the question of whether or not the terms of the agreement are favourable to the employees who are members of the Applicant. The employees who are members of the Applicant in their wisdom or doom chose the Applicant as their official representative on matters concerning their terms and conditions of employment and thus remain bound by the decisions taken on their behalf by the said union. It would have been a different case if such consent form was required by the funeral scheme organization to which the employees intend to affiliate to.

LEGAL CONCLUSION

In my assessment of the facts and legal issues, the Respondent was wrong to require that the individual

employees should complete and sign consent forms prior to the deductions agreed upon between the parties being implemented. As already stated herein above, such an act undermines the spirit of collective bargaining and may actually sow division between the union and its members.

5. AWARD

Having considered all the evidence presented during the hearing of the matter, the conclusion I make is that the Respondent is to implement the deduction of the agreed fee on all the members of the Applicant without requiring them to sign a consent form or other document that may have the effect of undermining the agreement reached between the parties. The Respondent must carry out the implementation of the said deductions immediately when the Applicant member's salaries and/or wages are due and payable.

THUS DONE AND SIGNED ON THISDAY OF JULY, 2014.

BONGANI S DLAMINI

CMAC ARBITRATOR