IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 30/2019**

In the matter between

FTM GARMENTS (PTY) LTD Applicant

And

AMALGATED TRADE UNION OF SWAZILAND (ATUSWA) Respondent

Neutral Citation: FTM Garments (Pty) Ltd vs Amalgated Trade Union of Swaziland (ATUSWA) (30/2019) [2019] SZIC 15 (February 20, 2019)

Coram: Sipho Madzinane – Acting Judge

(Sitting with D.P. Mmango and Ms. N. Dlamini

Heard: 11/02/2019

Delivered: 20/02/2019

J U D G E M E N T

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1. Before Court is an urgent application filed by the Applicant (an employer) against the Respondent which is a trade union duly registered in accordance with the Industrial Relations Act. The Applicant is seeking the following relief:

(i) *Dispensing with the requirements of the rules of Court pertaining to service of process and time limits and permitting this matter to be heard as one of urgency*.

(ii) *The Respondent is interdicted and restrained from*:

1.1. Holding meetings at the Applicant's premises and/or near the premises.

1.2. From connecting any sound system near the premises of the Applicant.

iii) Pending finalization of the dispute reported to Conciliation Mediation and Arbitration Commission (CMAC), the Respondent be interdicted

from communicating with the Applicant's employees in a manner that will disturb production.

(iv) *Directing that the order issued by this Court, operate with interim and immediate effect, and that the Respondent shall come on a date to be set by this Honourable Court, why orders 2.1, 2.2 and 3 above should not be made final*.

(v) *Ordering the Respondent to pay costs in the event that it opposes this application at attorney and own client scale*.

(vi) *Further and/or alternative relief*.

2. The application is supported by an affidavit deposed to by the Human Resources Manager of the Applicant. Applicant has stated the following in his founding affidavit:

2.1. That Respondent mounted a sound system at the Applicant's gate and started playing music and making speeches in an attempt to call Applicant's workers into a meeting.

2.2. Applicant contends that the essence of the exercise is to recruit Applicant's employees to join the union. In the process, the exercise by the union is disturbing the Applicant's operation as management could not hold meetings with its clients and/or customers, as the sound generated by the system made it impossible for any level of concentration.

2.3. That the sound system was mounted before lunch and after the exercise, the workers of the Applicant were no longer productive, as they were seen in groups discussing what they were told in the meeting.

2.4. That there is recognition matter that is pending at CMAC which is set for continuation on the 19th February 2019. Further that Applicant has never received an application for recognition from the Respondent.

2.5. That Applicant did write a letter to the Respondent complaining about the unlawful conduct and further the company attorney called the said Officer (Sibonelo Tsabedze) of the Respondent, who maintained they were within their rights and they will continue hence the application before Court.

3. The application is opposed by the Respondent and raised the following points of law:

3.1. **DISPUTE OF FACT**

Respondent avers that the union officials did address the workers on the date alleged by Applicant. They did not use any sound system before lunch break but arrived when already the workers out for lunch and when addressing the workers, they were standing on the other side of the road opposite the Applicant's premises. The union did not use a sound system but a single rechargeable mini speaker.

3.1.1. That the union was not there to recruit members and that at any event, it is normal for them to continuously recruit new members. The union officials were there to give feedback to their members regarding their matter pending at CMAC.

3.2. **ULTRA VIRES**

Respondent contends that the Industrial Relations Act allows the union to share information with its members in good faith. As such, the Applicant seeks to limit the union and workers' rights unlawfully. The relief sought from the court would limit the rights of the Respondent from communicating with its members.

3.3. **AD URGENCY**

Respondent also challenged urgency of the application. It being argued that when the application was filed, the meeting had already ended.

Further that Applicant can have such relief in due course at CMAC as the issue of recognition is pending at CMAC and there is no reason why the Applicant cannot have redress in terms of Part VIII of the Industrial Relation Act.

3.4. That Applicant has failed to satisfy the requirements of an interdict.

4. Respondent pleaded over to the merits but essentially, it reiterated the facts as already highlighted above in the points of law.

5. On the first appearance of the matter, on the 08th February 2019 the parties agreed to record an undertaking to the effect that Respondent will not have any meeting at and/or near the premises of the Applicant and play or *use a sound system* pending finalization of the matter. The Court then directed the parties to file their pleadings and the matter was allocated the 11th February 2019 for hearing of arguments.

6. On the day of hearing of arguments in the matter, the parties agreed to deal with both points of law and the merits of the matter. Accordingly, this will be a judgment on the matter both the points of law and the merits.

7. Respondent was the first one to address the Court on the points of law.

AD DISPUTE OF FACTS.

Respondent argued that there is a dispute on whether the union used a sound system or not. Further whether it was at the gate of the Applicant. Respondent argued that they were on the other side of the road opposite the gate of the Applicant. That it used a speaker not a sound system.

Applicant has contended that it was at or near its gate and as a result of the noise; it could no longer be able to hold meetings of management with its customers and/or clients. Further that Respondent has conceded using a sound making device to substantiate Applicant's case.

8. In determining the question of a dispute of facts, in the case of **E1 Ranch (PTY) LTD V Early Harvest Farming (PTY) LTD – Appeal Case No. 21/2017,** the Supreme Court stated as follows:

"**…It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of fact to conclude that an application cannot properly be decided on the affidavits"**

The Court has a duty to carefully scrutinize the nature of the dispute with a microscope lens to find out:

(i) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way, that the determination of such an issue is dependent on or influenced by it;

(ii) If the fact being disputed, though material to the issue to be determined, but there is dispute is such that by its nature it can be easily resolved or reconciled within the terms of the affidavits.

(iii) If the dispute of a material *fact is such* a nature that even if not resolved, it does not prevent a determination of the application on the affidavit.

(iv) If the dispute as to a material fact is a genuine or a real dispute.

9. When applying the law into the facts, the court finds that the dispute is not so material as to make the court not able to determine the matter in the affidavits filed. Respondent and the Applicant both concedes that a sound making device was used on the day in question. Secondly, Applicant contends that Respondent was recruiting new members whilst Respondent is saying it was updating its members. It is the Court's finding that in essence, Respondent was communicating with Applicant's employees whatever the subject of discussion. Accordingly, this point of law regarding dispute of facts is dismissed.

10. **AD ULTA VIRES**

Respondent contends that the relief sought by the Applicant is ultra vires in that it seeks to limit the right of the union to communicate with its members. Respondent argues that it will be in contravention of **Section 28 (2) and (3) and Section 104 of the Industrial Relations Act 2000** as amended.

10.1. It is this Court's finding that **Section 28 (2)** does not apply in this matter. What Respondent is accused of is disturbance of the business operations of the Applicant not its rights to advise or update its members. To the extend, if it is correct that Respondent was updating its members, that it was doing so without any disturbance of the business of Applicant, then it is unlikely that these proceedings would have been initiated. Accordingly, this Court finds that in the process of the union officials' business of updating its members who are

employees of the Applicant, it disturbed the business operations of the Applicant and as such, Applicant is entitled to seek legal redress.

10.2. **Section 98 and Section 104 of the Industrial Relations Act** again are not applicable in this matter. What is challenged is not the right of the Respondent's members and/or the respondent to recruit and update the Applicant's employees who are its members.

(a) To make it worse, **Section 104 (1) and (2)** speaks of a right of the employer to grant access. In this case there is nowhere in the affidavit of the respondent that Respondent decided to pursue the updating of its members in the manner it did because the employer refused to grant it access. During the hearing of the matter, the Court enquired from the Respondent's representative whether it did send or make a request to the Applicant. Respondent told the court that they did not sent a request nor make any because the union has not been recognized yet.

10.3. Accordingly, the Court dismisses the point of law on ultra vires.

11. **AD URGENCY**

Respondent has argued that Applicant has failed to satisfy the grounds of urgency. It is Respondent's case that the meeting complained about was held during the Applicant's employees lunch time. The meeting had ended when the union was served with an ultimatum. Further, that as there is a

matter pending at CMAC and scheduled for the 19th February 2019, Applicant can be afforded redress in due course as the parties are still to appear at CMAC. Further that Applicant could have engaged the union officials regarding a convenient place on when the union could suitable update its members.

11.1. In response, Mr Gamedze told the Court that this application is urgent because by the conduct of the Respondents Applicant could not continue with its business meetings. Further, they did call the union official Sibonelo Tsabedze but she insisted that they will proceed with other meetings.

11.2. It is the Court's finding that the facts of the matter point out clearly that it is urgent. The incident complained of took place on the 06th February 2019 and application was filed on the 07th February 2019. Before the application was filed, a letter was written to the union and was followed up by a tele-conversation with one Sibonelo Tsabedze, a union official. The said Sibonelo Tsabedze instead told the company lawyer that the union was to proceed with holding the meetings and using the sound emitting device. Accordingly, the point on urgency is dismissed.

12. **AD REQUIREMENT OF AN INTERDICT**

Respondent has argued that the Applicant has failed to satisfy the requirements of an interdict. It being argued that the Applicant has failed to

satisfy all the requirements of an interdict. Applicant has argued that it has satisfied the elements of an interdict.

12.1. **AD PRIMA FACIA RIGHT**

The Court finds that Applicant has satisfied all the requirements of an interdict. Applicant has demonstrated that it has a right to conduct its business without any interference and disturbance of anyone including the Respondent. The rights referred to in the pleadings by the Respondent, have no way been taken away and/or interfered with by the Applicant.

12.2. **AD IRREPARABLE HARM**

The Applicant has deposed to the fact that through its attorneys, it called the official of the Respondent, one Sibonelo Tsabedze who in turn told the Applicant's representative that they are going to continue with their activities (meetings and usage of the sound system). In that regard, Applicant filed the affidavit to Mr Banele Gamedze to confirm the allegations. In the answering affidavit, Respondent admitted this fact and filed the affidavit of Sibonelo Tsabedze who confirmed the allegations of Wonder Mkhonta.

Accordingly, this Court finds that Applicant has satisfied the requirement of apprehension of irreparable harm.

12.3. **AD BALANCE OF CONVENIENCE**

It is trite law that consideration of balance of convenience is relevant when determining whether or not to grant an interim order. In this matter, at this stage, it is no longer necessary to consider such point of law in as much as the parties are already dealing with a final order not an interim order on the merits of the matter. It being accepted that the parties agreed on the first day of appearance of the matter in Court on an undertaking. At any event, the Court has discretion in determining whether or not this aspect has been satisfied. In doing so, it considers all the facts placed before it in the founding affidavit. Accordingly, there is no point in determining this point at this stage.

12.4. **AD NO ALTERNATIVE / SATISFACTORY REMEDY**

In the answering affidavit, respondent deposed to the fact that Applicant should have raised the matter at CMAC as already there is a dispute between the parties in terms of Rule 28 of CMAC Rules. In response, Applicant pointed out that the application relates to activities of the respondent not in respect of the issue at CMAC currently pending.

It is the Court's finding that applicant has satisfied the requirements of an interdict. Respondent has failed to show how such an issue could have been dealt with at CMAC when there is no dispute reported to CMAC about it. The dispute pending at CMAC is about recognition in terms of Section 42 of the Act not a disturbance of the business operations of the Applicant.

13. The Court would like to place it on record that the Industrial Court is guided by the Industrial Relations Act in its work. As such, parties are encouraged not to be overly technical but should pay attention to the substance. In this regard, the Court would advise parties to consider Section 11 (1) of the Industrial Relations Act 2000 as amended.

S11(1) "The Court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice".

13.1. Accordingly, the Court finds that the line of opposition of the application by the respondent is technical and does not in any way set out facts that constitute a proper defence to the application.

14. Secondly, the Court would like to encourage the parties to start their relationship in a cordial and responsible manner. The Sections of the Act relied upon by the Respondent are not at all of assistance to the Respondent. If anything, Section 104(2) of the Industrial Relations Act, set out clearly, that the employer will grant access and has a discretion to impose restrictions.

15. What compounds the Respondent's case, is that there was never a request to the employer asking permission to meet its members in the first place. As such, it is difficult for this Court to find any unreasonableness on the part of

the Applicant. At any event the proceedings before the court are not at the instance of the respondent having been denied access to its members.

16. Further, the code of good practice in the Industrial Relations Act Section 27 states as follows:

S27 " An essential ingredient for sound Industrial Relations is mutual trust and respect between an employer and any organization representing employees. To establish this trust and respect, there should be regular contacts between the parties. Such contacts should not be left until there is a problem. Equally, employee organizations should be provided with facilities to meet members in order that they may represent them effectively".

17. Accordingly, the parties are encouraged to be respectful to the other for the smooth and beneficial relationship.

18. The court may urge the parties to try their level best to establish their relationship in an orderly and lawful manner. The relationship may benefit both as envisaged by the law.

19. The Court may point out that the respondent did not say much on the merits of the matter both during the argument and in its pleadings. Applicant though insisted on the fact that it has made out a case for a final order. In the premises, the Honourable Court will grant prayer 1, 2.1, 2.2 and 3 of the notice of motion as final orders.

The Court will not grant an order for costs as that can adversely affect the prospective relationship of the parties even before it can start.

20. The members agree.

SIPHO L. MADZINANE
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant:	*B. Gamedze*
	(Musa Sibandze Attorneys)
For Respondent:	*D. Dlamini*
	(A T U S W A)