IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between: Case No.647/2020

LEWIS STORES (PTY) LTD Applicant

And

SWAZILAND COMMERCIAL AND

ALLIED WOKERS UNION 1st Respondent

VELAPHI DLAMINI 2nd Respondent

CONCILIATION, MEDIATION AND

ARBITRATION COMMISSION (CMAC) 3rd Respondent

Neutral citation **:** ***Lewis Stores (PTY) Ltd & Swaziland Commercial and Allied Workers Union and Others (647/2020) [2020] SZHC 196 (29th September, 2020)***

Coram **:** **M. Dlamini J**

Heard **:** **24th August, 2020**

Delivered **:** **29th September, 2020**

Contract **:** ***Whenever the content of a written document is a subject for litigation, the cardinal rule of procedure is that the trier of fact must as the first port of call read and interpret the document giving rise to the issue - the interpretation assigned to the words in the document must first be given their literal or day-to-day meaning (golden rule) unless of cause doing so would lead to absurdity - absurdity in interpretation is not synonymous with unfairness - in other words, it is not the business of the justice or arbitrator to see to it that the meaning assigned to the words or phrases in the document result in fairness to either or both parties - to do so would be a travesty of one of the core principle of our law, freedom of contract, a principle based on public policy. [15]***

Summary: The question for determination at the instance of both parties is whether a non-union member is entitled to benefit from a negotiated salary in the absence of an agency shop agreement and in the face of the "*No free riders"* concept. The applicant prays that the court uphold the "*No free riders"* principle while the respondent laments that such would lead to discrimination among the workers, an unfair labour practice.

The Parties

[1] The applicant is a company duly incorporated and registered in accordance with the company laws of the Kingdom of Eswatini. In as much as it has spread its wings across the country, its principal place of business still remains at Mbabane City, Hhohho region.

[2] The 1st respondent is a duly approved and registered workers' union. In the present litigation, it represents thirteen employees of the applicant. The 2nd respondent is an admitted attorney of this Court and was appointed arbitrator over the dispute at hand. The 3rd respondent is an entity duly established in terms of the labour legislation of this Kingdom. Its core function is to conciliate, mediate and arbitrate on labour issues.

Brief Synopsis

[3] **Relationship of Union and Lewis Stores**

As the background, the arbitrator stated that on or about 18th April 1992, the Union reached a Recognition agreement with Lewis Stores. Pursuant to this Recognition agreement, in 2016, the duo concluded a wage agreement (2016 Agreement).

[4] In implementing the 2016 Agreement, Lewis Stores effected an increase in salaries of only subscribed members of the Union. Non-subscribed members were considered for a salary increased only on their performance output. The result of this increase of salary based on performance was that some of the employees were found to have underperformed and therefore received a zero salary increment.

[5] The Union, aggrieved by Lewis failure to effect salary increase across the board on its non-managerial employees, escalated its grievance to CMAC (3rd respondent) pursuant to a certificate of an unresolved dispute, an arbitrator was robed in.

Arbitrator's award

[6] Upon motion proceedings, the arbitrator's award was in favour of the Union. He ordered Lewis Stores to pay various amounts to all thirteen employees. His final conclusion was that it was discriminatory of Lewis Stores not to effect the 2016 Agreement upon all employees falling within the bargaining unit of the Union.

Arbitrator's analysis and final award

[7] The first port of call by the Arbitrator was to look at the terms of the Recognition agreement and the 2016 Agreement. He defined who was a member in terms of eligibility to benefit from the bargaining of the Union. The Arbitrator concluded:

> "*I hold that the deserving Applicants (*Respondents *in casu) were permanent employees of the Respondent who were non-Union members on the 1st June 2016* (the effective date of 2016 Agreement)." (my own emphasies)

[8] On the basis of the above, the Arbitrator awarded each of the thirteen employees as follows:

"*7.3 The Respondent is ordered to pay the Applicants the salary increases as per the 2016 Swaziland Wages Agreement as follows:*

- ***Zanele Mamba***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

  E740 x 9 = E6600 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award = ***E29, 540***

- ***Tivetile Mamba***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

  E740 x 9 = E6600 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award = ***E29 540***

- ***Thokozani Dlamini***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 June 2019)

  E740 x 9 = E6600 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award ***= E29. 540***

- ***Siphiwe Zwane***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

E 740 x 9 =E6600 (01 June 2019 – 29 Feb. 2020)

Sub-total Award ***= E29, 540***

- ***Nonhlanhla Ndwandwa***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

  E740 x 9 = E6600 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award ***= E29, 540***

- ***Nonhle Dlamini***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

  E740 x 9 = E6600 (01 June 2019 - 29 Feb. 2020)

  Sub-total Award = ***E29, 540***

- ***Joseph Nhlebeya***

  E440 x 12 = E5280 (01 June 2016 – 31 May 2017)

  E740 x 12 = E8800 (01 June 2017 – 31 May 2018)

  E740 x 12 = E8800 (01 June 2018 – 31 May 2019)

  E740 x 9 = E6600 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award = ***E29, 540***

- ***Winile Dlamini***

  E300 x 12 = E3600 (01 June 2017 – 31 May 2018)

  E300 x 12 = E3600 (01 June 2018 – 31 May 2019)

  E30 x 9 = E2700 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award = ***E9, 900***

- ***Sandile Masuku***

  E300 x 12 = E3600 (01 June 2017 – 31 May 2018)

  E300 x 12 = E3600 (01 June 2018 – 31 May 2019)

  E300 x 9 = E2700 (01 June 2019 – 31 Dec. 2020)

  Sub-total Award = ***E9, 900***

- ***Bhekumuzi Mbingo***
- *E300 x 12 = E3600 (01 June 2017 – 31 May 2018)*
- *E300 x 12 = E3600 (01 June 2018 – 31 May 2019)*
- *E300 x 7 = E2100 (01 June 2019 – 31 Dec. 2020)*

  Sub-total Award = ***E9, 300***

- ***Nkululeko Nkentjane***
- *E300 x 12 = E3600 (01 June 2017 – 31 May 2018)*
- *E300 x 12 = E3600 (01 June 2018 – 31 May 2019)*
- *E30 x 9 = E2700 (01 June 2019 – 29 Feb. 2020)*

  Sub-total Award = ***E9, 900***

- ***Derrick Nhlabatsi***

  E300 x 12 = E3600 (01 June 2017 – 31 May 2018)

  E300 x 12 = E3600 (01 June 2018 – 31 May 2019)

E30 x 9 = E2700 (01 June 2019 – 29 Feb. 2020)

Sub-total Award = ***E9, 900***

- ***Phemba Ndlangamandla***

  E300 x 12 = E3600 (01 June 2017 – 31 May 2018)

  E300 x 12 = E3600 (01 June 2018 – 31 May 2019)

  E30 x 9 = E2700 (01 June 2019 – 29 Feb. 2020)

  Sub-total Award = ***E9, 900***[1]

Determination

[9] The issue at hand was articulated by the parties themselves in the statement of agreed facts serving before the Arbitrator. It was well captured by him as follows:

> ***"2. ISSUE TO BE DECIDED***
>
> *In terms of the Statement of Agreed Facts filed by the parties, the issue for determination is 'whether the differentiation in respect of salary increases between the Union members and the non-Union members in the bargaining unit, based on the principle of collective bargaining amounts to discrimination, and if so, whether the discrimination based on the 'no free riders' concept in the absence of an agency shop agreement is acceptable and fair."*[2]

Preliminary observation

[1] Page 58 para 7.3 of book of pleadings

[2] Page 31 paragraph 2

[10] The case of the parties was crisp. It is highlighted under sub-title "*issue*". As correctly observed by the Arbitrator, the parties reported their dispute on 17th October 2017. The bone of contention was the 2016 agreement in respect of Lewis Stores employees who did not benefit from it owing to Lewis Stores contending that non-union registered employees were excluded from it.

[11] From the above, it is clear that the subsequent 1st June 2018 wage agreement was neither before CMAC nor the Arbitrator. It could not as when the dispute was reported (2017), it was not subsisting. It cannot further be said that the 2016 agreement should be applied beyond 1st June 2018 as the 2018 agreement was effective from that period onward.

[12] Further, as revealed by the statement of agreed facts, an agency shop agreement was concluded between the parties on 12th September 2017. Its effective date was 1st September 2017. From the pleadings serving before me and the Arbitrator, the present applicant has no qualms with all its employees benefiting from the 2016 agreement from the effective date of the agency shop agreement i.e. 1st September 2017 onward.

[13] The reasoning of applicant is that the free ride principle had been overtaken by each employee being a member by reason of subscription, owing to the agency shop agreement. In brief, all the above agreed facts point to one direction. It is that should the arbitrator find in favour of the Union, the computation for payment

should be based on the 2016 agreement. This means that the relevant period for purposes of computing salary increment for those employees who were excluded by Lewis Stores should be between 1st June, 2016 to 30th August, 2017 with a back pay from 26 December, 2016.

[14] It follows therefore that any computation of salary increment beyond this date and any award for such a period stands to be set aside. The reason is simple that there was neither a report to CMAC nor any travesty for that matter in regard to such a period. The award or order for a period beyond 30th August, 2017 is unwarranted following the issue at hand.

Merits

Legal principles

[15] Whenever the content of a written document is a subject for litigation, the cardinal rule of procedure is that the trier of fact must as the first port of call read and interpret the document giving rise to the issue. The interpretation assigned to the words in the document must first be given their literal or day-to-day meaning (golden rule) unless of cause doing so would lead to absurdity. Absurdity in interpretation is not synonymous with unfairness. In other words, it is not the business of the justice or arbitrator to see to it that the meaning assigned to the words or phrases in the document result in fairness to either or both parties. To do so would be a travesty of one of the core principle of our law, freedom of contract, a principle based on public policy.

[16] Writing on sanctity of contract, **Van Heerden JA**[3] stated:

> *"If there is one thing which more than another public policy requires is that* ***men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice****."* (my emphasis)

[17] The purpose for parties to conclude an agreement and in some instances document the same is that their transaction must be regulated by the terms reflected in their agreement. In terms of the freedom of contract principle, parties to a contract may reinforce a position of common law. However, it is also an element of the freedom of contract for parties to opt out of a common law principle. In other words, they may waive their rights or obligations inherent in a common law principle or statute. They may do so either expressly or impliedly in their agreement. Courts of law would only interfere with their liberty to contract out of law only where their agreement results in repugnancy by reason that it is against public policy or its very results is proscribed by law.

Case *in casu*

[18] My duty is simple. Did the arbitrator give a correct interpretation on who the beneficiaries were in terms of the 2016 agreement between the Union and Lewis Stores? The 2016 agreement reads:

[3] (1993 (1) SA 179 at 187)

"2016 SWAZILAND WAGE AGREEMENT

This serves to confirm the agreement between Lewis Stores (Pty) Ltd and SCAWU hereafter referred to as the Union. The points of agreement are as follows:

1. *Scope of the Agreement:*

   The agreement includes all SCAWU members who are part of the Swaziland bargaining unit.

2. *Effective Date:*

   The agreement is effective 1 June 2016 to 31 May 2018. Back pay will be paid on 26 December 2016.

3. *Across the board increase of E440.00 for 2016/2017 for the period 1 June 2016 to 31 May 2017 and E300.00 for 2016/2018 for the period I June 2017 to 31 May 2018.*

4. *The signatories were duly authorised to sign this agreement and confirm that it is standing on the parties they represent:*

[19] As correctly observed by the Arbitrator, the phrase which needs to be given meaning is: "*Includes all SCAWU members who are part of the Swaziland bargaining Unit."* The first word that needs attention is *"Includes"*.

[20] *"Include"* in general terms may mean that it should not exclude the specified members. In the case at hand the specified members are SCAWU members. I must emphasise that it presupposes existing members already. *"Include*s*"* is a word meant to emphasise that the general purpose of the agreement is directed to known members. It must however be borne in mind that SCAWU members should not be excluded from the agreement. In brief, it says that SCAWU members who are part of the *"Swaziland bargaining unit"* must be added to the already existing members who are to benefit from the agreement.

[21] The term *"includes"* is sometimes used loosely and interchangeably with the word *"refers"*. So that if we substitute *"includes"* with *"refers"* the clause would read:

> *"The agreement refers to all SCAWU members who are part of the Swaziland bargaining unit."*

[22] From the above, it is clear that the term *"includes"* is ambiguous in its meaning. In terms of the rules of interpretation, the court must avoid ambiguity in its interpretation. The next step is to read the entire document in order to ascertain the intention of the parties. Clause 4 partly reads:

> *"And confirms that it is standing on the parties they represent."*

[23] Who are the parties they present. Clearly SCAWU represented its members while Lewis Stores, the company, namely directors and

shareholders. At any rate Clause 1 refers to SCAWU members. The next question is who are members of SCAWU? The answer lies in their initial agreement of 1992. Clause 2.7 of the Recognition and Procedural Agreement reads:

> *"Union member' shall mean and include all employees who are paid up members of the Union according to the Union's constitution."*

[24] From the above and as correctly contended on behalf of Lewis Stores, SCAWU members were employees of Lewis Stores who had paid subscription fees. In the result, the 2016 agreement indicates that the intention of the parties was to benefit SCAWU members and not every employee of Lewis Stores who was not part of management. The term "*Includes"* in clause 1 of 2016 agreement therefore translates into "*Refers."* At any rate it would be absurd to interpret *"Includes all members of SCAWU."* to mean also non-member of SCAWU for the reasons mentioned in the proceeding paragraphs.

[25] SCAWU's foremost interest was towards its subscribed members. To say "includes all SCAWU members" would be to give priority to non SCAWU members being secondary. The reason is as alluded above, is that "*includes"* presupposes an already existing property in the circle or group. That already subsisting group in the circle could not be non SCAWU members. The only persons existing as priority were the SCAWU members themselves. In the result when the parties authored *"The agreement includes all SCAWU members who are part*

of the Swaziland bargaining unit" they meant that the agreement would benefit or regulate its subscribed members in accordance with the definition of members as mentioned in the 1992 Recognition and Procedural agreement.

[26] Further evidence fortifying the above perception is found in the subsequent 2018 agreement. It reads;

> ***"1. Scope of Agreement***
> *This agreement shall apply to employees in the bargaining Unit in the company.*
>
> ***2. Effective Date***
> *This agreement shall commence on the 1st June 2018 to 31st May 2020.*
>
> ***3. Wage Increment***
> *The following has been agreed:*
>
> *Year 1 being the period 1 June 2018 to 31 May 2019 the increment will be E400*
>
> *Year 2 being for the period 1 June 2019 to May 2020 the increment will be E240*
>
> *Back pay will be included in the September salary month.*
>
> ***4. Terms and Conditions***
>
> *The existing terms and conditions of employment not changed by this agreement shall remain in force."*

[27] Clearly, the same parties, formulating a similar agreement as 2016 i.e. increment agreement, used a totally different terminology. In the 2018 agreement, it is clear that the parties intended not just members of SCAWU to benefit but the entire category of employees of Lewis Stores who fell within the bargaining unit. The bargaining unit are those employees who are permanent and do not form part of management. It would, in other words, be folly to interpret the 2016 and 2018 agreements in the same vein in light of the glaring differences in the terminology employed. Clause 4 of 2016 agreement which states *"The signatories were duly authorised to sign this agreement and confirm that it is standing on the parties they represent"* is not included in the 2018 agreement. This again adds weight to the conclusion that the 2016 agreement was meant to benefit only members of SCAWU and not non-members.

[28] Lastly and equally important, the parties appear to me to have had at their backdrop of their minds that the 2016 agreement could not benefit non-members of SCAWU. It appears that the *"No free ride"* concept occupied their minds as well. I say this because before they drafted the 2018 agreement which benefited all employees of Lewis Stores who fell within the bargaining unit, they concluded an agency shop agreement. This agency shop agreement which was well defined by the Arbitrator was a vehicle upon which Lewis Stores would deduct certain fee from the employees who were within the bargaining unit for the benefit of SCAWU. In brief, every relative employee would find himself paying his due to SCAWU thereby complying with the *"No free ride"* concept. It is therefore not surprising that the

2018 agreement was subsequently concluded in the terminology captured above.

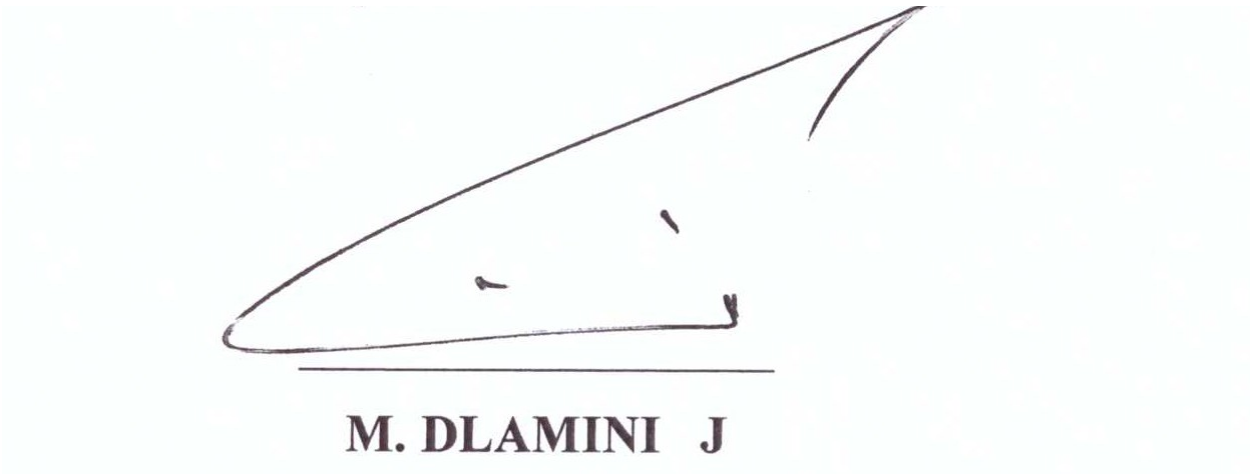
[29] In the circumstances of the case at hand, nothing was discriminatory therefore with regard to the 2016 agreement. It was the intention of both parties that the *"no free ride"* concept was to be upheld as evident in the wording employed in both 2016 and 2018 agreements. The agency shop agreement of 2017 fortifies this conclusion. To hold otherwise would be a travesty of the principle of our law, *"Freedom of contract."*

[30] In the result, I enter as follows:

30.1 The applicant's application succeeds;

30.2 The arbitrator's award is hereby reviewed and set aside **accordingly.**

30.3 No order as to costs.



M. DLAMINI J

For Applicant : **J. Henwood of Henwood and Company**

For Respondent : **B. S. Dlamini of B.S. Dlamini & Associates**