# IN THE INDUSTRIAL COURT OF APPEAL

## JUDGMENT

In the matter Between: Case No.16/18

**SWAZILAND NURSES ASSOCIATION** Appellant

And

**MINISTRY OF PUBLIC SERVICE** 1st Respondent

**JOINT NEGOTIATIONS FORUM** 2nd Respondent

**THE ATTORNEY GENERAL** 3rd Respondent

Neutral citation: ***Swaziland Nurses Association v Ministry of Public Service and two others (16/18) [2019] SZICA 02 (2nd May, 2019)***

Coram : **M. Dlamini AJA, N. Maseko AJA and M. Langwenya AJA**

Heard : **4th April, 2019**

Delivered : **2nd May, 2019**

***Interpretation of written Agreement :*** ***application of interpretation clause leaving a lacuna – definition of nurse under section 25 of Appellant's enabling statute leaving a lacuna – application of interpretation of nurse as per appellant's constitution still leaves a lacuna-***

***:*** ***court – rules of interpretation applicable – documents must be read as a whole to ascertain intention of the parties – reading entire clause 5.2 and with reference to Appendix 3 as mentioned in clause 5.2 closes lacuna. Clause 4.2.2 reinforces intention of the parties on definition of employees***

**Summary**: The appellant is challenging the decision of the *court a quo* confirming 1st respondent's decision to exclude **Mr. Lushaba** from joining 2nd respondent as appellant's representative. The respondents maintain that the *court a quo's* decision is unassailable.

**The Parties**

[1] The appellant is a trade union duly incorporated and registered in terms of the Industrial Relations Act. Its principal offices are situate at Manzini, Manzini region.

[2] The 1st respondent is a Government Ministry seized with, amongst others, matters pertaining to employment of civil servants. Its principal offices are in Mbabane, Hhohho region.

[3] The 2nd respondent is a forum duly established jointly by the Government Negotiating Team and the Public Sector Union. The 3rd respondent is the Attorney General cited herein in its capacity as the legal representative of the Government in civil litigation.

**Analogue**

[4] On or about 20th January, 2018, the appellant filed motion proceedings against the 1st respondent and other Government ministries challenging "*the implementation of the on-call allowances standardization Circular No.1 of 2018"*[1] as per case No. 36/2018. The matter was enrolled before my brother **T. Dlamini J** who ruled that the parties should "*consult on the circular and report back to court on 9th April 2018."*[2]

[5] Following the order by my brother **T. Dlamini J**, the parties agreed to meet on 7th March 2018. In this meeting, the 1st respondent disallowed **Mr. Sibusiso Lushaba** who is identified by the appellant as its Secretary General from participating. The meeting was therefore stalled with appellant demanding reasons for the 1st respondent's action. The Principal Secretary of 1st respondent who is also the chair under 2nd respondent gave reasons by correspondence dated 12th March 2018. Appellant rejected the reasons and communicated the same in writing. This fell on deaf ears.

[6] The appellant asserts that it is a violation of the recognition and collective agreement (the Agreement) for respondent to decline its representation by refusing **Mr. Sibusiso Lushaba's** (**Mr. Lushaba**) appearance before 2nd respondent. Appellant deposed in this regard.

> *"14. The 1st respondent is trying to choose who amongst the office bearers of the applicant can be mandated to represent the applicant and its' membership in its consultations and meetings within the 2nd respondent."*[3]

[1] Page 13 of book of pleadings
[2] Page 13 of book of pleadings
[3] Page paragraph 14

[7] Appellant insists that **Mr. Lushaba** is their Secretary General and has been mandated by the executive members of appellant to represent them before 2nd respondent.

**1st Respondent**

[8] The 1st respondent is adamant that **Mr. Lushaba** should be excluded as a representative of appellant. It asserts that the reason is that **Mr. Lushaba** resigned from his employment as a civil servant by letter dated 27th August 2017. 1st respondent expressed:

> *"3. **Mr. Sibusiso Lushaba** resigned from the employ of the Swazi Government on 27th August 2017. He is no longer a nurse employed by anyone in Swaziland. Therefore, he cannot be a member of the Applicant so as to be its Secretary General and to represent it at the bargaining table of the 2nd Respondent.*
>
> *4. Besides, **Mr. Lushaba** is no longer an employee of the Government. This on its own excludes him from the collective bargaining process. Applicant's Recognition Agreement with Government as employer confines the bargaining process to employees of the Government."*[4]

**Appellant**

[4] Page 47 paragraph 3 and 4

[9] Appellant replied as follows, after pointing out that **Mr. Lushaba** was a duly registered nurse with the Swaziland Nursing Council:

> *"5.2 It is factually incorrect that simply because **Sibusiso Lushaba** is no longer an employee of the government, he is now excluded in the bargaining process. **The Recognition Agreement between applicant and Swaziland Government** does not provide that if one is not a nurse, cannot represent the applicant. In fact, it allows representatives of the applicant to represent the applicant and its members. In this matter, it is worse that the respondents have not addressed the court to the specific clause of the Recognition or instrument they are relying on."* [5] **(**My emphasis)

**<u>Grounds of appeal</u>**

[10] The appellant states that the court *a quo* erred in law;

1) *"in holding that the termination of **Mr. Sibusiso Lushaba's** employment [sic-resignation] with [from] the Swaziland Government terminated **Mr. Lushaba's** right to represent the appellant in the negotiations.*

2) *The court below misinterpreted "members" in clause 5.2 of the Recognition and Collective Agreement.*

3) *The court also erred in referring to common law definition of "member."*

[5] Page 54 paragraph 5.2

4) *The court ought to have given efficacy to the Constitution of appellant and thereby accept the interpretation of a "member" and discard the meaning of member defined in the Recognition Agreement.*

5) *The court ought to have appreciated that members are not confined to one particular employer but may include a number of employers under one union.*

**Appellant's submissions**

[11] In motivating the grounds for the appeal, learned Counsel for appellant well-articulated in summary as follows:

*a)* the interpretation mentioned under clause 2.4 leads to inconsistency and absurdity in so far as clause 5.2 is concerned.

*b)* on the second ground, it was erroneous for the court to seek clarity on the meaning of members from common law whereas the Recognition Agreement and the Act establishing appellant defined the term *"member."*

*c)* upon appreciating that the interpretation as advanced under clause 2.4 of the recognition agreement led to absurdity in applying its meaning to clause 5.2, the court ought to have resorted to the meaning outlined in appellant's constitution.

**Respondent's counter**

[12] The respondent insists that there is no absurdity in upholding the interpretation described in clause 2.4 to clause 5.2. It contends that a

dichotomy should be drawn between the "Association" mentioned under the Act and the "Association", that is part of the negotiation team.

**The *court a quo***

[13] Upholding the decision of the chair to the negotiation team, thereby dismissing appellant's application, the learned Judge President reasoned as follows:

> *"12. The Recognition and Collective Agreement between the parties defines 'employee' and employer as well as "Member" and "Association". In terms of the agreement;*
>
> ***i)*** ***Employer*** *shall mean the Government of Swaziland and its representatives.*
>
> ***ii)*** ***Employees*** *shall mean Nurses in the employment of the Employer (the Government of Swaziland and its representative)*
>
> ***iii)*** ***Members*** *shall mean employees who have joined the association in accordance with this Agreement; and*
>
> ***iv)*** ***"Association"*** *shall mean the Swaziland Nursing Association and its representatives.*
>
> *13. In light of these definitions one is inclined to agree with the Respondent's argument that the termination of* **Mr. Lushaba's** *employment by his resignation, terminated his right to sit at the*

*bargaining table on behalf of the applicant. This is so because while both parties are entitled to nominate members of their negotiating teams such members must be employees as described by the agreement. Employees are identified as nurses in the employment of the Swaziland Government. Since* ***Mr. Lushaba*** *resigned, he is no longer an employee in terms of the Recognition Agreement and is ineligible to be nominated as a member of the negotiation team of the Applicant."*[6]

**Common cause**

**[14]** It is common cause among the parties that **Mr. Lushaba** resigned his employment from the respondent on 27th August 2017. It is further not in dispute that **Mr. Lushaba** is a nurse by profession. During his employment with respondent, **Mr. Lushaba** was elected by appellant as the Secretary General. When he resigned his employment, he maintained such position. He is still regarded as the Secretary General of appellant.

**Issue**

**[15]** In view of the Agreement, can **Mr. Lushaba** who retains his position as Secretary General in appellant, despite his resignation from his employment with the Government, be eligible to represent the appellant in the joint negotiation team?

**Determination**

[16] I have already pointed out that according to appellant the answer to the above poser cannot be found in the Agreement. From this submission it appears to me that appellant takes the correct view that the first port of call in addressing

[6] Page 64 paragraph 12 & 13

the issue is the Agreement. This Agreement calls for its interpretation on who exactly is mandated to form part of the joint negotiation team under it.

**Principles guiding interpretation**

[17] **C.G. Hall**[7] had this to say on the interpretation of a document:

> *"To put an interpretation on a document means to ascertain or determine the meaning of the particular words used, the grammatical construction of the sentences, and the facts or external object to which the words of the document relate, thus arriving at the sense of the whole document."*

[18] The learned author then proceeds with eloquence;

> *"The rule of interpretation is to ascertain not what the parties intention was, but what the language used in the contract means i.e. what was their intention as expressed in the contract."*

[19] He then sums it as follows:

> ***"The intention must be gathered from the language they used**, not from what either of the parties may merely have had in mind."*

[20] This approach has been expressed in a plethora of cases by the Justices. **Solomon J**[8] expressed similarly: "*The intention of the parties must be gathered from their language, not from what either of them merely have had*

[7] Maasderp's Institutes of South African Law, Vol 111, 8th Ed at page 26
[8] Pletseu v Heming 1973 AD 82 at page 99

*in mind."* It is at the backdrop of these guiding principles of interpretation that I now make a determination on the issue before me.

[21] The document sought to be interpreted in the case at hand is the Agreement guiding the joint negotiation forum. The bone of contention is who is a member in terms of the Agreement. Clause 2 reads:

> *"2.1 "Association" shall mean the Swaziland Nursing Association and its representative;*
>
> *2.2 "Employer" shall mean the Government of Swaziland and its representatives;*
>
> *2.3 "Employees" shall mean nurses in the employment of the Employer;*
>
> *2.4* ***"Members" shall mean employees who have joined the Association in accordance with this Agreement;***
>
> *2.5 "Technical leaders" shall mean employees who fall under the category as shown in Appendix I."*[9]

[22] From the above, a member of the joint negotiation forum must be an employee who has joined the appellant. This interpretation is not disputed by appellant. Appellant however, contends that employing this interpretation to clause 5.2 leads to absurdity. In order to cure the absurdity, an interpretation outside the Agreement must be employed. This interpretation is sourced from

[9] Page 29 paragraphs 2,2.1,2.2,2.3,2.4 & 2.5

appellant's enabling Act according to appellant. Let me now apply the submission by appellant with a view to ascertaining its results.

[23] Clause 5.2 reads;

> *"5.2 Both the Employer and the Association shall, respectively, nominate* ***members*** *of their negotiating teams which shall consist of not more than eight (8) representatives each. The Employer and the Association agree to adopt "the Procedure and Conduct of the Negotiations" in the form and manner contained in Appendix 3 of this Agreement."*[10]

[24] Applying clause 2.4 to clause 5.2 entails substituting the word "member" with the definition mentioned under clause 2.4. Clause 5.2 would then read;

> "Both the employer and the Association shall, respectively nominate ***employees who have joined the Association in accordance with this agreement*** of their negotiation teams which shall consist of not more than eight (8) representative each."

[25] I must accept that the above does not make sense. It creates a lacuna. The lacuna is that it leaves out the members from the Government team. My next step is to put aside the interpretation as directed under clause 2.4 and resort to the interpretation of "*member*" as defined in the Nurses and Midwives' Act No.16/1965 as contended by appellant. Appellant referred the court to section 25 which reads:

[10] Page 31 paragraph 5.2

*"25. (i) There is hereby an Association to be known as the Swaziland Nursing Association.*

*(2) The Association shall be a body corporate and may, in its corporate name, sue and be sued.*

*(3) The law relating to trade unions shall not apply to the Association.*

*(4) The Association shall consist of –*

*(a) all nurses and midwives who are registered or enrolled, to be known as senior members; and*

*(b) all student nurses and pupil midwives in training in Swaziland, to be known as junior members.*

*Who pay the fee payable under section 30(a)."*[11]

[28] Now does applying this broad category of nurses (as it is inclusive of not just qualified nurses but student nurses as well) cure the defect pointed out by appellant in clause 5.2? Using the same analogy of substitution, clause 5.2 would read as follows in applying section 25 of the Act:

*"5.2 Both the Employer and the Association shall respectively, nominate nurses and individuals who are registered or enrolled to be known as senior members and student*

[11] Section 25 of the Nurses and Midwive's Act No. 16/1965

*nurses and pupils midwives in training in Swaziland, to be known as junior members who pay the fee payable under section 30 (a) of their negotiation teams which shall consists of not more than eight (8) representative each."*

[29] Now, is the reading making sense after importing section 25 of the Act? Does it cure the defect of bringing sense to clause 5.2 by expanding *"member"* to include eight representatives from the Association and eight from the Government side? The answer is an emphatic "No." In other words, we are back to square one whether we consider the definition under clause 2.4 of the Agreement or section 25 of the Nurses and Midwives' Act No. 16 of 1965 as suggested by appellant. In the scheme of things therefore, the submission on behalf of appellant that the absurdity could be cured by applying section 25 of the Nurses and Midwives' Act No. 16 of 1965 holds no water. It therefore stands to be rejected

[30] In its application before the *court a quo*, appellant had referred to the definition of *"member"* ascribed by appellant's constitution. I must point out that when the matter was argued before us, appellant's Counsel insisted on Section 25 of the Act. The judgement sought to be impugned was based on the definition of *"member"* as per appellant's constitution. I shall consider the same in an endeavour to test whether the lacuna so identified under Clause 5.2 of the Agreement is remedied.

[31] Article 3(11) of Appellant's constitution reads:

| | | |
|---|---|---|
| *"Nurse* | *:* | *Practising nurse in Swaziland current registered with the Swaziland Nursing Council* |
| *D.E* | *:* | *State registered Nurse*<br>*Enrolled nurse*<br>*Nursing Assistant"* |

[32] Again, substituting the word *"member"* with the above, does not cure the defect that would result in the wording of clause 5.2 of the Agreement catering not only for the Union team but the Government team. How then do we address the lacuna evident in clause 5.2 created by the definition under clause 2.4? The answer is found from the principles of interpretation: Before admitting any extrinsic evidence, the wording of the entire document must be considered first. It is only where the absurdity or lacuna as it were persists that extrinsic evidence of the intention of the parties must be resorted to.

**The Agreement - Section 5.2**

[33] Section 5.2 refers to the Appendix 3 of the Agreement. Appendix 3 clause 2 refers to the *"team composition."* It reads;

> *"2.* ***Team Composition***
> *Each team shall consist of not more than:*
> *One (1) Chairman*
> *One (1) Vice-chairman*
> *Six (6) Representatives"*[12]

[12] Page 41 paragraph 2

[34] Now we know from appendix 3 who the members from the Association and Government are. These are from each side a chair, vice-chair and 6 representatives. So clearly when the drafter at clause 5.2 referred to members, it meant members of each team. However, this still does not answer the issue at hand, namely whether **Mr. Lushaba** who is no longer under the employment of Government although a registered nurse, can form part of the Association team for purposes of the joint negotiation forum.

[35] The answer lies in the interpretation of the Agreement. From clause 2.4 read with clause 5.2 together with Appendix 3 (which shows that there are 2 teams from the Association and Government) it is clear that the intention of the parties were that those who are to negotiate are members (employees either from the Association or Government) by virtue of being employees of the government. So both teams must be employees of the Government. However, with regard to the Association, there must both be employees of the Government and members of the Association. The qualification mentioned under clause 2.4 in respect of the Association is vivid in clause 4.2.2 which reads:

> *"4.2.2 in representing its members designated officials shall not leave their work stations to perform the Association's duties without the written permission and/or knowledge of their Employer, which shall not be unreasonably withheld. The Association's officials shall, at all times, remain subject to the law and regulations governing civil servants."*[13]

[13] Page 30 paragraph 4.2.2

[36] Clearly, from the above one who intends to represent the Association in negotiation cannot abandon his duties on the basis of attending to the business of the Association under the Agreement without a written authority from his supervisor. Secondly, "the Associations officials" – meaning the eight member team on behalf of the appellant are at all material times bound by civil servants regulations and rules. So how could **Mr. Lushaba** who is non civil servant not member of the government remain an official of the Association for its business under the Agreement? He certainly cannot by virtue of terminating his employment with the Government. He cannot be referred to as civil servant who is bound to abide by the Orders governing civil servants. Now this applies to employees of the Government and certainly not to a non-employee in the likes of **Mr. Lushaba.** This is the spirit or intention of the parties to the Agreement. This intention emanates from the language of the Agreement itself as per **Solomon J supra.**

[37] The appellant raised a further ground to the effect that the judgment by the *court a quo* is to the effect that the Association consists of members who have only one employer and that is the Government. This is an incorrect position as the Association has members who are employed by other employers such as belonging to the private sector just like SMAWU or SUFIAW for instance.

[38] Well and good. However, let us test that submission against the Agreement which sets out the negotiating forum. The title of the Agreement reads:

> *"Between*
>
> ***The Government of Swaziland***
>
> *Herein Represented by the Ministry of Public Service & Information*
>
> *(Hereinafter referred to as the **Employer**)*
>
> *And*
>
> ***The Swaziland Nursing Association***

*(Hereinafter referred to as "SNA" or the **Association**)*[14]

[39] From the above, it is clear that the parties to the Agreement are the Government and the Association. Now, the preamble to the Agreement which tells us the aspiration and intentions of the parties' states:

> *"1.* ***PREAMBLE***
>
> *The Parties to this Agreement have determined:*
>
> *1.1 to regulate the relations between them in the interest of mutual understanding, operations, efficiency and productivity;*
>
> *1.2 to ensure a speedy and impartial settlement of disputes and grievances affecting members of the Association; and*
>
> *1.3 to take steps to ensure that the recognized negotiating procedure is known and understood by all employees at all levels of management and that agreements reached as a result of negotiations are understood and accepted by all parties to them."*

[40] Bearing in mind the above purpose of the joint negotiation forum as per the Agreement, now accepting for a second that the Association as mentioned in the Agreement consists of members who are employees of other employers other than the Government, is it justifiable to say that the Government as a single employer to the Agreement is entitled, for instance, to *"ensure a speedy and impartial settlement of disputes…"* on behalf of the other employers as well? Or to come closer home, the issue on the table is "*the implementation of*

[14] See page 28 of book of pleadings

*the on-call allowances in terms of Circular No:1 of 2018*." Now, is it correct to say that Government, at the exclusion of the other employers, can negotiate with representatives of its nurse employees and those from the private and parastatal sectors and take resolutions which will bind the other employers who are not part of the negotiation forum? The answer could be a 'yes' provided the other employers mandated the Government to do so on their behalf. In the case at hand, there is no such mandate and appellant has not referred the court to any. The Government entered into the Agreement to safeguard its interest together with those of its nurse employees. In the result, it cannot be said that the employees envisaged under the Agreement includes employees from other employers other than the Government. Yes, it could, generally speaking, be that the Association broadly includes nurses employed elsewhere other than the Government. However, when it comes to the Agreement serving between the parties, the negotiations are between Government and the Association whose members are also employees of the Government as clarified by clause 2.4. It stands to conclude therefore that the judgment of the *court a quo* cannot be impugned even under the last ground of appeal.

**[41]** In the final analysis, the judgement by the Judge President in the *court a quo* cannot be assailed. I therefore enter the following orders:

41.1 The appellant's appeal is dismissed.

42.2 The *court a quo's* decision is confirmed;

43.3 No order as to costs.

_____

**M. DLAMINI AJA**

**I agree:**

_____

**N. MASEKO AJA**

**I agree:**

_____

**M. LANGWENYA AJA**

| | | |
|---|---|---|
| **For the Appellant** | **:** | T.C**.** Mavuso of Motsa, Mavuso Attorneys |
| **For the Respondent** | **:** | N. G. Dlamini of the Attorney General |