



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.103/2022

In the matter between:

**SWAZILAND AGRICULTURAL MANUFACTURING
AND ALLIED STAFF ASSOCIATION (SAMASA)**

Applicant

And

**THE ROYAL ESWATINI SUGAR
CORPORATION (RES)**

Respondent

Neutral Citation: Swaziland Agricultural Manufacturing and Allied Staff Association (SAMASA) vs. The Royal Eswatini Sugar Corporation (RES) (103/2022) [2022] SZIC 47 (21 April 2022)

Coram: **V.Z. DLAMINI-ACTING JUDGE**
(Sitting with D. Mmango and MT. E Mtetwa - Nominated Members of the Court)

LAST HEARD: 13th April 2022

DATE DELIVERED: 21st April 2022

SUMMARY: *Applicant brought an urgent application against the Respondent seeking orders staying an intended implementation of a new payment system affecting the 13th cheque and holiday allowance. Basis of application that parties had not reached an impasse in negotiation for the introduction of the new system. Respondent contends that it was entitled to unilaterally implement the system as parties had reached a deadlock.*

Held: *On the facts, it is found that the earlier impasse was vitiated by Respondent placing issue on the negotiating table for further engagements. Disregarding new developments would promote negotiations in bad faith and disharmony in industrial relations.*

JUDGEMENT

INTRODUCTION

[1] The Applicant, a Staff Association incorporated and registered in accordance with **Section 27** of the **Industrial Relations Act of 2000 (as amended) (IRA)** and recognized as a collective bargaining agent for Respondent's employees designated as staff in terms of **Section 2** of the **IRA**, instituted an urgent application on the 1st April 2022 against the Respondent, a company duly incorporated and registered in terms of the Company laws of Eswatini, seeking orders in the following terms:-

J. Dispensing with the normal rules relating to forms, procedures and time limits regulating institution of the proceedings and allowing this matter to be heard as one of urgency.

2. *Condoning the Applicant's non-compliance with the rules of this Honourable Court.*
3. *A Rule Nisi hereby issue with immediate interim effect, calling upon the Respondent to show cause on a date to be appointed by the court, why an order in the following terms should not be made final:*
 - 3.1 *Staying forthwith the intended implementation of the TGP as communicated through the memo dated 28th March 2022 pending finalization of the matter or alternatively;*
 - 3.2 *Staying forthwith the intended implementation of the TGP as communicated through the memo dated 28th March 2022 pending finalization of the current negotiations on the TGP.*
4. *Prayers 1, 2, 3 and 3.1 to operate with immediate and interim effect pending the outcome of this matter.*
5. *Declaring the intended implementation of the TGP as communicated by the memo dated 28th March 2022 as unlawful, null and void by virtue of being contrary to the Collective Agreement and the terms and conditions of employment of the members of the Applicant.*
 - 5.1 *Directing the Respondent to pay the 13th cheque and holiday allowance in terms of the subsisting binding Collective Agreement entered into by and between the Applicant and Respondent in 2004 up until there is a new Collective Agreement entered into, varying the prevailing terms of the 2004 Collective Agreement.*
6. *Costs of the Application against Respondent.*
7. *Further and or alternative appropriate relief*

BACKGROUND FACTS

- [2] As part of the wage negotiations for the 2020/21 financial year, in January 2021 the parties commenced negotiations for the introduction of a new remuneration system known as the Total Guaranteed Package (TGP) , which was proposed by the Respondent. According to the Respondent, the migration of staff to the TGP was intended to empower them with choice and flexibility in dealing with their remuneration, reduce administrative costs, ensure that they received a guaranteed package at total cost to the employer, and reduce taxation.
- [3] It appears that the phased introduction of the TGP remuneration system had a measure of success until the Respondent proposed that it should also be applied to the Applicant's members' 13th cheque and holiday allowance. Whereas the status quo was that the 13th cheque and holiday allowances were paid as a lumpsum at the end of a calendar year, the Respondent proposed that these be paid as part of the employees' monthly remuneration.
- [4] During negotiations in November and December 2021, the parties reached a deadlock on the TGP item. But then on the 2nd March 2022, the item was placed on the agenda for discussions. Unfortunately, the parties could not come around to engage on the TGP item in their meetings of the 2nd to the 4th March 2022; they defened the outstanding issues to the 10th and 17th March 2022. Then on the 28th March 2022, the Respondent issued a

memorandum

(TGP Memo) in which it notified the Applicant that it would be unilaterally implementing the new system of payment of the 13th cheque and holiday allowance with effect from the 1st April 2022 as negotiations on the item had reached a deadlock on the 1st December 2021. In retaliation, the Applicant instituted the present application.

ANALYSIS OF ARGUMENTS

- [5] During argument, Mr. Ndlangamandla submitted the Applicant was no longer relying on the Collective Agreement as another basis for challenging the unilateral implementation of the TGP system to the 13th cheque and holiday allowance. In view of Mr. Ndlangamandla's approach, it is no longer necessary for the Court to determine whether a case has been made out for **prayers 5 and 5.1** above.
- [6] Following the Applicant's approach, the Court narrowed the issue for determination for Counsel as whether pursuant to the deadlock of the 1st December 2021; the Respondent's placement of the TGP item on the agenda for negotiations on the 2nd March 2022 had not vitiated the impasse.
- [7] Mr. Ndlangamandla referred the Court to the minutes of the 2nd March 2022 and contended that the item was presented by the Respondent for further engagement and as such must be deemed to have been re-opened after the impasse of the 1st December 2021. Counsel referred the Court to legal authorities supporting the principle that where the employer had not

negotiated in good faith, it was not entitled to unilaterally implement its proposal.

[8] Conversely, Mr. Jele submitted that the minutes of the 1st December 2021 clearly showed that a deadlock was reached on the issue and since then, the Applicant had not presented a fresh counter-offer for Respondent's consideration. Moreover, Mr. Jele argued that the item was included in the 2nd March 2022 for purposes of informing the Applicant about the modalities of its implementation. Counsel also submitted that since the parties had reached a deadlock after negotiating in good faith, the Respondent was entitled to unilaterally implement the TGP system on the 13th cheque and holiday allowance; similarly, he supported his proposition with legal authorities.

[9] In the case of **Swaziland Union of Financial Institutions and Allied Workers v First National Bank and Another (47/2018) SZSC 62 (30th November 2018) at paragraph 54**, the Supreme Court said the following:

"Our National Constitution embraces the inalienable right to collective bargaining by unionized employees regarding their terms and conditions of employment ... "

[10] In the case of **Swaziland Agricultural and Plantations Workers Union & Another v Swaziland Ranches t/a Tabankulu Estate (219/2015) [2016] SZIC 44 (September 22, 2016) at paragraph 22**, the Court had this to say:

"This Court in the Swaziland Agricultural Plantations case

(supra) pointed out the following regarding negotiations at

paragraph 43:-Negotiations involve an attempt to reach a consensus. Although consensus is the aim of negotiation, it is not essential that an agreement is reached. Recognition and Collective agreements often provide dispute resolution procedures which kick-in when negotiations have failed. In the absence of agreed resolution procedures, the law also allows an employer who has bargained in good faith to an impasse to unilaterally implement its proposals. "

[11] See also: Sayed v Usuthu Pulp Co. Ltd t/a Sappi (IC CASE No. 443/06) [principle not affected by outcome of appeal]; Swaziland National Association of Government Accounting Personnel v Swaziland Government (IC CASE NO 497/2000); National Union of Mineworkers and Another v Eskom Holdings SOC Limited (J1934/II) [2011] [2012] 33 ILJ 669 (LC); Swaziland National Association of Teachers and Others v Swaziland Government (67/99) [1999] SZIC 5 (2 January 1999)

[12] The minutes of the 1st December 2021 reveal that the parties agreed that a deadlock had been reached on the TGP item (13th cheque and holiday allowance). The Applicant inquired from the Respondent about the implications of the impasse; it is recorded that the latter did not have "a firm and direct response to what SAMASA has asked".

[13] The Employee Relations Office then advised the parties in that meeting that an impasse meant that they were now free to exercise their options in law,

which included reporting a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC) or filing a complaint to the Commissioner of Labour in terms of **Section 26** of the **Employment Act, 1980**.

[14] The Respondent missed an opportunity at this stage to notify the Applicant that whereas it had hoped to implement the TGP on the 1st April 2022 with her concurrence as indicated in the minutes of the 26th November 2021, she was now going to unilaterally implement the system on the same date.

[15] Despite the deadlock reached concerning the TGP on the 1st December 2021, when the Respondent was invited to table an item for negotiations in the meeting of the 2nd March 2022, she is recorded to have said the following:

"...We have one item for negotiations and would like to apologize for not exchanging anything to our counterparts prior to our discussions. Our item is linked to the proposals they have brought. Our item is cost of living. The other item will be registered if parties agree - TGP. We need to close it out and have it cleared as to where we at. " [Our emphasis]

[16] According to the aforesaid minutes, the TGP item was amongst the consolidated list of items for negotiations; it appears as the last item. It is apparent that the parties negotiated according to the chronological order in the consolidated list; it is probably the reason why the TGP item had not been discussed by the 4th March 2022 and was deferred to the 10th and 17th March 2022 as alluded above.

[17] The inclusion of TGP on the table for negotiations on the 2nd to 4th March 2022 removed the cap that the parties had deadlocked on it; both parties had a desire to one last time attempt to reach an amicable resolution. In our view, after the re-opening of the negotiations on the item, the parties were no longer at liberty to exercise their options based on the stale deadlock of the 1st December 2021.

[18] To allow the parties to exercise their options when they had all the time to do so before the issue was brought back to the negotiation table, would be to promote bad faith in collective bargaining and disharmony in industrial relations, which conduct the Court is obliged to censure in terms of the **Industrial Relations Act (Section 4)**. It is not difficult to fathom why the parties still desired an amicable resolution; they put a premium on industrial harmony by crafting a Recognition Agreement whose provisions express a philosophy that industrial action should be a last resort (See: **Clause 13**).

[19] In the case of **East Rand Gold & Uranium Co. Ltd v National Union of Mineworkers (1989) 10 ILJ 683 (LAC)**, the Court said the following:

"Until the stage that an impasse is reached, the parties to the bargaining will usually have attempted to reach a bilateral agreement. An impasse, of course, is reached when this is no longer possible. it is not in the interest of the parties to leave a matter unresolved"

[Emphasis added].

[20] The recently decided case of **Swaziland Agricultural Plantations Workers Union & Another v Swaziland Ranches t/a Tabankulu Estate (359/2021) [2022] SZIC 113** is distinguishable on the facts and as such this Court is not obliged to follow the reasoning of the Court in that case.

CONCLUSION

[21] Having reached the above conclusion, the Court will forthwith stay the Respondent's unilateral implementation of the TGP (13th cheque and allowance) pending finalization of the cutTent negotiations on the item. Mr. Jele expressed reservation in the event the Court were to stay the implementation of the TGP because it has already been implemented and might entail the Applicant's members having to repay the monies already paid to them.

[22] While the Court is loathe to descend into administrative issues, the proposed payment system is intended to be applied on a monthly basis, so we see no prejudice to the parties because it has only been effected in the first month; the stay will be effective the following month up until such time there is an agreement or impasse, after which the parties are at liberty to exercise their legal options.

[23] In the premise, the Court orders as follows:

[a] The intended implementation of the TGP as communicated through the Memo dated 28th March 2022 is hereby stayed pending finalization of the current negotiations on the TGP.

[b] Each party to pay its own costs.

The Members agrees.



V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT

Mr. M. Ndlangamandla
(MLK Ndlangamandla Attorneys)

FOR RESPONDENT

Mr. Z. D. Jele
(Robinson Bertram)