



**CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MBABANE

SWMB 80/13

In the matter between:-

**WORKERS UNION OF SWAZILAND
TOWN COUNCILS**

APPLICANT

And

MUNICIPAL COUNCIL OF MBABANE RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini
For Applicants : Mr. M. Mkhwanazi
For Respondent : Mr. Z. Jele

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

The Applicant herein is the Workers Union of Swaziland Town Councils (WUSTC). The Applicant is a Trade Union whose members are unionisable employees of the Respondent. The matter before the Commission, for arbitration was instituted by the Applicant on behalf of those employees.

The Applicant's postal address is P.O. Box 7072, Mbabane. Mr. Mandla Mkhwanazi, an attorney from the law firm of Mkhwanazi Attorneys, appeared on behalf of the Applicant.

The Respondent is the Municipal Council of Mbabane, a statutory body of P.O. Box 1, Mbabane. The Applicant was represented herein by Mr. Zweli Jele, an attorney from the Robinson Bertram firm of Attorneys.

2. **ISSUES IN DISPUTE**

The nature of this dispute is one of cost of living adjustments of 10%, for the period 2012/2013.

The Applicant claims a 10% cost of living adjustment for the said period, whilst the Respondent submitted that it could not afford to effect the said cost of living adjustment because it did not have sufficient funds to facilitate same.

This dispute was certified as unresolved by virtue of the certificate of unresolved dispute no. 191/13.

3. SUMMARY OF EVIDENCE

3.1. THE APPLICANT'S CASE

The Applicant's representative called Mr. Vusi Simelane, who is the Chairman of the Applicant to testify in support of their case.

3.1.1. THE TESTIMONY OF MR. VUSI SIMELANE

Mr. Simelane testified under oath that he is the Chairman of the Applicant. The witness stated that the Applicant has a Recognition and Procedural Agreement with the Respondent, which agreement contained a negotiation procedure. He stated that it had been agreed upon that the Applicant and the Respondent, would in each year negotiate the review of salaries, with a view to effecting an increase in light of the inflation rate of that particular period.

The witness stated that they, as Applicants had made an initial demand of 15% which was negotiated down to 10%, whilst the employer simply offered a 0% adjustment. He stated that this was clearly in bad faith, as the employer did not take into account the inflation rate of the given period, and neither did the employer factor in the recently introduced Value Added Tax.

Mr. Simelane stated that the employer had simply told them that the Swaziland Government had issued a directive as per Public Enterprise Units Circular No. 1/2012 that they were not to effect any kind of increments, but refused to show the Applicants the said instrument which they alleged bound them to follow the said directive by the Swaziland Government.

The witness stated further that the employer also cited a restructuring exercise that the council had to undertake, as the rationale for their offer of a 0% inflation adjustment for the period of 2012/2013. Mr. Simelane stated that this was not a good enough reason for the 0% offer as the restructuring exercise was not new, and it had never hindered their negotiations, and their agreements on the salary adjustment based on the rate of inflation in previous years.

The witness referred to Minutes of a negotiation meeting between the parties for the year 2006/2007 wherein it was recorded that the parties agreed that the basis for negotiations would be 12 months average of the inflation period. The said Minutes were admitted as part of the Applicants' evidence. He stated that this was the way in which the parties had agreed to conduct negotiations, and that this had been the manner in which they had done things from the year 2006. He stated that this agreement had prevailed regardless of the financial situation faced by the Respondent.

The Applicant also referred to Minutes of the 28th of August, 2012, and also to those of the 14th of September, 2012. These minutes were all admitted as part of the Applicant's evidence, and they recorded that the Respondent was in receipt of the Applicant's demand for the 2012/2013 Cost of Living Adjustment, and there was a request by the Management of the Respondent, for the Applicants to motivate the demand for a 15% salary adjustment, in view of a directive from the Swaziland Government. The witness stated that to date the Management of the Respondent had never showed them the instrument through which the Swaziland Government instructed the Respondent not to offer anything more than 0% for the salary adjustment.

The Applicant's witness also referred to the Respondent's allegations that over and above the said Circular No. 1, the World Bank had issued the Council with a directive to engage in a restructuring exercise that meant that they could not effect a cost of living salary adjustment. The Applicant's witness referred to minutes of the 4th of December, 2012 where the management of the Respondent stated that the 15% demand made by the Applicant would escalate the Council's Wage Bill from 32 million to 37 million, which thing was said to be unsustainable.

He stated that at this meeting the employer stated that the employer was offering a 0% counter offer to the demand of a 15% cost of living adjustment.

The Applicant testified that the financial year 2012-2013 had been the first time that the Applicants were not offered anything at all in terms of cost of living adjustments. He stated that in previous years they had been offered something despite the existence of all of these fiscal challenges, and the recommendations by the World Bank.

The Applicants witness referred to the minutes of the 29th of January, 2013 which recorded that the parties had deadlocked on the issue of the cost of living adjustments for the financial year 2012-2013. The witness stated that as a result of this deadlock, the parties drafted and entered into an agreement in which they encapsulated the fact that they had deadlocked on this issue. The minutes referred to were also admitted as part of the Applicant's evidence, as well as the said agreement.

During cross-examination, the Applicants' witness confirmed the existence of a Recognition Agreement, signed in the year 2009 between the parties, he also admitted that the Council is a Municipal body that is regulated by the Urban Government Act 5/1969.

The Respondent's representative put it to the witness that the said Act, in section 51 requires that all amendments of all terms and conditions of employment of staff must be approved by the Ministry of Housing and Urban Development. The witness stated that he believed that the said Minister had delegated those powers to the Management of the Respondent, and they had been, as parties, negotiating such issues and effecting cost of living adjustments all along. He stated that the employees had a Staff Standing Order which entitled them to the said adjustment.

The Applicants' representative was asked if it was indeed a clause included in the Recognition Agreement that every negotiation the basis would be the rate of inflation? The witness conceded that this was not stipulated in the agreement, but it had been an established practice that the parties would use the rate of inflation as the basis for negotiations.

The witness also agreed that the Council receives a subvention from the Government of Swaziland, and that the Council also sources its finances from health reports, refuse collection, rates and other services rendered to the members of the public. The Respondent's representative also stated that the Swaziland Government had a right to then dictate policy on how the money ought to be utilized.

Mr. Jele cited the Constitution of Swaziland, section 56, which provides that the entities that receive and utilize public funds must uphold the Government policy of the day on the utilization of funds. The witness stated that he was not aware of this law, but maintained that he was relying on the Recognition Agreement with the employer, and the fact that this is the way they had operated in previous years.

The Applicants' witness was asked if they had been receiving wage increments in the past three years? Mr. Simelane confirmed that this had been the case. He narrated how they had received the following increments:-

- 2010-2011 – 5%
- 2011-2012 – 5%

The Respondent's representative put it to the witness that he had been instructed that they had not received such an increment in the financial year of 2011-2012. The witness maintained that they had indeed received the increment, and challenged the Respondents to produce proof of the contrary.

The witness was asked if he and the Union had been made aware that the Council had asked for funding from the World Bank to run certain programmes, and had to adhere by the stipulations made by this Organisation in order to qualify for the grant of the money.

The Respondent's representative stated that the World Bank had issued a directive that the Councils personnel costs should not exceed 4% of the total expenditure. He stated that the International Monetary Fund (IMF) had directed that the Council should cut their personnel costs by 10% and not look at effecting increments. The witness stated that he was not aware of this.

The Respondent's representative referred to the witness to the minutes of the meetings between the parties, dated the 4th of December, 2012 where it is stated under item 4.0(2) that the 15% demand could not be met by Council as it would increase the wage/salary bill from 32 million to 37 million which would not be sustainable. Mr. Simelane stated that this was only in relation to the 15% demand, and not the 10% demand that they were now pursuing. He maintained that the employer had failed to communicate the reasons why they simply offered 0% as a counter offer to their reduced demand of 10%.

Mr. Jele referred the witness to the minutes of the meeting between the parties dated the 29th of January, 2013, and in particular item 6.0 where it is stated that there was no budget for the 2012/2013 cost of living adjustment on account of the anticipated, restructuring exercise.

The Respondent's representative put it to the witness that the Respondent had been candid with the Applicants and stated that they were unable to pay the said increment. He stated that the demand made by the Applicants had not been based on what was in the budget as approved by the Government, but on external factors. The witness stated that the employer had not said to them as a Union that it was unable to pay, but had relied on the Government's directive not to effect increments, that was the only hindrance for the Council that was tabled to them. He stated that the directive from the World Bank had very little to do with the Cost of Living Adjustment that was required because their salaries had to be sufficient to deal with the rate of inflation. He stated also that the council had failed to furnish the Union with a copy of the said directive for Government which alleges by the Applicants rendered the employer incapable of effecting the Cost of Living Adjustment.

3.2. THE RESPONDENT'S CASE

The Respondent's representative called Mr. Nhlanhla Vilakati, who is the Respondent's City Treasurer to testify in support of the Respondent's case.

3.2.1. **THE TESTIMONY OF MR. NHLANHLA VILAKATI**

The witness testified that he is currently employed by the Respondent as the City Treasurer, a position also known as Director of Finance. He stated that he had held the position for the previous seven (7) years.

He stated that it was part of his duties to ensure that the Council had sufficient funds to carry out its mandate. He stated that most of the Council's funding is sourced from the collection of rates (property taxes), and also the Council's revenue. He stated that the decision as to how the Council's funds were to be utilized was based on a determination made by the Councillors, and the Management of the Respondent. He stated that the budget, once completed, and approved is then advertised for inspection by members of the general public. He stated that it is advertised for a month, and taken to the Ministry of Housing and Urban Development for approval (with or without adjustments). He stated that increases in personnel costs such as salary reviews and adjustments would have to be included therein, and approved by the Council.

He stated that increases in personnel costs would have to be approved not only by the Councillors, but also by the Ministry of Housing.

He stated that the Ministry has the final say on any salary adjustments that the council would be desirous of effecting.

The witness testified that they are enjoined by a provision of the Urban Government Act to publish the financial statements and the budget, and these must also be scrutinized by auditors.

He stated that the council can only spend what has been budgeted for, and duly approved by both the council and the Ministry. The witness stated that the Union, as well as members of the general public all have equal access to the financials, of the council (financial statements and the budget).

The witness stated that he is one of the members of Management who participates in the salary negotiations meetings with the Applicants' union. He referred specifically to the 2012-2013 Cost of Living Adjustment negotiations, he stated that he was aware of the demand that was made by the Applicant of 10% increment and explained why the employer could not meet this demand. He referred to the Swazi Government's directive that the council should not increase salaries because the Government would not be able to finance such an increase because of the poor state of the economy.

He stated also that the council is in the middle of a restructuring process. He pointed out that a team from the World Bank had advised the Respondent to cut down on their high wage bill. He stated that this was in a bid to get some funding from this organisation so as to finance some of the Respondent's programmes and also to build capacity. He stated that this team had also recommended that the council should embark on a restructuring process which would enable the council to deliver services to the people of Mbabane with minimal resources. The team of experts stated that the council's wage bill was very high compared to acceptable worldwide standards, that is, 30-40%. He stated that the council's current wage bill stands at 50% - 60% in relation to the total revenue of the council. He stated that this was found to be unacceptable and the council had to abide by these directives in order to qualify for the access to the finances to be provided by the World Bank.

He stated that it would be very perilous for the Council to ignore these recommendations by the World Bank, as the council needs these funds to pursue its capital projects. He stated that presently the council has been given just over three million Emalangenani to fund such projects around the city of Mbabane, such as maintenance of roads, and upgrading these as well. He stated that the council has very little choice as it needs to access these funds.

The witness stated that Council did not have the financial ability to meet the 15% demand that was made by the Applicants. He stated that this would have resulted in an inflation of the already very high wage bill, and would also have resulted in the Respondent being disqualified from accessing the World Bank's funds.

The witness also referred to another reason that was a factor in the council's inability to meet the 15% demand by the Union as being the intervention by the Swazi Government. He stated that the Swazi Government is a major financier of the Council and therefore the Respondent has to necessarily cooperate with the directives issued by it. He stated that 50% of the Council's income is received from rates from the Government, and from private property owners, and as the Government had been pressed for money due to the economic down-turn, the Council had not received its dues from it.

He stated that the Council was loathe to defy any directives from the Government as they had previously experienced a situation where the Government had held back their rate revenue, and the council had suffered a great deal financially. He stated that this had occurred in the period between the year 2007 and 2008.

He stated that the Government had instructed the council to freeze salaries and not to effect increments so they had complied with this new instruction.

The witness stated that in all the meetings with the Applicants, the Management of the Respondent had made these reasons for the council's inability to pay known to the Union.

The witness further referred to the state of the council's financial state and in particular to the council's Annual Financial Statements for the year ended 31st of March, 2013. He stated that the financial statements reflected that the council had made a surplus of E4,174.098. He stated that the surplus did not necessarily translate into cash, which would be needed to pay the increments in salaries.

He stated that the staff/personal bill for the past six financial years was E31 million per year, which translates to E2.6 million per month. He stated further that to pay out money to meet the wage bill, whilst at the same time the revenue per month was E5.2 million was untenable. He said not all of the E5.2 million was cash. He said it was made up of cash and credit transactions.

He stated that with the poor economic position of most of the Swazi populace, the council could not collect the desired E5.2 million.

He said the collection rate is very low, such that the E5.2 million had to be discounted by 59%, which brought the amount collected to E3.1 million (and yet the council desires to receive at least 80% of the rates collected). He stated that if one compares the cash position of E3.1 million with the E2.6 million which is the average wage bill, the end result is a meager E500,000.00 (approximately).

He stated that this five hundred thousand emalangeni was clearly insufficient to meet all of the council's expenditures, and there would be a need to resort to digging into the reserves of council in order to meet other expenses. He said this would lead to a situation of near bankruptcy, and was clearly unsustainable as the council did not have the financial muscle, and the cash flow reflected in the financial statement is an aggregation of all activities.

The witness referred to page 12 of the financial statements and explained that the E66,926.378 that was reflected there as cash at the end of the year was actually not all meant for operations of the council, he stated only about E20 million was for operations, but the rest was for Council projects, restructuring and all other things that had to be pursued by the council.

He said the personnel cost for the financial of 2012 – 2013 was actually E33 million, so the projection made, according to him made the situation very severe.

According to the witness in terms of the World Bank standards and Conventional Employment Standards, the ratio of personnel costs in relation to the total expenditure costs to run a sustainable organisation ought to be :- 30:70 the 30 being the personnel costs, whilst the 70 represents the total expenditure. The witness stated that the Respondent currently had a situation where their personal costs stood at around 50% as opposed to 30%.

The witness stated that Council was at present engaged in endeavours to bring the financial position to a sustainable point by embarking on a restructuring exercise, so as to bring down the personnel costs to a desirable level. He also said the council has also decided not to replace employees, who have left the employ of the council, unless the position is entirely critical for service delivery. He said their most viable prospect in the bid to reduce personnel costs is indeed the restructuring process.

During cross-examination the witness confirmed that indeed the parties had a Collective Agreement in terms of which a cost of living adjustment was to be effected every financial year, and that it had been agreed that the basis of negotiation for these negotiations would be the rate of inflation.

He admitted that the parties had agreed that they would negotiate so that the issue of the cost of living adjustment had to be looked at in relation to what the salary adjustment should look like.

The witness was asked if the parties had ever signed an agreement which was to the effect that the employer could validly offer the workers a 0% increment, or to put it another way, nothing at all? The witness conceded that this was not the case. He stated that although the parties had agreed that the negotiation basis was the 12 months average of the inflation rate, but he did not agree that this was what the employer should offer. He did however, concede that the average inflation rate for the year 2012-2013 was not the 0% they had offered.

The Applicant's representative asked the witness that if the increment were to be effected only for those workers who were part of the bargaining unit, would this not be a very drastic impact on the total wage bill? The witness admitted that the impact would not indeed be as drastic as the scenario that he had painted in his evidence in chief.

The witness was asked who was ultimately responsible for ensuring that the collection of rates was effected to its optimum level and increased from the 59% at which it presently stood, to the desired 80%?.

The witness conceded that it was Management of the Respondent, and not the trade union members. The Applicant's representative put it to the witness that it appeared that the workers, and the members of the Trade Union were suffering simply because the Management were failing to carry out their duties effectively. The witness stated that in as much as the Trade Union members were suffering, due to the rising inflation he maintained that it was the poor economic climate which engulfed the whole country which was responsible for the poor collection of rates. He explained there were too many people who were expected to pay their rates but simply could not keep up with their payments, he explained that many homes were now child-headed, and the rate of unemployment was also quite high.

The Applicant's representative put it to the witness that the members of the bargaining unit were entitled to a cost of living adjustment based on the agreement that exists between the parties. The witness stated that he did not dispute this.

During re-examination, he pointed out that even though the council is legally obliged to effect a cost of living adjustment calculated in the basis of the average inflation rate for that year, the issue of whether this was affordable was paramount to the whole matter.

He stated that the Management of the Respondent had considered whether a wage increase of 10% could be awarded to the workers, and it was decided that this was not feasible, bearing in mind that the resultant surplus would have been E900,00.00. He stated that this money was simply not available. He stated that even if the employer only focused on the workers in the bargaining unit only, this would not be sustainable, and they were loath to resort to a short term win as it may have been possible perhaps for a month or two, but certainly not on a long term basis.

4. ANALYSIS OF EVIDENCE

The dispute at hand is centred around a deadlock in negotiations which was reached by the parties over a cost of living adjustment for the financial year of 2012 – 2013. The statement was reached on the 29th of January, 2013 where a deadlock in terms of article 9.02 of the Recognition Agreement between the parties.

It was not in dispute that this agreement existed between the parties, and neither did the Respondent's witness dispute that according to their agreement, the Applicant was entitled to a cost of living adjustment calculated on the basis of the average inflation rate for the financial year under scrutiny.

The Respondent however, gave three reasons for the employer's counter offer of 0% to the employees' demand of an initial 15%, which was eventually reduced to 10%.

- a) The Respondent cited the instruction by the Swazi Government that it should not effect any increments to salaries.
- b) The fact that they were engaged in a restructuring exercise in compliance with a directive by the World Bank.
- c) That the Respondent could simply not afford to effect the increment.

As regards the issue of the directive by the Swazi Government, it is necessary to make reference to the Public Enterprise Unit Circular No. 1/2012, which is an instrument which was issued by the Ministry of Finance to all Chief Executives of "Category A" Enterprises. This instruction is to the effect that for the year 2012, in the case of wage and salaries SCOPE had directed that "major" should be 0% (zero percent). It goes on to state as follows:-

"If you want to increase salaries above (zero percent) 0% you need to get mandate from your Ministry before you negotiate, agree and sign any agreements with Staff Unions. This was communicated to Chairpersons of Category A Public Enterprises by Sub-SCOPE".

It is apparent that the law empowers the Standing Committee SCOPE and the PEU to determine what is "major", however the term "major" should not be read in isolation of the provisions of Section 10 (e) of the Public Enterprises Act, 1989. This provision provides that "Category A" enterprises are enjoined from doing the following without the approval in writing of the Minister responsible acting in consultation with the Standing Committee,

"make any major adjustment to the level or structure of staff salaries and wages or other terms and conditions of service of its staff".

The said Act has attached to it a Schedule which gives a list of all public enterprises to which the Act applies, and places these in categories "A" and "B". The schedule lists the Respondent in schedule "B" of the said Act. It is stated therein that it is the Town Council of Mbabane. It is trite that this refers to the Respondent even in spite of the use of the word "Town" as this refers to the same entity because "Mbabane" after the promulgation of the Act, in 1989, subsequently attained "city" status.

This being the case it is apparent that the instruction contained in Circular No. 1 does not apply to the Respondent since it is a "Category B" Enterprise and a "Category A" enterprise that must first seek ministerial written consent before negotiating, agreeing

and signing any agreements with staff unions that are meant to effect increments to salaries above the (zero percent) 0% mark. This having been said, the first reason for the Respondent's failure to negotiate the demand made by the employees, and to simply offer a 0% increase falls away.

The second reason that was stated by the Respondent for the failure to meet the Applicant's demand for the cost of living adjustment will be dealt with in conjunction with the third one that pertains to the affordability of the increment. The reason for this is that the two are interlinked as the Council, according to the Respondent's witness seeks to comply with the World Bank directive to restructure so as to qualify for funding that is sourced from this organisation.

The Applicants' witness stated that the restructuring process was not new, and had been going on for quite a while but this had not stopped the Council from engaging in cost of living adjustment negotiations, and in fact granting same. The Applicant's witness stated that indeed the only time where they had not been granted a cost of living adjustment is the period of 2012-2013.

The Respondent's representative initially challenged that the Applicants had been granted a cost of living adjustment for the period of 2011-2012, but he did not pursue the point, nor was any evidence adduced to counter it.

According to the author Sonia Bendix, "Industrial Relations", 2^{ed}, page 205, :-

"In wage negotiations, economic conditions are of a particular importance. This negotiations need to take cognizance of inflation levels, cost of living indices, levels of economic activity, business cycle, industry trends and economic forecasts, unemployment level and the general position of the labour market".

This approach finds support in the case of ***Durban City Council vs Durban Intergrated Employees Society 1990 (IL)ILL 619***, which case states as follows:-

"Factors to be considered include statistical material concerning the cost of living although this material should not be mechanically applied, market factors, even where the enterprise is a municipality and does not compete in the commercial market; the effect of inflation on wages and wages paid by similar enterprises".

This position was followed in the case of ***Y.K.K. Southern Africa (Pty) Ltd vs Swaziland Manufacturing & Allied Workers Union I.C. Case No. 303/04.*** The Court in this case also lamented in orbiter that it is not a task that the courts look forward to, when it is asked to step into the shoes of a reputable employer to determine a wage increment, but it finds itself having to do this when they are faced with a situation where a matter of such a nature is brought before it.

The Respondent's witness gave evidence to the effect that the Respondent was undergoing financial hardship, and it was not able to meet the demand of 15% that had been tabled by Applicants because that would have pushed the wage bill of 50% to 60% in relation to the total revenue of the council, even further upward. He stated that this was contrary to the goal of council to decrease the personnel bill towards the 30% mark, as suggested by the World Bank team, so as to make operations sustainable, and to be within the acceptable international standards.

The Respondent witness also acknowledged that the fact of not getting a cost of living adjustment, with the rising inflation rate, severely prejudiced the workers in their livelihood.

He did not however, state how the Respondent's financial status would be affected by a cost of living adjustment that was at par with, or a little below that which had been offered in previous year.

It is true that according to the Applicant's witness the workers of the Respondent had received cost of living adjustments at the following rates in previous financial years:-

- 2010-2011 = 5%
- 2011-2012 = 5%

According to the Consumer Price Index (C.P.I.) the inflation rate for the stated financial years had stood as follows:

2010 – 2011 = 4.5%
2011 – 2012 = 6.1%

The fact remains that despite these inflation rates, and the ongoing restructuring process, the employer had still managed to accord the workers a cost of living adjustment of 5% during these periods.

During the financial year 2012 the inflation rate had stood at 8.9% according to the C.P.I. records. The Respondent's witness did not shed any light on how the financial standing of the council would have been affected by a cost of living adjustment of which was below that which had been offered in previous years. As such, it is my finding that the workers, being entitled to a Cost of Living Adjustment as per the Recognition Agreement should have been accorded some form of adjustment, it not the 10% that they had initially demanded so as to cushion them against the rising inflation rates.

5. AWARD

Having heard both parties, it is hereby ordered that the Respondent is to accord the Applicants a cost of living adjustment of 3% for the financial year of 2012-2013.

**THUS DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF MARCH, 2014.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**