



Ruling

Case Number: **GAEK4363-24**

Commissioner: **Dineo Phokela**

Date of Ruling: **23 May 2024**

In the **Matter** between

Fikile Zwane and 293 others

(Employees/Respondents)

Premier FMCG t/a Mister Sweets (Pty) Ltd

(Employer/Applicant)

Employee's representative: In Person

Employee's address:

Telephone:

Telefax:

E-mail:

Respondent's representative: Employers` Organisation Official

Respondent's address:

Telephone:

Telefax:

E-mail:

Details of hearing and representation

1. The matter was referred to in terms of section 134 of the Labour Relations Act, 66 of 1995 as amended ("the LRA"). The Conciliation process was conducted on 10 May 2024 at 9h00 under the auspices of the CCMA Benoni.
2. The employees, **Fikile Zwane and 293 others** appeared in person. The employer, **Premier FMCG t/a Mister Sweets (Pty) Ltd** was represented by **Mr. Phillip Mare** an official from **PEASA**.

Background to the dispute

3. The employees referred a refusal to bargain dispute to the Commission on 11 April 2024. The employer raised a point *in limine* during the conciliation process where a directive was issued for parties to file their submissions in writing. The employer is to file their submissions on 13 May 2024 and the employees may file their submissions on 16 May 2024.

Issue/s to be decided.

4. I have to decide whether the CCMA has jurisdiction to conciliate the matter.

Summary of evidence and argument

Employer's submissions

5. The employer argues that they signed a recognition agreement with a majority trade union effective as of September 2021 that includes the obligation to bargain and agree on wages as per Annexure A. The wage agreement is applicable in the Bargaining Unit as ascribed in the agreement in paragraph 3.14 stating: "Bargaining Unit" shall mean employees of the EMPLOYER who are classified as wage earners in Levels 1 to 3. It excludes employees whose performance is managed through an individual performance scorecard. The respondents (employees), having referred to the matter are part of the Bargaining Unit and are subject to the agreement of the Negotiation Committee as applicable to paragraph 4.2. as follows: "The annual negotiation envisaged in point 4.1 covers only the Bargaining Unit as defined in 3.14 for a period of three (3) years.
6. The respondents cited herein above received payment after communication was sent out that increased payments would be made to all staff. None of the respondents indicated that the payment was to be re-paid and that they rejected the offer. It is submitted that the CCMA in terms of s138(9) is part of the general provisions for arbitration proceedings: the Commissioner may make any appropriate arbitration award in this Act, including but not limited to, an

award- that gives effect to a collective agreement. In **AMCU v Royal Bafokeng Platinum Limited CCT 181/18** wherein it is clear that even non-members of a majority union, including minority unions and individuals are bound by the decisions and agreements reached by a majority union and an employer. In **BE BOP A LULA Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd [042/07]** a matter is fully and finally settled where a payment and/or offer, if received without rejection and having been paid back, whether the offer or compromise is regarded as being a full and final settlement. The CCMA lacks jurisdiction to consider the matter and may not conciliate for lack of jurisdiction on the following grounds as set out herein above and that the matter, being res judicata, has become settled and cannot be arbitrated or conciliated.

Employees` submissions

7. The employees submitted that the employer purported to have concluded a two-year wage agreement with the union, UCIMESHAWU, on 10 April 2024. This agreement sought to bind all employees within the bargaining unit. However, what the employer purposefully does not say is that the majority of workers had resigned from UCIMESHAWU before the wage agreement was signed. When the agreement was signed, UCIMESHAWU was no longer representative of the majority of workers at the workplace. There are 131 letters from Mister Sweets employees resigning from UCIMESHAWU as per FZ2. The bulk of these resignations occurred on 26 July 2023, with some occurring on 6 March 2024. In some instances, workers resigned from the Union twice, on both 26 July 2023 and 6 March 2024. They have elected to organize themselves as a workers` forum under the banner of SIMUNYE Workers` Forum (SWF) with 263 workers from Mister Sweets as per FZ3 and FZ4 respectively. The employer persists in alleging that UCIMESHAWU remains a majority without providing any proof thereof. They persisted in conducting wage negotiations with a union that was no longer representative of the majority of the workers at the workplace.
8. The UCIMESHAWU and Management wage agreement cannot be binding on the workers in the bargaining unit, given that SWF, not UCIMESHAWU, represented the majority of workers at the time. The wage agreement cannot be said to be a full and final settlement of the current dispute, GAEK4363-24. The dispute concerns a refusal by management to negotiate with SWF representatives which falls under section 64(2)(a)(i) of the LRA which empowers the CCMA to make an advisory award where there is a refusal to bargain. The CCMA has jurisdiction to conciliate the dispute. The concern around the practicality of a multiplicity of consultations is therefore misplaced as the majority of workers have decided to constitute themselves as a workers` forum and they simply need to negotiate with the elected representatives of the majority of workers which is in line with the employers` submissions around the principle of majoritarianism as in the **AMCU v Royal Bafokeng** judgment. The **Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing** case concerns a dispute about a commercial transaction between two companies which is completely inappropriate to seek to apply it to Collective Bargaining and labour relations.

Analysis of arguments

9. In *Department of Home Affairs and one other v PSA and others* (CCT 148/16) [2017] ZACC 11; (2017) 38 ILJ 1555 (CC); 2017 (9) BCLR 1102 (CC) (handed down 4 May 2017) the Court affirmed that disputes about matter of mutual interest referred to conciliation must be conciliated, be they "rights" or interest disputes. It is not the function of the conciliator to pronounce whether the dispute is one of "rights" or one of "interest". "Interest" and "rights" disputes are both matters of mutual interest. Whether the matter is a dispute of "interest" or "right", and therefore whether it may legitimately form the subject of a strike is not relevant for the determination of whether it may trigger conciliation under the LRA. The employees have referred a refusal to bargain dispute relating to appropriate bargaining subjects which includes bargaining on wages and other mutual interest matters.
10. There are resignation forms that were served on the employer and were duly acknowledged by the Human Resources Manager. Section 23 of the Constitution of the Republic guaranteed the right of freedom of association of employees. In the present matter, employees have resigned from the Trade Union and chose to form a forum to bargain as employees with the employer on wages. The employees have elected not to be part of the Trade Union and the Constitution gives them such right.
11. Section 64 (1) of the Labour Relations Act 66 of 1995 provides as follows: *Every employee has the right to strike and every employer has the recourse to lock-out. Section 134 of the LRA provides as follows: (1) Any party to a dispute about a matter of mutual interest may refer the dispute in writing to the Commission if the parties to the dispute are- (a) on the one side- (ii) one or more employees, the employees have organized themselves wishing to bargain with the employer (applicant). The LRA was meant to give effect to the Constitution and under the circumstances, I am of the view that the employees are not precluded from doing so. The conclusion of the agreement between the Union and the employer does not take away their election to bargain with the employer.*

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12. I find that the CCMA has the requisite jurisdiction to conciliate the matter.
13. Case Management is directed to schedule the matter for conciliation.

A handwritten signature in black ink, which appears to read "D. O. Phokela", is enclosed within a hand-drawn oval. A horizontal line extends from the right side of the signature.

Dineo Phokela
CCMA Commissioner