IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 21/2018

In the matter between:

SAPWU: NAMBOARD EMPLOYEES Applicant

And

NATIONAL AGRICULTURAL MARKETING BOARD Respondent

Neutral citation: SAPWU: Namboard Employees v National Agricultural Marketing Board [21/2018] [2020] SZIC 50 (06 May 2020)

Coram: **Nsibande JP**
(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard: 03 October 2019

Date Delivered: 13 May 2020

Summary: Costs – Section 13 (1) of the Industrial Relations Act empowers court to grant costs order where Court finds Respondent's conduct to be dilatory in defending proceedings – Costs on Attorney client scale granted.

RULING

[1] The Applicant, the Swaziland Agricultural and Plantation Workers Union (SAPWU) is a duly registered organisation with its principal place of business at Manzini Heights, Manzini District in the Kingdom of Eswatini.

[2] The 1st Respondent is the National Agricultural Marketing Board (Namboard) a public enterprise established in terms of the **National Agricultural Marketing Board Act No. 13 of 1985** with its principal place of business at the Corner of Mbhebha and Masalesikhundleni Streets, Manzini in the District of Manzini, Kingdom of Eswatini.

[3] The 2nd Respondent is the Chief Executive Officer of 1st Respondent with the overall authority on the day to day operations of the 1st Respondent.

[4] The Applicant is duly recognised as an organisation representing unionised employees of the 1st Respondent, in terms of the **Industrial Relations Act 2000 as amended**.

[5] Sometime in 2017, the 1st Respondent undertook a remuneration and job grading re-evaluation and grading review with the assistance of a firm of Consultants Price Waterhouse Coopers Services (PTY) Ltd. The outcome of the review was a final salary review report **(the report)** which the Consultant

delivered to the 1st Respondent. The Applicant then sought a copy of the report from the Respondents without success, resulting in a dispute being reported to the Conciliation Mediation and Arbitration Commission (CMAC). At conciliation the parties settled the dispute and the 1st Respondent undertook to deliver the report to the Applicant on or before 16th February 2018. It did not do so, despite having signed a memorandum of agreement to have the report delivered and to the parties by the said date.

[6] On the 3rd of April 2019, following that the Respondent had not delivered the report to the Applicant, the Applicant approached the court for an order in the following terms:

"1. Compelling and directing the Respondents to comply with the Court Order on 26th March 2018.

2. Declaring that the 2nd Respondent be joined and ordering both Respondents to show cause why on a date to be determined by this court, they should not be held in contempt of court and committed to goal for the non-compliance of (sic) the court order.

3. Directing the 1st and 2nd Respondents to pay the costs of this application on the scale as between Attorney and own client scale (sic).

4. Further and for alternative relief."

[7] There was some disagreement as to whether the order of 26th March 2018 referred to in prayer 1 of the application was served on the Respondents. CMAC, which had initiated the registration of the memorandum of agreement signed by the parties (in terms of **Section 84** of the **Industrial Relations Act**) could not confirm service of the order on Respondents. In any event the Applicant caused same to be served on the Respondents on 27th May 2019 whilst this matter was pending before Court. By 15th August 2019, when the Court ordered that the matter be referred to oral evidence, it was still being disputed that the report had been made available to the Applicant.

[8] The Respondents defence to the application was that it had presented the report to the Applicant on numerous occasions namely:

1. On 25th September 2018 as borne out by **annexure NB1** to its answering affidavit.
2. On 27th March 2019 when under cover of a letter of the same date a copy of the report was delivered to Applicant. **Annexure NB2** is the said letter with the purported report.

[9] The Applicant, while conceding that the report was presented to it at a presentation meeting with the Consultant on 25th September 2018, denies that **NB2** is a copy of the report. It avers that **NB2** contains power point slides that

were a part of the Consultants presentation of 25th September 2018. It avers further that the final report was not availed to it.

[10] The document **NB2**, does not appear to us to be a final report. It appears to be power point presentation slides as alleged by Applicant. Because the Respondent insisted that this was the report and the Applicant disputed this, the Court ordered that the matter go to oral evidence and that Applicant could subpoena the Consultants, if it deemed it necessary. The matter was set down for hearing on 3rd October 2019. On the 1st October 2019, the Respondents filed what it called PWC 2018 Salary Review Report. From the report it appears that it was delivered to the 2nd Respondent under cover of letter dated **13th September 2018**. It is titled **"Remuneration Benchmarking and Salary Review Report 2018"**. It is not the same as **"NB2"** and it appears that it is exactly what the Applicant was seeking. The result of Respondent filing this report was that the matter was removed from the roll. The Applicant sought a costs order which was resisted by Respondents.

[11] In terms of **Section 13 (1)** of the **Industrial Relations Act of 2000** (as amended) *"the Court may make an order for the payment of the costs according to the requirements of the law and fairness and in so doing the Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay in bringing or defending a proceeding."*

We have considered the following:

11.1 The Respondent agreed, in terms of the written memorandum of agreement dated 22nd January 2018 to deliver the report to the Applicant by 26th March 2018. It did not do so.

While, it may be accepted that there may have been delays in receiving the final report from the Consultant, the 1st Respondent itself confirms having received the report on 25th September 2018. Apart from handing Applicant the power point presentation made on 25th September 2018 in its presence, the final report was not handed to Respondent. No explanation for the failure to shelve the actual report is given by the Respondent despite that it admits receiving the final report and had agreed to give Applicant a copy thereof.

11.2 When Applicant launched the application in Court, Respondent insisted that the power point presentation was in fact the report. Between 3rd April 2019 until 1st October 2019, the Respondent, whilst expressing its intention to co-operate, did the opposite. Having agreed in January 2018 to share the report with the Applicant we find it grossly unreasonable that it had to take the matter being referred to oral evidence and a subpoena being served on the Respondents Consultant for the report to be availed.

[12] It is our view that it would be fair to grant the Applicant costs on the Attorney-client scale. There is no costs order against 2nd Respondent as there were no allegations made against him at all (adverse or otherwise).

[13] In the circumstances we order that the 1st Respondent pays costs on the Attorney-client scale.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. M. Nsibande
(Mongi Nsibande & Partners)

For Respondent: Mr. N.D. Jele
(Robinson Bertram Attorneys)