IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 127/2010

In the matter between:

SAMBULO MAMBA	**1st APPLICANT**
CLEMENT HLATSHWAKO	**2nd APPLICANT**
BHEKI MASEKO	**3rd APPLICANT**
NCABA JELE	**4th APPLICANT**
MDUDUZI MASEKO	**5th APPLICANT**
SAUL NDZIMANDZE	**6th APPLICANT**

And

N AND W ENTERPRISES (PTY) LTD	**1st RESPONDENT**
MR. TUCKER N.O	**2nd RESPONDENT**

CORAM:

D. MAZIBUKO;	**JUDGE**
A. M. NKAMBULE:	**MEMBER**
M. MTHETHWA:	**MEMBER**
MR. SIPHO MADZINANE:	**FOR APPLICANT**
MS. SAZIKAZI MABUZA:	**FOR RESPONDENT**

JUDGEMENT-30th JULY 2010

Application for interdict, Applicant's affidavit based on inadmissible hearsay, therefore bad in law. Recognition of a trade union by employer must be in writing-section 42(1),

(3) Industrial Relations Act 1/2000 applied.

1. There are 6 (six) Applicants before Court and all 6 (six) are employees of the 1st Respondent. They were employed on different dates. The Applicants have been charged with the same offence by their employer (1st Respondent) and have been invited to a disciplinary hearing. The hearing had commenced but not completed at the time the matter was brought to Court. The Applicants are *inter alia* challenging the procedure which was used at the hearing. Further, they are challenging a ruling which they allege was made by the 2nd Respondent (the chairman of the disciplinary hearing). The Applicants have filed their complaints in one application for the sake of convenience. The founding and replying affidavits before Court have been deposed to by 3rd Applicant namely Bheki Maseko. Other than the 3rd Applicant there is no one else who has deposed to an affidavit from the Applicants' side.

2. The matter before Court came by way of urgent application. The Applicants have prayed for relief on the following terms;

> *"1. Dispensing with the normal time limits, forms of service and hearing this matter as one of urgency.*
>
> *2. Condoning the Applicants sic [Applicant's] late filing of the Application.*
>
> *3. Pending finalization of this matter, the First and Second Respondent be interdicted from proceeding with the Disciplinary hearing set for **1430 hours on the 22nd March 2010** at the First Respondent's place of business.*
>
> *4. Reviewing and/or setting aside the decision of the Second Respondent (disciplinary Chairperson) of refusing Union Representation of the Applicants.*

5. Directing the Respondents to allow Union Representation of the Applicants at the disciplinary hearing as there is a Shop-Stewards amongst the Applicants and also because First Respondent had always allowed such representation.

6. Directing the First and Second Respondents to pay costs of suit, each paying the other to absolved.

*7. Directing that prayers **1,2, and** 3 operate with immediate and interim effect returnable on a date to be determined by the Honourable Court.*

8. Granting Applicants further and/or alternative relief."

3. The 1st Respondent is N and W Enterprises (Pty) Ltd a private limited liability company incorporated and registered in accordance with the laws of Swaziland. The 1st Respondent operates business as a baker in Matsapha trading under the style Butterfield Bread.

4. The 2 Respondent is a certain Mr. Tucker who was appointed chairman of the disciplinary hearing in which the 6 (six) Applicants were called to answer certain charges. Mr Tucker, (2nd Respondent) has not opposed the application. It is only the 1st Respondent who has opposed the application.

5. The 3rd Applicant avers that about 1999 the 1st Respondent signed a recognition agreement with a trade union named SCAWU (Swaziland Commercial and Allied Workers Union). According to the 3rd Applicant the signing of the alleged recognition agreement took place before he was employed by the 1st Respondent. It is further alleged by 3rd Applicant that he and his 5 (five) co-Applicants are members of that union (SCAWU) since the time it is alleged the union was granted recognition.

6. The 3rd Applicant avers further that the original recognition agreement together with its copies were misplaced while in the possession of the union as well as those in the possession of the 1st Respondent. These documents are alleged to be irretrievably lost. As a result the 3rd Applicant is unable to produce the recognition agreement before Court as an exhibit. It is about March 2009 that the union as well as the 1st Respondent realised that they both have misplaced their copies of the recognition agreement. Both the union as well as the 1st Respondent took steps to restore the misplaced agreement. The union allegedly sent the 1st Respondent a written proposal containing terms and conditions on which the 2 (two) sides could agree on. The proposal was in the form of a draft agreement which the union had prepared and dispatched to the 1st Respondent. The draft was accompanied by a covering letter dated 26th march 2009 which is annexed to the founding affidavit marked **H1.** Annexure **H1** is an invitation to the 1st Respondent to consider the draft and make proposals that would suit the interest of the 1st Respondent. Also contained in annexure **H1** is an invitation to the 1st Respondent to meet the union (SCAWU) on the 1st April 2009 in order to enter into negotiation which would lead to the 2 (two) sides concluding a recognition agreement. Annexure **H1** was signed by a certain Musa Ndlangamandla under the title; secretary general.

7. The 3rd Respondent avers further that the proposed negotiation towards drafting a recognition agreement failed, hence there is no replacement recognition agreement in place. It is said that the failure to negotiate was caused by the secretary general of the union who became extremely busy with his office work and failed to follow up the negotiation which he had initially proposed. As a result there is no replacement agreement to produce before Court.

8. In his replying affidavit the 3rd Applicant admits that he was not an employee yet of the 1st Respondent at the alleged time of signing of the recognition agreement. He argues that the said agreement was

signed early 1999 and subsequently misplaced. He states that the agreement, was later found and that he saw it when was it shown to him by the union at the time when the union recruited him for membership. He does not state the time when this event allegedly occurred. He further argues that the agreement which was shown to him by the union has since been misplaced. The Court has noted that the 3rd Applicant has failed to state the date or year he alleges the recognition agreement was misplaced. In paragraph 11 of the founding affidavit the 3rd Applicant avers that the parties realised in March 2009 that the agreement has been misplaced. In paragraph 19 of the said affidavit the 3rd Applicant avers that the agreement had been misplaced more than 3 (three) years (calculated from the year 2010).

9. According to the 3rd Respondent he has other means of proving that the aforesaid recognition agreement once came into existence and that proof is listed in paragraphs 9.1. and 9.2. below. It is argued further that a practice has developed between SCAWU and the 1st Respondent in terms of which the latter has by conduct given SCAWU recognition. This practice is said to have crystallized into a binding custom.

9.1. The 3rd Applicant avers that the 1st Respondent has been deducting money from the salaries of the employees in particular the Applicants which represented monthly subscriptions to the union (SCAWU). The 1st Respondent remitted to the union on a monthly basis the money deducted. This practice is on going since the time the recognition agreement was entered into (early 1999) to the time that the present application was brought to Court (May 2010).

9.2. The 1st Respondent has allowed the union (SCAWU) to represent the Applicants in annual salary negotiations. The 1st Respondent has further allowed the union (SCAWU) to

represent some of the employees of the 1st Respondent in disciplinary proceedings. A certain Nkhosinathi Maseko and Lungelo Dlamini are cited as examples.

10. What brought the matter to Court are the events that took place at the 1st Respondent's workplace between the 15th and 17th March 2010. The 3rd Applicant avers that the 1st Respondent suspended the 6 (six) Applicants from work on the 15th March 2010 on allegation of theft of bread. Subsequent to the suspension the 1st Respondent served the Applicants with a notice to attend a disciplinary hearing scheduled for the 17th March 2010. According to 3rd Applicant their intention was to request a fellow employee who is a shop-steward to represent them at the hearing. That however did not materialise because that shop-steward was also suspended. The Applicants then obtained the help of a union official a certain Mr. Ndlangamandla to represent them. It is the 3rd Applicant's opinion that in the absence of a shop-steward there was no one else competant to represent the Applicants at the workplace hence the services of a union official were requested.

11. On the 17th March 2010 the said union official arrived at the hearing to represent the Applicants. The 3rd Applicant alleges that the chairman of the disciplinary hearing (2nd Respondent) *mero motu* objected to the union official representing the Applicants. The 2nd Respondent (chairman) allegedly demanded to see the recognition agreement in order to satisfy himself that there is a recognised union at the 1st Respondent's undertaking. The 3rd Applicant avers that the chairman was informed that a recognition agreement was entered into but the written agreement and its copy are lost. The chairman allegedly stated that union representation will be allowed upon production of a recognition agreement. It is alleged that the chairman was informed that despite the missing agreement the 1st Respondent and the Applicant had conducted their affairs in a manner consistent with an acknowledgement by both sides that a recognition agreement

was in place. That plea however fell on deaf ears. The attitude of the chairman led to the urgent application before Court.

12. According to the 3rd Applicant, they are entitled to be represented by a union official at the hearing due to the seriousness of the charges. If the Applicants are found guilty there is a possibility of a dismissal. The 3rd Applicant himself (Bheki Maseko) alleges that he is a shop-steward of the union (SCAWU) at the 1st Respondent's workplace. As a shop-steward the 3rd Applicant claims that he is entitled to be represented by a union official. The 3rd Applicant cited the Industrial Relations Act in general in support of his allegation. In the absence of a shop-steward at the workplace he avers that there is no one competent to represent himself and his co-Applicants.

13. The 3rd Applicant further challenged the manner which the Applicants were suspended. Allegedly the Applicants were suspended without a hearing and for an indefinite period. According to the 3rd Applicant the suspension was carried out in an irregular manner.

14. The answering affidavit of the 1st Respondent is deposed to by its managing director Mr. Andre York. The 1st Respondent has challenged the evidence of the 3rd Applicant regarding the events that allegedly took place at the 1st Respondent workplace at the time before the 3rd Applicant was employed. The 1st Respondent has challenged such evidence as inadmissible hearsay. The 1st Respondent has denied the existence of a recognition agreement between the union (SCAWU) and 1st Respondent. Further it is denied that the alleged agreement is misplaced. It is submitted that the alleged agreement never existed therefore it could not have been misplaced. Further it is denied that an effort was ever made by the union and the 1st Respondent to replace the lost agreement. The 1st Respondent denies making an effort or attempt to replace an agreement which 1st Respondent insists it never existed. What makes

matters worse is that the 3rd Applicant has failed to attach the draft, agreement which he alleges was prepared by SCAWU.

15. The 1st Respondent admits that it does deduct money from the salary of the Applicants and remit same to the union (SCAWU) since November 2007. The 1st Respondent avers that her conduct aforesaid is an administrative exercise based on the written authorization of the Applicants. Mr. York for the 1st Respondent argued that he acted in error in entertaining the request of the Applicants in remitting their money to SCAWU. That error, he argues, does not amount to recognition of a union by conduct or custom.

16. Mr. York alleges that he took over control of the 1st Respondent in January 2007. At that time the 1st Respondent was making deductions from the salaries of 2nd, 3rd and 6th Applicant and remitting same to a union called CAWUSWA (Commercial and Allied Workers Union of Swaziland). There are 3 (three) stop order forms attached to the answering affidavit with the names of and purportedly signed by 2nd, 3rd and 6th Applicants in which the 1st Respondent is requested to deduct money from the salaries of the said employees and remit same to CAWUSWA. These forms are marked **B1, B2** and **B3** and are dated 26th November 2006, 23rd November 2006 and 24th November 2006 respectively.

17. The 1 Respondent, further refutes the allegations that an attempt was made by the parties about March 2009 to negotiate a new recognition agreement which was meant to replace the one that is alleged to be lost. The 1st Respondent, denies further that the alleged attempt to replace the said agreement failed due to the busy schedule of the secretary general of SCAWU. Mr. York

avers he could not have negotiated with SCAWU on issues of recognition of or drafting a recognition agreement with SCAWU because he was particularly aware at that time (March 2009) that SCAWU did not have the requisite statutory minimum membership at the 1st Respondent's workplace necessary for recognition. He further avers that if SCAWU genuinely believed that they previously had a recognition agreement or that they deserved recognition, SCAWU could have simply applied to Court in terms of the Industrial Relations Act for an appropriate order. Mr. York further denies that there was ever a common understanding between SCAWU and the 1st Respondent that the 2 (two) sides had previously signed a recognition agreement which has since been irretrievably lost.

18. In June 2007 the 1st Respondent moved its factory from Mbabane to Matsapha. The change caused CAWUSWA to lodge a complaint in writing with the Labour Commissioner concerning the inconvenience which its members who are employees of the 1st Respondent would suffer as a result of the factory relocation. According to CAWUSWA its members would have to pay travelling expense to and from Matsapha. The letter from CAWUSWA is attached to the answering affidavit and is marked **B5** dated 6th June 2007. The letter is signed by CAWUSWA secretary general a Mr. John B. Dlamini. The matter was resolved through negotiation with CAWUSWA. According to the 1st Respondent it was CAWUSWA (and not SCAWU) that assisted the employees at the workplace. Mr. York maintains that he never dealt with SCAWU on that issue.

19. In November 2007 the 1st Respondent received stop order forms with SCAWU letterheads signed by 2nd, 3rd, 4th and 6th Applicants in which SCAWU requested the 1st Respondent to deduct money (union dues) from the salaries of the said employees (Applicants) and remit same to SCAWU. These forms are attached to the answering

affidavit marked **B7, B8** and **B9,** and are dated 25th November 2007, 25th November 2007 and 28th November 2007 respectively. In April 2008 the 1st Respondent received a similar request signed by the 5th Applicant dated 16th April 2008. The latter stop order form is marked **B10.** The 1st Respondent denies therefore that SCAWU was recognised by or dealt with 1st Respondent as far back as 1999. About late 2007 a few employees in particular 2nd, 3rd and 6th Applicants began paying their dues to SCAWU. A year later 5th Applicant joined them. A majority of the employees continued to pay their dues to CAWUSWA. By paying dues to SCAWU from the salaries of the 4 (four) employees aforementioned the 1st Respondent denies that it was thereby confirming the existence of a recognition agreement with SCAWU or granting SCAWU recognition. The 1st Respondent maintains that this was simply an administrative exercise requested by the concerned employees for their convenience.

20. The 1st Respondent avers further that about September or October 2008 SCAWU requested by letter a meeting with 1st Respondent in order to negotiate wage increase, shift allowances and other conditions of service of the employees. The 1st Respondent questioned the authority of SCAWU to engage in the proposed negotiation without first gaining recognition. This confrontation led to a strike among some employees of the 1st Respondent. The 1st Respondent called for the intervention of Conciliation, Mediation and Arbitration Commission, established in terms of section 62 (i) of the Industrial Relations Act 1/2000 as amended (hereinafter referred to as CMAC). An effort was made by CMAC to conciliate the dispute which resulted in an agreement dated 14th October 2008. A copy of that agreement is attached to the answering affidavit marked **B11.** According to the 1st Respondent paragraph (h) of annexure B11 is of particular interest to her since it confirms that there is no recognition agreement existing between SCAWU and 1st Respondent. In that paragraph (h) of annexure **B11** SCAWU and the 1st Respondent are advised by CMAC to negotiate and finalise a recognition agreement.

An effort to negotiate and finalise a recognition allegedly failed due to the fact that after the strike aforementioned, some of SCAWU members resigned. The resignation of SCAWU members resulted in the failure by SCAWU to qualify for the statutory minimum membership required for recognition. It is alleged that SCAWU was left with 8 (eight) members at the time of signing the answering affidavit. The loss of members allegedly destroyed any hope that SCAWU could gain recognition from the 1st Respondent. It is alleged further that SCAWU has the same difficulty of reduced membership even at the time of signing the answering affidavit, namely March 2010. This means that the prospects of SCAWU gaining recognition are remote. As a result thereof, SCAWU fails to meet the requirements necessary to represent the Applicants in the disciplinary hearing. If the 1st Respondent were to allow SCAWU to represent the employees at the disciplinary hearing, 1st Respondent argues that, that would mean that the 1st Respondent is perpetuating its mistake. The mistake was that of deducting money from some of the employees' salaries and remit them to SCAWU. The 1st Respondent alleges to have acted in ignorance when it entertained the request from its employees aforementioned of deduction money from their salaries and remit same to SCAWU.

21. The Applicant's claims are based on the premise that the union (SCAWU) was granted recognition as the employee representative by the 1st Respondent during 1999 (the exact date has not been stated). As a result of that recognition the union (SCAWU) is said to be entitled to represent it members who are employees of the 1st Respondent in matters affecting those employees at the 1st Respondent's undertaking. The Applicants have claimed in their application certain rights and benefits which allegedly accrued to them by virtue of their membership to SCAWU. These rights and benefits include representation of the Applicants by SCAWU at disciplinary hearings and wage increase negotiations. The Applicants are the party before Court that has alleged the existence of a

recognition agreement between SCAWU and the 1st Respondent. The Applicants therefore have a duty to prove with evidence on a balance of probabilities *inter alia* the existence of the alleged recognition agreement.

22. The evidence of 3rd Applicant is fraught with difficulties and has been seriously challenged by the 1st Respondent. The 3rd Applicant introduced the allegation regarding the existence of the recognition agreement as follows;

> *"Prior to my employment, save for two of the Applicants being Clement Hlatshwayo and Paul Ndzimandze, on or about 1999, the First Respondent had entered into a recognition agreement with our union being* ***Swaziland Commercial and Allied Workers Union (SCAWU)."***

23. According to the affidavit of the 3rd Applicant, the alleged recognition agreement between SCAWU and the 1st Respondent took place during or about 1999. The 3rd Applicant admits that he was not employed by the 1st Respondent at the time the alleged agreement was signed. With this admission the 3rd Applicant meant that he did not witness the signing of the said agreement. In his entire affidavit the 3rd Applicant insists though that the alleged agreement was entered into in writing during or about 1999 between SCAWU and the 1st Respondent. In paragraph 20 of his replying affidavit the 3rd Applicant went as far as stating that the 1st Respondent was represented by its then managing director a certain Mr. Rawlings when the agreement was signed. The 3rd Applicant does not state his source of information regarding the signing of the alleged agreement as he has admitted already that he did not witness the event. The 3rd Applicant has failed to file a supporting affidavit from a witness who can testify to the alleged signing of a recognition agreement. There is no evidence therefore before Court to support the allegation made by the 3rd Applicant regarding the

signing of a recognition agreement between SCAWU and the 1st Respondent. The allegation made by the 3rd Applicant amounts to either inadmissible hearsay or imagination. The evidence regarding the signing and therefore existence of the recognition agreement is crucial to the 3rd Applicant's case.

The learned authors define hearsay as follows;

> *"Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated ..."*

LH Hoffmann and DT Zeffertt: The South African Law of Evidence, 4th ed. (Butterworths), 1988 at 124.

24. The 3rd Applicant further stated in his affidavit that the recognition agreement and its copies were misplaced by both sides namely the union (SCAWU) and the 1st Respondent. In paragraph 8 and 11 of the founding affidavit the 3rd Applicant states as follows;

> *"Unfortunately the original and copies of the recognition agreement were misplaced by both the Union and the employer as time went by.*
>
> *Again, sometime in March 2009, when the parties, had realized that they no longer had the hard copies of requisite Recognition Agreement, they sought to rectify the situation by making another agreement to formerly regulate their relationship."*

According to the 3rd Applicant the union (SCAWU) and the 1st Respondent became aware in March 2009 that each side has misplaced its copy of the said recognition agreement.

25. The 3rd Applicant does not state how he got to know that the union (SCAWU) has lost its copy of the alleged agreement. There is

no evidence before Court which indicates that SCAWU was ever in possession of the said agreement. The 3rd Applicant does not allege that he is or was a union (SCAWU) official in 1999 or March 2009. The 3rd Applicant does not allege that about March 2009 he was in possession of union documents or the alleged agreement in particular. The 3rd Applicant did not witness the union (SCAWU) signing or taking possession of the alleged agreement early 1999. He further did not experience the loss of the alleged agreement. The possession and the misplacement are allegations which have been made by the 3rd Applicant which are not in his personal knowledge or experience. The 3rd Applicant is relying on information which he has received from someone else. That person has not filed an affidavit to establish evidence or confirm the allegations made by the 3rd Applicant. There is therefore no evidence before Court to support the alleged possession or misplacement of the said agreement by SCAWU. The allegation made by the 3rd Applicant amounts to inadmissible hearsay.

26. The 3rd Applicant further alleges that the 1st Respondent also lost her copy of the said agreement in March 1999. The 3rd Applicant is an ordinary employee of the 1st Respondent and is not in management position. The 3rd Applicant does not state that he was at any stage in possession or control of the recognition agreement on behalf of the 1st Respondent. The 3rd Applicant has failed to explain how he got to know that the 1st Respondent was in possession of and has further misplaced her copy of the alleged agreement. The 3rd Applicant has no personal knowledge of the alleged possession and misplacement of the said agreement on the part of the 1st Respondent. The allegations made by the 3rd Applicant concerning the 1st Respondent are inadmissible hearsay. The Court has no evidence that the 1st Respondent was ever in possession of a recognition agreement which the 1st Respondent allegedly misplaced in March 2009 or at all.

27. In his replying affidavit the 3rd Applicant states as follows

concerning the alleged agreement in his paragraph 7 (a) and (b);

> *"It is my humble submission that I was not an employee of the Respondent at the time the Recognition Agreement was entered into, we found it and saw it as it was shown to us by the Union in its quest to recruit us.*
>
> *Furthermore, when it was misplaced, we were already employed by Respondent. Accordingly, we maintain that we are aware of it save for the fact it has since been misplaced."*

The 3rd Applicant avers that the recognition agreement which allegedly was misplaced by both the union (SCAWU) and the 1st Respondent in March 2009 was eventually found. According to the 3rd Applicant the agreement was shown to him by the union at the time when the union recruited him.

28. The 3rd Applicant does not identify the union representative who allegedly found or showed him the agreement. According to the 3rd Applicant he was not present at the time that he alleges the agreement was signed (during 1999). The 3rd Applicant was not in possession or control of the agreement before it was allegedly misplaced in March 2009. The 3rd Applicant has no knowledge of the contents of that agreement and its features. The 3rd Applicant has no means of identifying the said agreement. If indeed some document was shown to the 3rd Applicant, at the time he was recruited by the union, the 3rd Applicant had no means of verifying that, what was shown to him by the union is the same document that was allegedly signed in 1999 and was misplaced both the union (SCAWU) and the 1st Respondent in March 2009. There is no evidence before Court to state or support the allegation made by 3rd Applicant. If indeed a document was shown to the 3rd Applicant by the union, the union ought to testify that it is the same document that was signed during 1999 by SCAWU and 1st Respondent and was misplaced by both

sides in March 2009. The Union did not testify. The 3rd Applicant is therefore relying on allegations that are not in his personal knowledge. These allegations are either inadmissible hearsay or imagination. Since the allegations made concern SCAWU, there is no explanation as to why is there no affidavit from SCAWU to introduce the evidence or support the allegations made.

29. The document which the 3rd Applicant alleges was found and shown to him by the union is not before Court. The Court as well as the 1st Respondent is unable to examine that document. As it is alleged by the 3rd Applicant that the 1st Respondent signed the said agreement during 1999, the 1st Respondent should have access to the 'lost and found' document in order to confirm or deny her signature and the signature of her witnesses if any, and the terms and conditions recorded therein. By failing to produce that document, the 3rd Applicant has failed to produce vital evidence in support of his case.

30. In the quotation that appears in paragraph 27 of this judgment the 3rd Applicant alleges that the recognition agreement which was allegedly signed and misplaced by SCAWU and the 1st Respondent was found and shown to the 3rd Applicant in the company of other unidentified person. The Court has difficulty with that allegation as with the previous allegations for reasons stated hereunder.

> 30.1 There is no allegation as to who exactly found the alleged recognition agreement, when and under what circumstances.
>
> 30.2. If indeed a union representative showed an agreement to the 3rd Applicant in the company of another person, why did that person fail to file an affidavit stating or confirming the allegations made concerning him/her. It must be proved with evidence that what was shown to the 3rd Applicant is not a fake

or forged document but the actual recognition agreement which the 3rd Applicant alleges was signed during 1999. That evidence is not before Court.

30.3. What makes matters worse for the 3rd Applicant is that even the document which he alleges was found by the union and shown to him is not before Court. The 1st Respondent will not be able to read its contents as well as examine the signatures therein and those of the witnesses if any. The 3rd Applicant has failed to produce before Court the alleged recognition agreement as well as the other document which allegedly was found and shown to him by the union.

30.4. The 3rd Applicant has alleged that a draft agreement was prepared by the union as a proposal that was forwarded to the 1st Respondent to be negotiated as a basis for a replacement agreement. That draft agreement is not before Court. The union (SCAWU) has not supported the allegation that they drafted a proposal. There is no indication that the covering letter annexure **H1** was delivered to the 1st Respondent. The 3rd Applicant is not the author of annexure **H1.** The 3rd Applicant has introduced annexure **H1** in order to prove the truth of its contents. In as far as the 3rd Applicant is concerned annexure **H1** is hearsay evidence and therefore inadmissible. The author of annexure **H1** has not filed an affidavit introducing his document or supporting the 3rd Applicant.

30.5 In the quotation that appears in paragraph 27 of this judgment the 3rd Applicant avers that the recovered document has also been misplaced. The 3rd Applicant does not state who misplaced such an important document, when and under what circumstances. The 3rd Applicant does not allege that he was in possession of the allegedly recovered document. He does not state who was in possession or control of that document. He

does not state how he got to know that the document is misplaced. The 3rd Applicant's allegation amounts to either inadmissible hearsay or imagination. So far no one has given evidence that the misplaced recognition agreement was recovered and misplaced again. The Court is asked to believe that a certain recognition agreement exists which was signed during 1999, was misplaced by both signatories in March 2009 and was recovered at a later unknown date by one signatory (SCAWU), but was again misplaced by a certain unidentified person at a date unknown to the Court and under unknown circumstances. The terms and conditions of that agreement have not been stated in the affidavits before Court. The 3rd Applicant has never read the alleged agreement. The Court is further being asked to believe every allegation that the 3rd Applicant has made about the said agreement as the gospel truth and find in favour of the Applicants. So far there is no evidence at all before Court to persuade the Court regarding the allegations made. The application is therefore bad in law.

31. The 3rd Applicant has alleged that SCAWU signed a recognition agreement with 1st Respondent early 1999. The 1st Respondent has introduced annexures **B2, B3,** and **B4** to Court. These are stop order forms signed by the 2nd, 3rd, and 6th Applicants dated 26 11. 2006, 23.11.2006 and 24.11. 2006 respectively. The wording in the forms is materially similar. All 3 (three) forms are directed to the 1st Respondent. The 1st Respondent is notified that each of the said Applicants is a member of a union named CAWUSWA (Commercial and Allied Workers Union of Swaziland). The 1st Respondent is directed to deduct from the salary of each Applicant a sum of E 10.00 (Ten Emalangeni) and pay if over to CAWUSWA as a levy due to CAWUSWA. The 1st Respondent avers that according to annexures **B2, B3** and **B4** the 2nd, 3rd and 6th Applicants acknowledged over their signatures that they have joined

CAWUSWA (and not SCAWU). It is further argued that the 3rd

Applicant has contradicted himself in his papers. This is when he alleges that SCAWU received recognition from 1st Respondent during 1999 and has been recognised as such to date of the application (March 2010), yet 3rd Applicant and 2 (two) others were CAWUSWA members since November 2006 by virtue of annexures **B2, B3,** and **B4.**

32. In his replying affidavit the 3rd Applicant has failed to deny his signature as it appears in annexure **B3.** Further the 3rd Applicant has failed to deny the contents of annexure **B3.** The 3rd Applicant has clearly avoided to address annexure **B3,** which mentions his name. The 3rd Applicant had an opportunity to challenge the said annexure **B3** and the allegations that the 1st Respondent has made concerning annexure **B3.** The failure by the 3rd Applicant to deny his signature in annexure **B3** and the contents therein amounts to an admission on his part.

32.1 The Court accepts as proven that about November 2006 the 3rd Applicant joined CAWUSWA as a member. Further that on the 23rd November 2006 the 3rd Applicant directed the 1st Respondent as employer to deduct E10.00 (Ten Emalangeni) from the salary of the 3rd Applicant and pay it over to CAWUSWA as union dues. This directive was given in writing and is marked annexure **B3.**

32.2 In terms of annexure **B3** the 3rd Applicant was a member of CAWUSWA as from the 23rd November 2006. The 3rd Applicant cannot therefore claim that SCAWU was an employee representative at the 1st Respondent's undertaking from 1999 to March 2010 (the latter being the date the present application was filed). The contents of annexure **B3** clearly contradicts the evidence of the 3rd Applicant. The 3rd Applicant has failed to explain which version is to be believed. That leaves the Court in the 'dark' regarding the contradiction in the evidence of the 3rd

Applicant compared with the contents of **B3.**

33. The 1st Respondent has further introduced annexures **B6, B7, B8, B9** and **B10** to Court. These annexures are stop order forms signed by 2nd, 3rd, 4th, 6th, and 5th Applicants dated 28.11. 2007, 25.11.2007, 25.11.2007, 28.11.2007 and 16.11. 2008 respectively. In terms of these annexures the said Applicants notified the 1st Respondent that they have each joined SCAWU (Swaziland Commercial and Allied Workers Union) as members. The 1st Respondent was directed to deduct money from the salary of each Applicant and remit same to SCAWU as union dues with effect from the month on which the forms were signed.

34. In his replying affidavit the 3rd Applicant did not deny his signature as it appears on annexure **B7.** Further the 3rd Applicant has not denied the contents of annexure **B7.** The 3rd Applicant has not addressed the existence or contents of annexure **B7** at all in his affidavit. The evidence in annexure **B7** indicates that 3rd Applicant joined SCAWU as from November 2007 and not earlier as suggested by 3rd Applicant. It is therefore incorrect for the 3rd Applicant to allege that SCAWU was granted recognition and has been the representative of employees (Applicants) at 1st Respondent's undertaking since 1999. The evidence indicates that SCAWU gained some members (about 4 (four) Applicants) at the 1st Respondent's undertaking as from November 2007. It is only then that SCAWU could have applied for recognition by 1st Respondent, if so advised.

35. The 1st Respondent has further introduced to Court annexure **B5.** This is a letter from CAWUSWA dated 6th June 2007 addressed to the Commissioner of Labour. In this letter CAWUSWA has filed a complaint arising from the fact that its members (1st Respondent's employees) are being financially prejudiced by the 1st Respondent's decision to relocate its factory from Mbabane to Matsapha. The change of factory has caused the workers to incur transport expense

while traveling to and from work. The 3rd Applicant has not denied that the 1st Respondent's employees were represented by CAWUSWA as it appears in annexure **B5.** The 3rd Applicant failed to explain the reason CAWUSWA openly and actively represented the employees (including the Applicants) in the 1st Respondent's undertaking at the time when SCAWU is supposed to enjoy recognition as the employee representative. By failing to explain this obvious contradiction the 3rd Applicant is taken to accept that his allegations concerning the recognition of SCAWU by 1st Respondent since 1999 are incorrect.

36. The 1st Respondent has further introduced to Court annexure **B11.** This is an agreement dated 14th October 2008 signed by both SCAWU and 1st Respondent before CMAC. Paragraph (h) in annexure **B11** is of particular interest to the 1st Respondent and it reads as follows;

> *"Parties will sit and finalize a recognition agreement within 3 months from the time [sic] this agreement is signed and there'll be no further negotiations between now and the time the recognition agreement is finalized."*

It is argued that annexure **B11** is a written acknowledgement by SCAWU that there is no recognition agreement existing between itself and the 1st Respondent. It is argued further that no such agreement was concluded even after the signing of annexure **B11** because SCAWU failed to get the statutory minimum membership required to qualify for recognition.

37. In response to the 1st Respondent's allegations made above the 3rd Applicant stated as follows in paragraph 21 of his replying affidavit;

> *"Contents herein are noted save to point out that at the time the Recognition was gained, the Union had sufficient*

members. It is my humble submission that the practice between the parties had crystallized itself into a binding custom and the Honourable Court cannot overlook that."

37.1. The reply indicates clearly that the 3rd Applicant has failed to deny the existence of the CM AC based agreement being annexure **B11** and its contents.

37.2. The 3rd Applicant has failed to deny that the contents of paragraph (h) in annexure **B11** is an acknowledgement by SCAWU that it has no recognition agreement with the 1st Respondent. It is noted by Court that SCAWU could not have agreed to the contents of annexure **B11** in particular paragraph (h) therein if SCAWU already had a recognition agreement with the 1st Respondent.

37.3. The 3rd Applicant has failed to deny the 1st Respondent's assertion that even after the signing of annexure **B11** SCAWU and the 1st Respondent failed to enter into a recognition agreement. That allegation means further that at no point did SCAWU and the 1st Respondent enter into a recognition agreement from the date of signing of annexure **B11.**

37.4. The reply filed by the 3rd Applicant is confusing to say the least. The 3rd Applicant states that *..."at the time the Recognition was gained, the Union had sufficient members."* The 3rd Applicant does not say at which time does he allege the recognition was gained, for instance before or after signing annexure **B11.** The reply contradicts the agreement namely annexure **B11** since SCAWU has acknowledged over her signature that she (SCAWU) did not have a recognition agreement with 1st Respondent.

37.5. There is no affidavit from SCAWU which alleges that she (SCAWU) ever entered into a recognition agreement with 1st Respondent before or after signing annexure **B11.**

37.6. The 3rd Applicant alleges that SCAWU had sufficient members to apply to Court for recognition but fails to state how many were those members and what their names are.

37.7. If SCAWU had sufficient members to apply for recognition, the 3rd Applicant as well as SCAWU have failed to explain the reason SCAWU did not apply for recognition to the 1st Respondent, failing which to Court.

37.8. The 1st Respondent's reply as quoted above indicates that he could not deny or challenge the evidence as contained in paragraph (h) of annexure **B11.** This paragraph which has been signed by SCAWU contradicts and also destroys the premise on which the 3rd Applicant has built his case.

39. The 1st Respondent's allegation that there was no recognition agreement that was concluded with SCAWU after signing annexure **B11** has not been denied. That inflicted the final blow to the Applicants' case. Without a recognition agreement the application before Court cannot succeed and therefore stands to be dismissed.

40. The Court finds that both the 3rd Applicant's affidavits are largely based on inadmissible hearsay. In some instances it is not clear whether the allegations are based on hearsay or pure imagination. In either case the allegations are inadmissible. As a result the Applicants have failed to persuade the Court to grant the orders sought. The learned authors have stated the legal principle regarding hearsay evidence in applications as follows;

> *"As a general rule,... hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed, this is very often done.*

Alternatively, when a deponent includes in an affidavit facts in respect of which he does not have first-hand knowledge a verifying affidavit may be annexed by a person who does have knowledge of those facts."

Herbstein and Van Winsen; **The Civil Practice of the High Court of South Africa, 5th ed, Vol 1 (Juta) 2009 at 444.**

The 3rd Applicant and his co-Applicants have clearly failed to follow the rules of procedure regarding drafting of affidavits and that has caused the Applicants to fail on the facts.

In terms of section 42 (1) of The Industrial Relations Act No. 1/2000 as amended, (hereinafter referred to as Act 1/2000) a trade union is entitled to apply in writing to the employer for recognition as an employee representative at the employer's undertaking. This section reads 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."

41. In terms of section 42 (3) of Act 1/2000 the employer to whom an application is made for recognition must reply in writing as well. If no reply is received from an employer within 30 (thirty) days of service of an application, the union may apply to Court for an appropriate relief. That means that a claim by a trade union that it has received recognition from an employer must be proved only by a written agreement failing which the claim must fail.

41.1. The 3rd Applicant has stated in his affidavit that SCAWU was

recognized by the 1st Respondent during 1999. That claim is therefore governed by The Industrial Relations Act No. 1/1996 (hereinafter referred to as Act 1/1996. This Act 1/1996 just like its successor equally mandated the union to apply for recognition in writing. The relevant portion is section 43 (1) of Act 1/1996 which reads as follows;

> *"An industry union or industry staff association which has been issued with a certificate under section 25. may apply in writing to an employer for recognition as the exclusive collective employee representative for such categories of employee as are named in the application concerning all terms and conditions of employment including wages and hours of work."*

In terms of section 43 (3) of Act 1/1996 the employer to whom an application for recognition has been made is obliged to reply in writing. If the employer fails to reply within 30 (thirty) days of receipt of an application for recognition, the union may apply to Court for an appropriate relief. There is therefore no provision in both Act 1/1996 and Act 1/2000 for recognition of a union by an employer orally, by conduct or by custom. A written agreement is the only evidence authorized by statute by which a trade union can prove that it has been granted recognition by an employer as the employee representative at the employer's undertaking.

41.2. The 3rd Applicant has advanced an alternative argument namely that the 1st Respondent has by conduct granted SCAWU recognition. It was argued further that, that conduct has developed into a practise which has crystallized into a binding custom. That argument is factually inaccurate and contrary to law and is therefore flawed as stated above. The 3rd Applicant and his co-Applicants fail on the law as well.

42. In the founding and replying affidavits the 3rd Applicant has complained about the manner in which he and his co-Applicants were suspended. He argued that they were suspended indefinitely and without consultation. He did not state whether or not the suspension was with pay. The 1st Respondent has denied the allegations made by the 3rd Applicant concerning the suspension. Further the 1st Respondent denied the allegation made concerning 2 Respondent. According to Mr. York he is the one that raised an objection regarding an application by the Applicants for union representation. He avers that he is the one who challenged the existence of the alleged recognition agreement and not the 2nd Respondent. There are material disputes of fact regarding this evidence and the Court cannot deal with them on affidavits. The Applicants will have to file a proper claim regarding the suspension and have the issues determined at a trial.

43. The Applicants have an additional problem regarding the issue of suspension. There is no prayer in the Notice of Motion regarding suspension. There is no relief that the Court has been asked to grant. There is no need therefore for the Court to deal with this aspect of the case. Even if material disputes of fact did not exist, the Applicant would still fail on the issue of suspension on the application before Court as the Notice of Motion has not been properly drafted. The issue of suspension is not properly before Court. The Court will not make a determination regarding same. The Court stated as follows in a similar situation in the matter of;

Commissioner of Correctional Services vs Ntsetselelo Hlatshwako

Supreme Court of Swaziland Case No. 67/09 (unreported) at page 4 per Ramodibedi CJ

"It Is trite that a litigant [cannot] be granted that which he/she has not prayed for in the lis."

For the reasons stated above the Court will not spend anymore time on the issued of suspension.

44. The Applicants have failed in their application. The failure was mainly a result of poor drafting and research on the Applicant's part. It is possible that the Applicants' papers were drafted by a junior legal clerk and an attorney was engaged at a later stage. The 1st Respondent has asked for costs at a punitive scale. The Court is not convinced that this is a case where the unsuccessful party should be mulcted in costs at a punitive scale. In the exercise of its discretion the Court agrees to grant costs in favour of the 1st Respondent at the ordinary party and party scale.

45. For the reasons stated above, the Court makes the following order;

(a) The application is dismissed.

(b) The 1 Respondent is awarded costs of suit in the ordinary scale.

The members agree.

DUMSANI MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT