INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 99/17

In the matter between:

SWAZILAND RAILWAY	Applicant
And	
PUBLIC AND PRIVATE SECTOR	
TRANSPORT WORKERS' UNION	1st Respondent
CONCILIATION MEDIATION AND	
ARBITRATION COMMISSION (CMAC)	2nd Respondent

Neutral citation: Swaziland Railway vs Public and Private Sector Transport Workers' Union and Another (99/2017) [2017] SZIC 84 (2017)

Coram: MAZIBUKO J,

(Sitting with A.Nkambule & M.Mtetwa

Nominated Members of the Court)

Last Heard: 5th September 2017

Delivered 18th September 2017

Summary: (1) Dispute between trade union and employer. Union referred dispute for conciliation before the Commission. The parties

failed to resolve the dispute and Commissioner certified the dispute- unresolved.

(2) Employer appoints Consultant to review salaries. Union issues notice to conduct strike ballot.

(3) Employer applies for an order to interdict strike ballot exercise and to interdict potential strike action. Employer argues that parties agreed to refer the dispute to a consultant for determination and that the consultant's report would be implemented once it is approved by the employer's principal. Employer further argues the agreement was concluded tacitly.

(4) Held: Evidence before Court does not support agreement that Union has waived its right to take strike action.

(5) Held further; that tacit agreement has not been proved. Elements to prove tacit agreement analysed.

(6) Held further; that any agreement on a dispute which the parties failed to resolve before the Commissioner should be concluded in writing.

JUDGMENT

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1. The Applicant is Swaziland Railway, a body corporate, with power to sue and be sued, established under the Railway Act of 1962, carrying on business as such, at Mbabane, Swaziland.

2. The 1st Respondent is the Public and Private Sector Transport Workers Union, a trade union registered according to the laws of Swaziland, having its principal place of business at Mpaka – Swaziland. The 1st Respondent is recognized by the Applicant as the collective bargaining agent for all unionisable employees at the Applicant's undertaking. The 1st Respondent will also be referred to as the union.

3. The 2nd Respondent is the Conciliation, Mediation and Arbitration Commission, a body corporate, established in terms of Section 62 of the Industrial Relations Act No.1/2000 (as amended). The 2nd Respondent will also be referred to as the Commission. The 2nd Respondent took a decision not to participate in this matter.

4. About the 17th August 2016 the union reported an unfair labour practice dispute with the Commission. According to the 'Report of Dispute' which

is annexure SR1 to the founding affidavit, the union demanded and/or complained of the following issues:

14.1 A salary increment at 15% across the board.

14.2 An allowance increment at 15% across the board.

14.3 An irregular – shift allowance.

5. About the 24th August 2016 the Commissioner attempted to resolve the dispute through conciliation but without success. Thereafter the Commissioner issued a Certificate of Unresolved Dispute, which is annexure SR2.

6. About March 2017 the union issued a strike notice which was directed to the Applicant. The said notice also called upon the Commission to conduct a ballot exercise. The said notice is not before Court, however it is not in dispute that it was issued.

7. The Applicant wrote to the Respondent a letter marked SR4 which was dated 8th March 2017. In that letter the Applicant objected to the conduct of the union. In particular the union had called its members to a ballot exercise. The Applicant interpreted that conduct to mean that the union was preparing to embark on an industrial strike. The Applicant was

vehemently opposed to a strike action. The Applicant stated the basis of its objection as follows:

"(a) *On or about October 2016 during the Conciliation proceedings at CMAC, the Union was advised that Salaries and all issues falling within the ambit of salaries including Allowances, would be reviewed by an independent consultant. It was on this basis that SR Management felt that it would be premature and/or futile to bargain on an issue which was a subject for review by a Consultant.*

(b) *Pursuant thereto, a Consultant to review Salaries was appointed, being LCC Capital Consulting (PTY) Ltd. As part of its mandate, the Consultancy is expected to consult all stakeholders and the exercise is expected to be finalised before the end of the current financial year, that is, 31 March 2017.*

(c) *The Consultant met the Union ExCo on several occasions whereby submissions were presented by the Union, including issues pertaining Allowances. As things stand, a draft report is yet to be tabled by the Consultant, the contents of which might be shared to the Stakeholders. Notably, the salary review exercise is still pending.*

It is worrying therefore that while the Allowances are still being reviewed by the Consultant, the Union has opted to take the present route of issuing out a Strike Notice. In my respectful opinion and as discussed telephonically with the Union's Secretary General and his Vice this morning, the whole exercise by the Consultant might be perceived unimportant as the conduct of the union implies that whatever outcome will be recommended by the Consultancy, it shall have no force and effect."

(Record pages 32- 33)

8. In the founding affidavit the Applicant reiterated the issue of engaging a consultant by stating the following:

"20. At that stage the applicant had consulted and advised the first respondent that it intends to appoint a consultant who was going to undertake a salary review exercise of the applicant's employees. <u>There was no objection to that from the first respondent.</u>

21. A conciliation meeting was then held between the parties at the second respondent's offices. The applicant's defence and / or submission with regard to the claim of the first respondent was that it had already referred the matter to a consultant,

being LCC Capital Consulting (Pty) Ltd, for a salary review of the applicant's employees. It was made clear to the Commissioner that as soon as the consultant has finished its work the applicant was going to seek relevant approvals and implement same. It was made clear to the first and the second respondent that the salary review exercise was going to be completed on or about the financial year end of the applicant which is on the 31st March 2017. <u>There was no object [objection] to that from either the first or the second respondent</u>."

(Underlining added)

(Record page 14)

9. In paragraphs 20 and 21 of the founding affidavit, the Applicant appears to have made a recommendation to the union that: it may be advisable for the union to withhold industrial action on their demands. The Applicant had engaged a consultant to undertake a review exercise of the salaries of the Applicant's employees. It was stated that the demands of the union may be (and not that they will be), adequately addressed in the consultant's report which the Applicant expected in March 2017. According to the

Applicant, the union did not object to the recommendation that the Applicant had made.

10. Further in its founding affidavit the Applicant added another element in support of its contention as follows:

10.1 *"29. The application is based upon the fact that there is an agreed salary review, being conducted by a consultant which is yet to finalise its exercise on or about the 31st of March 2017."*

(Underlining added)

(Record page 17)

10.2 *"37.1.2 The first respondent has agreed to the salary review by the consultant. In fact, the first respondent has made certain representations on a number of occasions to the consultant on the salary review process and it cannot then at the end seek to disassociate itself from it. The first respondent has to await the outcome of the salary review exercise before embarking on the industrial action;"*

(Underlining added)

(Record page 20)

11. When considering the last two (2) quotations from the founding affidavit, it appears the Applicant's position regarding the consultant has moved from; a recommendation, to; an agreement. In the earlier statement the Applicant's position was that it recommended to the union that the latter should not take industrial action pending the outcome of the salary review exercise. In the latter statement the Applicant appears to be certain that it concluded an agreement with the union to the effect that an industrial action will not proceed until the report on the salary review exercise is finalised and that its implementation is subject to approval by the Applicant's principals.

12. The union has denied the alleged agreement with the Applicant and it stated as follows in its evidence:

"8

12.1 *The contents are vehemently denied. The Applicant did not advise us about the consultant* <u>*during the 2015/16 salary negotiations,*</u> *but raised the issue at conciliation and* <u>*even then, the parties did not agree to engage a consultant;"*</u>

(Underlining added)

(Record page 42)

"6.3

12.2 *Moreover, <u>there was no agreement between the parties to engage the consultant</u>, hence the issuance of the certificate of unresolved dispute. The 1st Respondent did partake in the salary review because it is the Applicant's policy to review salaries every three years. If the Applicant wanted the salary review policy to be amalgamated with the cost of living salary increase, it should have approached CMAC in terms of Section 86(9) of the Industrial Relations Act, so that an agreement incorporating both issues be signed by the parties."*

(Underlining added)

(Record page 41)

The union has denied that it agreed to the Respondent's proposal that their dispute be determined by a consultant. The union added that if there had been an agreement it would have been concluded in writing.

13. According to the Applicant, after the conciliation meeting, it engaged a consultant to review the salaries and allowance of its employees. The same issues that the union had reported as a dispute (and in respect of which the commission had issued a Certificate of Unresolved Dispute), were referred to the consultant (by the Applicant), for review. The Applicant stated as follows in the founding affidavit.

13.1 *"The issue in dispute is about a salary increment of the first respondents' members. After a conciliation meeting at CMAC[Commission] about the same issue in or around October 2016 the first respondent was advised that all salaries and allowances of their members was,[were] going to be reviewed by an independent consultant, LCC Capital Consulting (Pty) Ltd, and then the applicant was going to implement the consultant's report after obtaining relevant approvals."*

(Underlining added)

(Record pages 8-9)

13.2 *"After a Conciliation meeting at CMAC [Commission] about the same issue in or around October 2016 the first respondent was advised that all salaries and allowances of their members was[were] going to be reviewed by an independent consultant …*

and then the applicant was going to implement the consultant's report *after obtaining relevant approvals."*

(Underlining added)

(Record page 18)

14. The Applicant's argument is that the dispute in respect of which: a Certificate of Unresolved Dispute - was issued, has since been resolved by agreement. According to the Applicant, that agreement prohibits the union from taking action in furtherance of a strike – while the Applicant awaits the consultant's report. The Applicant has instituted an urgent application against the union for relief as follows:

"*1. The applicant is hereby condoned for non- compliance with the Rules in relation to service and manner of service and this matter is enrolled and heard as one of urgency;*

2. A rule nisi hereby issue calling upon the respondent to show cause on a date to be fixed by the Court why an order in the following terms should not be made final;

2.1 The first and second respondent are interdicted and/or restrained from holding the balloting exercise pursuant to their strike declaration;

2.2 The first respondent and/or its members are interdicted and/or restrained from pursuing and/or embarking upon a strike action regarding the wage increments which matter was argued should be dealt with a consultant; [sic].

2.3 The declaration of a strike issued by the first respondent is declared unlawful, invalid and of no force and effect.

2.4 The first respondent and its members are hereby interdicted and restrained from embarking upon the contemplated strike action.

3. The first respondent is ordered to pay the costs of this application in the event of unsuccessful opposition."

(Record pages 4- 5)

The application is opposed. The union has filed an answering affidavit.

15. The relationship between Applicant and the union is governed by Section 86(9) of the Industrial Relations Act, which provides that:

15.1 *"Where, at any time a dispute which has been certified as unresolved within the meaning of section 85 is resolved by agreement between the parties, the procedure specified in section 84 shall be followed.*

15.2 Section 84 provides as follows:

> *"84(1)Where a dispute has been determined or resolved, either before or after conciliation, the parties shall prepare a memorandum of agreement setting out the terms upon which the agreement was reached and the memorandum shall be lodged with the Court for registration by any of the parties, or by the Commissioner of Labour at the request of the parties."*

16. Parties that have appeared before the Commissioner for conciliation of a dispute - but failed to reach settlement, are still at liberty to resolve their dispute - even after the Certificate of Unresolved Dispute had been issued. Whatever agreement that the parties arrive at: it is mandatory that it be written and signed. The Act recognizes only written agreements. In terms of Section 86(9) as read with 84(1) of the Industrial Relations Act, an oral agreement on issues that were subject of conciliation is not permissible. The Act is justified in recognizing a written instrument only – as proof that the parties concluded an agreement. The terms of that agreement are easily accessible by mere production of the written instrument.

17. The agreement that is referred to by the Applicant is denied by the union. Even if that agreement was admitted (which is not the case) it would still be defective for failure to comply with Section 86(9) as read with 84(1) of the Industrial Relations Act.

18. The union has referred to Section 15 of the Collective Agreement and it provides as follows:

> *"15(a) …*
>
> *(b) The parties agree that either party may take industrial action only after CMAC [the Commission's] effort to settle that particular matter have been exhausted."*
>
> (Record page 47)

In the matter before Court, the parties have failed to settle their dispute and the Commissioner has confirmed this position in the 'Certificate of Unresolved Dispute'. Either party is at liberty therefore to take industrial action. The Respondent has acted within its right to take the necessary steps in preparation for a strike action. The strike ballot is lawful in terms of law as well as the Collective Agreement. The Court cannot interdict a lawful strike ballot or a lawful strike.

19. The effect of the Applicant's contention is that the Respondent's right to take industrial action is subject to approval by the Applicant's principal. According to the Applicant, the Respondent cannot take industrial action until the consultant has issued its report. Even after the report had been issued, the Applicant is yet to obtain approval before it can implement the report. In the event the Applicant does not get the alleged approval, it would mean the Respondent cannot take industrial action. The Applicant's contention is not supported by the evidence and is clearly contrary to the Act.

20. The Applicant has introduced another legal principle in his replying affidavit which deserves to be mentioned. According to the Applicant the parties had a tacit agreement in terms of which the union agreed not to take industrial action pending availability of the consultant's report. The Applicant stated as follows:

20.1 *"15.3 I admit that the dispute is one of interest and state that instead of industrial action the parties agreed tacitly that the issue will be resolved through the salary review exercise by the consultant;"*

(Record page 56)

20.2 "*16.3 The respondent tacitly agreed to the engagement of the consultant*."

(Record page 57)

21. As aforestated, in the case before Court a written contract is mandatory - as per statutory requirement. Authorities state that:

"A written contract is one which is recorded in writing and which bears the signature of the parties."

GIBSON J.T.R.: WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW, 6th edition, Juta, 1970. (ISBN not provided) page 315.

22. A tacit contract is different in form from the one concluded by oral or written words. Authorities have defined tacit contract as follows:

"… conduct can take the place of written and spoken words in the case of both offer and acceptance, in which case there is created an 'agreement by conduct', otherwise known as a 'tacit agreement.' It must be quite clear that the parties intended to contract and in deciding this question the test is objective …"

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, 7th edition 1997, Juta. (ISBN 0 7021 4058 9) at page 43.

23. The Applicant's reliance on a tacit contract is an admission that the Applicant has neither written nor oral contract with the union. As aforestated, in the case before Court, the statutory requirement is that a binding contract between the parties must be written. According to authority:

> *"The acceptance must comply with any statutory formalities applicable to that type of contract. If the contract is required to be reduced to writing and signed by the parties, the acceptance must be in writing and signed by the offeree."*

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, (supra) (at page 38).

The Applicant's reliance on a tacit agreement is misplaced as it is in breach of section 86(9) as read with 84 (1) of the Act.

24. Besides the failure by the Applicant to comply with the statutory provision as aforementioned, the facts of the matter do not support the Applicant's contention that a tacit contract was concluded between the parties. A tacit contract must have all the essential elements of a contract especially the *consensus ad idem*. In the matter of STANDARD BANK OF SA LTD vs OCEAN COMMODITIES INC. 1983 (1) SA 276 his Lordship Corbett JA explained the principle as follows:

> "*In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem*."

(Underlining added)

(At page 292B)

25. In order to determine whether or not a tacit contract has been established the Courts have developed two (2) methods to approach the inquiry namely:-

25.1 the *‘no other reasonable interpretation’* test, and

25.2 the ‘*preponderance of probabilities’* test.

The former approach is mentioned in the judgment of Corbett JA in the Standard Bank case (supra).

26. In the matter of MUHLMANN vs MUHLMANN 1984(3)SA 102 per his Lordship HOEXTER JA it was held that:

> *“… the true enquiry was simply whether it was more probable than not that a tacit agreement had been reached.”*
>
> (At page 124 B-C)

27. There is no evidence in the affidavits that the union agreed by conduct:-

27.1 that it will not exercise its right to embark on an industrial strike, instead the dispute between the parties which was declared unresolved (by the Commissioner) will be resolved by a consultant whom the Applicant has or will - engage, and

27.2 also that the consultant's report (once it is issued) is subject to approval by the Applicant's principals before the Applicant could implement it.

28. There is no evidence that the parties had reached *consensus ad idem*. In the absence of *consensus ad idem*, there is no contract. This position has authoritative support.

28.1 *"It must be proved that there was in fact consensus ad idem."*

per Corbett JA

STANDARD BANK case (supra) at page 292.

28.2 *"AD IDEM*

Parties to a contract are said to be ad idem when there is a consensus between them on all the terms of such contract."

CLASSSEN CJ: DICTIONARY OF LEGAL WORDS AND PHRASES, volume1, Butterworths, 1975 (SBN 409 01890 2) at page 46.

28.3 "*The acceptor must be of the same mind as to the subject – matter of the contract as the offeror. There must, as it is said, be a "meeting of minds'."*

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW (supra) page 38.

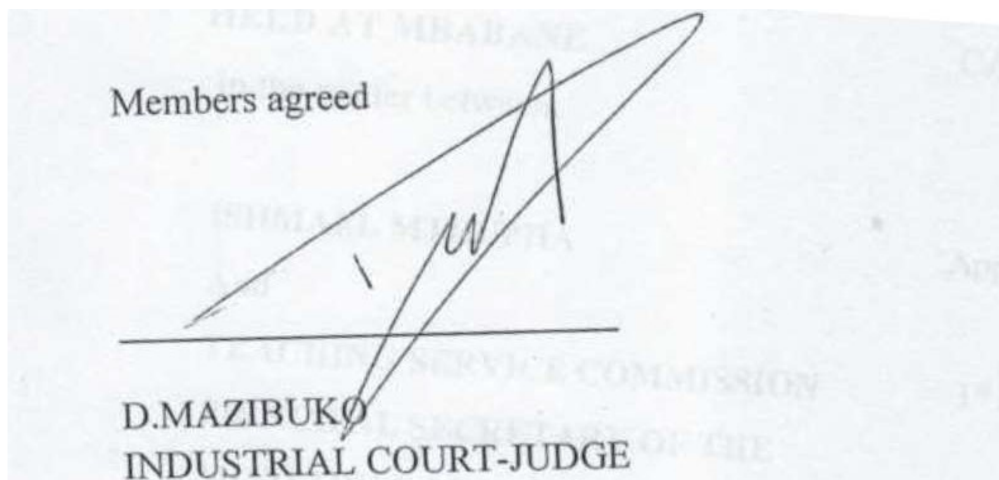
The Applicant has failed on a preponderance of probabilities to prove that a tacit contract was concluded between itself and the union. It cannot be said that there is no other reasonable interpretation of the conduct of the union. The union has infact given a reasonable explanation for its conduct as stated in the quotation above. Had the Applicant's case not failed on the legal principle, it would have failed on the facts.

29. The Respondent has incurred a considerable cost in defending its right. It is fair that the principle that: costs should follow the event, be applied in this matter.

Wherefore the Court orders as follows:

29.1 The application is dismissed.

29.2 The Applicant is to pay the cost suit.



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