# IN THE INDUSTRIAL COURT OF SWAZILAND

**HELD AT MBABANE**

**CASE NO. 623/09**

In the matter between:

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| **SWAZILAND MANUFACTURING & ALLIED** | |
| **WORKERS UNION** | **1st APPLICANT** |
| **JOSEPH SIBANDZE** | **2nd APPLICANT** |
| **PATRICK MDLULI** | **3rd APPLICANT** |
| **PETER SIMELANE** | **4th APPLICANT** |
| **TERENCE MNQUBE** | **5th APPLICANT** |
| **BONGINKHOSI DLAMINI** | **6th APPLICANT** |
| **AND** | |
| **NGWANE MILLS (PTY) LTD** | **RESPONDENT** |

**CORAM:**

| | |
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| **D. MAZIBUKO:** | **JUDGE** |
| **A. M. NKAMBULE:** | **MEMBER** |
| **M. MTHETHWA:** | **MEMBER** |
| **FOR APPLICANT:** | **SHADRACK MASUKU** |
| **FOR RESPONDENT:** | **LINDELWA MNGOMEZULU** |

**JUDGEMENT - 17th MARCH 2010**

*Collective agreement - amendment thereof - agreement must be in writing- oral agreement and oral amendment null and void and contrary to section 55 Industrial Relations Act 1/2000 (as amended)*

**1. The 1st Applicant before Court describes herself as Swaziland Manufacturing and Allied Workers Union, a trade union duly registered in terms of section 27 of the Industrial Relations Act No. 1/2000 as amended.**

**2. The 2nd to 6th Applicants are members of the 1st Applicant and serve in the shop stewards committee. The 2nd to 6th Applicants are employees of the Respondent and have filed affidavits in support of the 1st Applicant's application.**

**3. The Respondent is Ngwane Mills (Pty) Ltd a company duly incorporated in accordance with the laws of Swaziland.**

**4. The 1st Applicant and Respondent have signed both a Recognition Agreement and a Collective Agreement, the latter has been updated from time to time.**

**5. During the year 2008 the parties entered into negotiations with an intention to conclude a new collective agreement. In the course of negotiation each of the parties were able to identify areas of interest which should be debated upon and regarding which it was desirable that an agreement be made. Despite their efforts the parties failed to arrive at an agreement and thereafter declared a deadlock. The parties issued a joint statement in writing in which they listed items on which they were deadlocked. This statement was by consent of both parties sent for conciliation to CMAC (Conciliation, Mediation and Arbitration Commission) established in terms of section 62 (1) as read with section 64 (1) (b) and (c) of the Industrial Relations Act 1/2000 as amended. In their joint statement the parties submitted to CMAC the following items for conciliation; wages, housing allowances, food rations, medical aid and pension fund.**

**6. An attempt to resolve the deadlock at CMAC failed. Therefore the**

**dispute which had been taken to CMAC remained unresolved. In terms of procedure, CMAC had to issue a 'certificate of unresolved dispute.' While awaiting delivery of the 'certificate of unresolved dispute' the Applicants had a change of heart. They indicated to the Respondent that they had a mandate to conclude an agreement with the Respondent and they withdrew the dispute from CMAC.**

**7. A collective agreement for the year 2008/2009 was subsequently drawn and signed by the parties on the 16th February 2009. That agreement is now the subject of litigation before Court.**

**8. It is not clear as to why the Applicants delayed in coming to Court on an agreement which was signed on the 16th February 2009. From the Notice of Motion it appears that the cause of action was instituted on the 10th November 2009.**

**9. The Applicants have moved an application before Court in which they claim relief as follows;**

*"1. That the Collective Bargaining Agreement signed the 16 February, 2009 be for the period; 1st October, 2008 and ending on the 30th September, 2009.*

*2. That the improved terms and conditions of employment including wages shall commence on the 1st October, 2008 and end on the 30th September, 2009.*

*3. That clause 26 of the Collective Bargaining Agreement maintains its status quo as per the Collective Bargaining Agreement 2007/2008.*

*4. That the commencement date of 16th February, 2009 is declared null and void and of no force or effect.*

*5. Directing Respondent to pay costs of this application.*

*6. Granting Applicants any further or alternative relief.*

**10. The first complaint which was raised by the Applicants is that the 2008/2009 agreement though signed on the 16th February 2009 should have retrospective effect. The agreement should start operating from 1st October 2008. It should operate for a period of one (1) year and end 30th September 2009.**

**11. The agreement which is the subject of litigation contains rights and interests which are of benefit to the Applicants. Some of these rights have economic value such as wages. Those rights and benefits will be devalued if the commencement date of the agreement has no retrospective effect. The Applicants will not be able to claim back-pay if the commencement date is not altered from 16th February 2009 to 1st October 2008.**

**12. According to the Applicants the 2008/2009 agreement was drafted by Respondent. In drafting the agreement the Respondent acted unlawfully and unfairly when it inserted therein the commencement date as 16th February 2009 instead of 1st October 2008. The conduct of the Respondent was a unilateral act. The consent of the Applicant was neither solicited nor obtained.**

**13. According to the Applicants the parties had previously agreed to the 1st October 2008 as the commencement date of the 2008/2009 agreement. In paragraph 18.2 of the founding affidavit the 1st Applicant states as follows;**

> *"18.1 DURATION: The management negotiating Committee changed the duration period from the previously agreed 1st October, 2008 to now 16th February 2009 or as at the date of signing: This was the 16th February 2009."*

**14. The Applicants do not state where and when was the alleged previous agreement entered into. It is clear from the quotation in paragraph 13 of this judgment that the alleged agreement preceded the**

**2008/2009 written collective agreement, the latter being the subject of litigation. It is not stated whether the alleged previous agreement was oral or in writing. If it was in writing a copy of that agreement is not before Court. If oral, the terms thereof have not been pleaded in the papers before Court.**

**The Court is not in a position to refer to the alleged previous agreement. There is no evidence before Court to support the existence of the previous agreement as alleged by Applicants. The Applicants have the onus to support their allegation with evidence. The Applicants have failed to discharge that onus regarding the alleged previous agreement. According to the evidence before Court the 2008/2009 written agreement is the only collective agreement between the parties for the relevant period.**

**15. The 2008/2009 agreement states as follows in clause 31;**

*"DURATION*

*The duration of this agreement,* ***which shall commence on the 16 February 2009,*** *shall be for a period of at least twelve months and will remain in force until at least 30 January 2010. This matter is subject to court interpretation. Any changes or amendment shall be effected as per Court instruction."*

***(emphasis added)***

**From the above quotation it appears the parties agreed in writing that the commencement date of the 2008/2009 agreement shall be *16 February 2009.* The wording is clear and requires no interpretation or instruction.**

**16. In addition, clause 23 of the same agreement states as follows;**

*"All employees, as defined in Section 4.2 of the Recognition Agreement, shall have their hourly wages increased by 10.0%* ***with effect 16th February 2009*** *as per the grades set out below. This matter is subject to Court interpretation of clause 31:*

*Duration of this collective agreement. Any changes or amendment shall be effected as per Court instruction".*

***(emphasis added)***

**A reading of clause 23 of the 2008/2009 agreement reveals that it is consistent with clause 31. Both clauses confirm that the commencement date of the 2008/2009 agreement is *16 February 2009.***

**17. Furthermore, clause 33 of the same agreement states as follows;**

*"By signing this Agreement both the Employer Representatives and the Union Representatives confirm that they fully understand the contents and the effects of this Agreement and undertake to deal with all matters arising from the interpretation of this Agreement strictly in accordance with the Ngwane Mills/SMAWU Recognition Agreement, the Industrial Relations Act no. 1 of 2000, the Employment Act of 1980 and the Employment (Amendment) Act No. 5 of 1997. It is further understood that this agreement* ***replaces all previous agreements and/or matters arising out of previous agreements."***

***(emphasis added)***

**The Applicants' allegation that the parties had a previous agreement regarding dates of commencement of the 2008/2009 agreement is contradicted by clause 33 quoted above. It is the finding of the Court that the 2008/2009 agreement replaces all previous agreements and matters arising therefrom. The written agreement is the final record of the negotiation between the parties. As stated in paragraph 14 of this judgment, there is no evidence that there is an agreement made by the parties prior to the 2008/2009 collective agreement concerning some terms which have since been altered in the said collective agreement. Even if there was such previous agreement it would be inadmissible by virtue of section 33 of the 2008/2009 Collective agreement.**

(a) **The Applicants do not state the reason they signed an agreement whose contents they now contest. At the hearing of this matter the Applicants' representative a certain Mr. Masuku admitted that the signatories to the 2008/2009 agreement who represented the Applicants were at the time of signing aware of the contents of clauses 23, 31, and 33 of the said agreement. Actually the said Mr. Masuku is one of the signatories to the agreement in his capacity as Secretary General of the 1st Applicant. It therefore follows that Mr. Masuku and his cosignatories signed the agreement with full knowledge of its contents and thereby assented to the contents therein.**

(b) **While the parties were engaged in negotiation they exchanged a series of letters. One of those letters dated 25th August 2008 written by Respondent to Applicants is attached to the Applicants' founding affidavit and is marked 'SM2' In clause 6 of that letter, it reads as follows;**

*"6. Backpay*

*It is in the best interest for all parties that we conclude the negotiations process timeously, there will be* ***no back pay*** *effected if we fail to meet the deadline (agree and sign-off) on the anniversary of the current existing agreement - i.e. 01st October 2008.*

**The effect of this letter is that any subsequent agreement will not be backdated to 1st October 2008 or any other date. This fact was brought to the Applicants' attention as early as 25th August 2008.**

**20. In paragraphs 9.2 of their founding affidavit the Applicants state as follows;**

*"On the 25th August, 2008 negotiations commenced between the two [2] parties and the Respondent presented her counter proposals to the Applicants' party; which is annexed and attached hereto and marked "SM2."*

**21. The Applicants admit to have received the letter marked "SM2'.**

**Further the Applicants admit to have read and understood its contents. It is the Applicants evidence that the letter 'SM2" contained the Respondent's counter proposal in response to the 1st Applicant's proposals dated 24th July 2008. If the Applicants were not in agreement with clause 6 of annexure 'SM2' they should have protested there and then and engaged the Respondent in further negotiation regarding the commencement date of the 2008/2009 collective agreement. There was no point in the Applicants signing an agreement which contains terms which the Applicants do not accept. The Applicants' first complaint has no merit.**

**22. The second complaint raised by Applicants relates to payment of bonus to the Applicants for regular and punctual attendance at work. According to Applicants the parties had agreed as follows in the 2007/2008 collective agreement on this item;**

> **"ATTENDANCE AND TIME KEEPING BONUS**
>
> *An attendance bonus will be paid fortnightly based on 100% attendance and 100% time keeping for that period subject to an allowance of 15 minutes accumulated lateness for that period."*

**23. In the 2008/2009 collective agreement the parties have provided differently in clause 29 regarding this item as follows;**

> *"An attendance bonus will be paid fortnightly based on 100% attendance and 100%) time keeping for that period."*

**According to the Applicants the removal of the 15 minutes tolerance for late coming in the 2008/2009 agreement was neither negotiated nor agreed to. In the absence of an antecedent agreement between the parties, the Respondent should not have inserted a different clause in the 2008/2009 agreement but should**

**have inserted the 2007/2008 clause without alteration. The Applicants had assumed that the clause regarding attendance bonus in the 2007/2008 agreement will be repeated verbatim in the 2008/2009 agreement. That assumption, according to Applicants is based on the fact that the parties did not agree to change that clause in their 2008/2009 negotiation.**

**24. The Respondent however avers that it notified the Applicants by letter dated 25th August 2008 annexure 'SM2' that the 15 minutes tolerance for late coming will be removed. In clause 4 of 'SM2' the Respondent stated as follows;**

*"4. Time keeping*

*In a bid to inculcate a culture of self-discipline and responsible conduct among our employees we propose a removal of the fifteen (15) minutes accumulated tolerated lateness period."*

**25. As stated in paragraph 20-21 of this judgment, the Court is satisfied that the Applicants received, read and understood annexure 'SM2' which was received by them on the 25th August 2008. The Applicants were made aware before negotiation started that the clause relating to "15 minutes tolerance for late arrival" will not receive automatic transfer to the 2008/2009 collective agreement. The letter annexure 'SM2' contains the Respondent's proposal on items which were debated before the 2008/2009 agreement was signed. In paragraph 9.2 of the founding affidavit (quoted in paragraph 20 of this judgment) the Applicants confirm that annexure 'SM2' contains the Respondent's counter proposals which were presented for negotiation when the parties met on the 25th August, 2008. For the reasons stated above the Applicants' second complaint also has no merit as it is not supported by the facts.**

**26. The effect of the Applicants' prayer is to amend some of the terms**

**of the 2008/2009 collective agreement. The drafting of a collective agreement is regulated by section 55 of the Industrial Act No. 1/2000 as amended (hereinafter referred to as the Act). The Act provides as follows in section 55 (1) (a);**

" A collective agreement shall

(a) be **in writing** and **signed** by the parties to the agreement ***(emphasis added)***

**A collective agreement is one that is written, signed and complies with section 55 of the Act. That means any amendment which is not in writing and signed by the parties to the agreement shall be null and void. The Applicants' claim that there is an agreement antecedent to the 2008/2009 written collective agreement must be supported by evidence of writing and signature as required by the Act. The Applicants have failed to produce written evidence signed by the parties to support their allegation regarding the alleged antecedent agreement. A collective agreement cannot be amended orally. The Applicants' argument is in conflict with the Act and must therefore fail.**

**27. The Act provides as follows in section 55 (3);**

*'A collective agreement **shall** take effect on any date **agreed upon by the parties in writing** and may contain retrospective provisions.*

***(emphasis added)***

**The provisions of this subsection are mandatory regarding the commencement date of a collective agreement, i.e. it shall be the date agreed upon by the parties in writing. The parties have agreed in writing that the 16th February 2009 is the commencement date of their 2008/2009 collective agreement in compliance with the Act.**

**For these reasons the application fails both on the facts and the law.**

**The Court therefore makes the following order;**

**(a) The application is dismissed.**

**(b) Each party to pay its costs.**

**The members agree.**

**DUMSANI MAZIBUKO**

**JUDGE OF THE INDUSTRIAL COURT**