IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI CMAC REF: NO: SWMZ 161/08

CAWUSWA APPLICANT

AND

PINKS FAMILY OUTFITTERS
T/A WOOLWORTHS RESPONDENT

CORAM
ARBITRATOR: VELAPHI DLAMINI
FOR APPLICANT: JOHN DLAMINI
FOR RESPONDENT: LINDELWA MNGOMEZULU

NATURE OF DISPUTE: REFUSAL TO IMPLEMENT
STOP ORDER FACILITY

DATE OF ARBITRATION: 27th OCTOBER 2008

ARBITRATION AWARD

1. DETAILS OF THE HEARING AND REPRESENTATION

1.1 This arbitration was held at the Conciliation, Mediation and Arbitration Commission Offices (CMAC or Commission) situated at 4th Floor, SNAT Cooperatives Building in the city of Manzini, in the district of Manzini. The hearing was on the 27th October 2008.

1.2 The Applicant is CAWUSWA, an acronym for Commercial and Allied Workers Union of Swaziland, a trade Union registered in terms of the Industrial Relations Act 2000 as amended, having the capacity to sue and can be sued in its name, of P. O. Box 1158 Manzini. CAWUSWA was represented by Mr John Dlamini, its official.

1.3 The Respondent is Pinks Family Outfitters trading as Woolworths a body corporate, having the capacity to sue and can be sued in its own name of P. O. Box 2385 Manzini. The Respondent was represented by Ms Lindelwa Mngomezulu, of Currie & Sibandze Attorneys, Mbabane.

2. BACKGROUND OF DISPUTE

2.1 On the 27th June 2008, the Applicant reported a dispute for "refusal to implement stop order facility" at the CMAC offices at Swaziland Dairy Board, Enguleni Building in the Manzini City.

2.2 Upon receipt of the dispute, the Commission attempted to resolve it by inviting the parties to a conciliation meeting on the 20th August 2008.

2.3 The dispute remained unresolved and a Certificate of Unresolved Dispute was issued by the Commission on the 22nd August 2008.

2.4 Both parties agreed to refer the dispute to arbitration under the auspices of CMAC. The undersigned Commissioner was appointed to determine the dispute by means of arbitration.

2.5 A pre-arbitration conference was held on the 21st October 2008 in terms of which the parties did not object to my appointment as an arbitrator in the matter. Further they remained resolute on the

positions each held when the Certificate of Unresolved Dispute was issued. Moreover it was agreed

that the evidence that would be tendered by the parties was both documentary as well as oral. The services of an interpreter were dispensed with.

3. ISSUE (S) IN DISPUTE

3.1 The issue in dispute was that the Applicant and the Respondent being parties in a Recognition Agreement, the former requested the latter to make authorized deductions from a group of its employees who were the Applicant's members.

3.2 The Respondent's view was that the employees set out in the trade union's request were fixed term employees who never formed part of CAWUSWA's bargaining unit; moreover, the Applicant had failed to apply and has not been granted an extension of the Recognition Agreement to include these employees.

3.3 According to the Respondent, unless the fixed term employees' inclusion in the agreement is negotiated and agreed, it was not in a position to accede to the Applicant's request.

3.4 The Applicant contends that the Respondent's refusal to implement the stop order facility is unlawful.

4. SUMMARY OF EVIDENCE

4.1 APPLICANTS CASE

4.2 THE TESTIMONY OF GRAHAM NKAMBULE

4.3 The Applicant called Mr Graham Nkambule as its sole witness, who was sworn and introduced himself as CAWUSWA's organizing secretary.

4.4 Nkambule testified that the Applicant was recognized by the Respondent following CAWUSWA's application in January 2003. The parties signed a Recognition Agreement in May 2003. The letter of application and the

Recognition Agreement were handed in as part of his evidence and were marked exhibits "A" and "B" respectively.

4.5 It was this witness's evidence that the Applicant represented all categories of employees at Respondent's undertaking, except staff who were outside of the scope of the bargaining unit in terms of the Industrial Relations Act 2000 as amended.

4.6 Nkambule stated that during the month of June 2008 the Applicant made a request in writing that the Respondent make authorized deductions in terms of Section 43 (2) of the Industrial Relations Act 2000 as amended, in respect of a group of employees who were CAWUSWA's members.

4.7 According to the witness, the Applicant was obliged to represent all employees in the Respondent's workplace except for those defined as staff in terms of the Industrial Relations Act 2000 as amended. The Respondent was obliged to deduct the fees from the employees whose stop

order forms were submitted because none of them was a member of the Respondent's staff.

4.8 Nkambule testified that the Respondent refused to effect the deductions through a letter dated the 23rd June 2008, citing the reason that the employees in the list were all fixed term contract employees who did not form part of the bargaining unit as per the parties' Recognition Agreement.

4.9 Under cross examination by Ms Mngomezulu, Nkambule denied that since 2003, following CAWUSWA's recognition by the Respondent, the Applicant has collectively bargained for permanent employees only.

4.10 Further the organization's secretary disputed that the Recognition Agreement and the letter of application for recognition excluded fixed term contract employees from the bargaining unit. However, he could not produce proof that the Applicant had prior to June 2008, recruited temporary employees to be its members and Nkambule also failed to produce evidence that

-7-

CAWUSWA had bargained for the so-called fixed term employees.

5. RESPONDENTS CASE

5.1 THE TESTIMONY OF N. K. PREMCHANDAR

5.2 Similarly the Respondent also called a single witness Mr N. K. Premchandar to testify on its behalf. Premchandar introduced himself as a Manager for Administration and Financial Accounts at the undertaking.

5.3 On oath, Premchandar testified that in 2003, when the Applicant was recognized by the Respondent, the bargaining unit was not defined. However, it was agreed that it would be a process to be achieved through negotiations between the parties. Negotiations to define the categories of employees in the bargaining unit never materialized.

-8-

5.4 It was the Manager's evidence that by conduct, the Applicant defined which category of employees formed the bargaining unit and it was not the fixed term contract employees because at no stage prior to 2008, did CAWUSWA bargain on behalf of those employees. The Applicant only bargained for permanent employees.

5.5 Premchandar stated that it was for that reason that the Respondent refused to implement the stop order facility. It was the Respondent's position that unless the Applicant applied and was granted an extension of recognition to include the temporary employees; the Applicant's request would not be acceded to.

5.6 During cross examination, the Manager denied that the Applicant had negotiated for the terms and conditions of service for all employees including fixed term contract employees. However, he also could not produce evidence proving that during the subsistence of the Recognition Agreement, CAWUSWA had only negotiated for permanent employees.

-9-

6. CLOSING SUBMISSIONS

6.1 Both parties' representatives filed written submissions by the 31st October 2008.

6.2 APPLICANT'S

6.3 It was the Applicant's submission that since the Respondent recognized it as the sole collective bargaining agent for all the employees except the staff, the Respondent was obliged to deduct fees from each employee whose name and signature appear in the stop order form.

6.4 Further it is contended by CAWUSWA that the Respondent will not suffer any prejudice if it complies with the Applicant's request, whereas the trade Union will because it relies on subscriptions to sustain itself and provides meaningful representation of its members.

6.5 The Applicant submitted that the issue of negotiating the categories for the bargaining unit was

overtaken by events because the Respondent

recognized the Applicant without negotiating and defining the bargaining unit. The Respondent never took issue with the fact that the categorization of the bargaining unit was not defined when it granted recognition before such definition was done.

6.6 Finally, the Applicant prayed for an order directing the Respondent to comply with its lawful request and commence implementing the stop order.

7. RESPONDENTS

7.1 The Respondent submitted that since the Applicant specifically refused to name the categories of employees which it wished to represent, its past practice must be considered to define the bargaining unit. Since recognition was granted in 2003, the parties had engaged each other in negotiations in respect of full time permanent employees only.

7.2 Further it is being contended that there was a mutual unspoken understanding that fixed term contract employees did not form part of the

bargaining unit and this understanding had continued for five years. The Respondent referred to annexures "WNY" and "WWC" being monetary claims by temporary employees not represented by the Union. The annexures were however not attached to its submissions.

7.3 The Respondent argued that the Applicant forwarded stop order forms for only the permanent employees and negotiated for that category for five years which meant that by its practice, CAWUSWA defined the permanent employees as the bargaining unit.

7.4 It was the Respondent's submission that because the Applicant had not approached the former for an extension of their Recognition Agreement to include temporary employees; the Respondent was not legally obliged to implement the stop order facilities as requested by the Applicant.

7.5 It was contended by the Respondent that the Applicant had therefore prematurely approached the Commission without first exhausting or

negotiating with the Respondent for inclusion of the temporary employees into the bargaining unit.

7.6 Finally, the Respondent prayed for the dismissal of the application or alternatively, that the Applicant be ordered to engage the Respondent in negotiations for the inclusion of the temporary employees into the bargaining unit.

8. ANALYSIS OF EVIDENCE AND THE LAW

8.1 The issue for determination is whether or not the so called fixed term employees of the Respondent formed part of the Applicant's bargaining unit in terms of the Recognition Agreement signed by the parties in May 2003.

8.2 If it is found that the fixed terms contract employees were not included in the Union's bargaining unit, then its application must fail.

8.3 In order to make a determination of the aforesaid issue, the inquiry has to begin with the letter of application for recognition written by the Applicant

directed to the Respondent and then proceed to consider the Recognition Agreement itself.

8.4 The Applicant through its Secretary General applied for recognition by a letter dated 13th January 2003 directed to the Respondent. The material portions read as follows;

"we are seeking recognition as the bargaining agent for bargaining unit in terms of Section 42 of the Industrial Relations Act No: 1 of 2000.

The category we intend to represent is everybody within the bargaining unit except for staff in terms of the Industrial Relations Act. This is our global view of categorization. We believe that the detailed categories can only be a result of a negotiated process (my emphasis).

8.5 None of the parties contended that the Respondent did not respond in the affirmative nor raised issue with the Applicant's letter within the **dies** permitted by Section 42 (3) of the Industrial

-14-

Relations Act 2000 as amended. Section 42 (3) provides;

"the employer shall reply to the organization and the Commission in writing within 21 days of the receipt of the application stating that :-

(a) it recognizes the trade union or staff association; or
(b) it refuses to grant recognition and the reasons for such refusal"

8.6 It is common cause, however that in May 2003 the parties concluded a Recognition Agreement.

8.7 The preamble of the agreement states that it is between the same parties in these proceedings and that the agreement was reached following a successful verification exercise in terms of Section 42 of the Industrial Relations Act, 2000. It is noted that the agreement cites the Act without any reference to an amendment however in my view that does not invalidate the agreement as its

- 15-

terms are in compliance with the Industrial Relations Act 2000 as amended. Moreover there parties have not objected to any term thereof.

8.8 The terms of the agreement are brief and provide as follows;

1. The union recognizes Pink's Family Out Fitters (Pty) Ltd t/a Woolworths as the employer to all its members within the bargaining unit.
2. The union recognizes the rights of the employer as enshrined in Section 99 of the Industrial Relations Act 2000.
3. The employer recognizes the Commercial And Allied Workers Union of Swaziland (CAWUSWA) as sole bargaining agent for all its employees within the bargaining unit.

-16-

4. The employer recognizes the rights of the Union as enshrines in the Industrial Relations Act 2000.
5. Both parties recognize each other as social parties with a role to regulate their relations through collective bargaining.
6. Both parties agree to engage each other in negotiating all terms and conditions of service including all procedures including wages/salaries, the hours of work, safety and the welfare of the workforce.
7. The employer agrees to deduct through stop order, union dues from all union members".

8.9 The employer representative signed the agreement on the 8th May 2003 and the Union's representative on the 12th May 2003.

8.10 It is common cause that the Applicant was recognized as a sole bargaining agent for all the employees of the Respondent within the bargaining unit.

8.11 The Applicant did not mention the classification or categories of employees within its bargaining unit that it sought recognition for in its letter. However, the recognition sought was in respect of all the Respondent's employees within Applicant's bargaining unit.

8.12 It has been argued by the Respondent that in the absence of the classification, the parties must look at past practice to define the bargaining unit. In the past, the Applicant had negotiated for permanent employees only, it follows therefore that CAWUSWA's bargaining unit were those employees.

8.13 The Industrial Relations Act 2000 as amended does not provide a direct definition of the terms "bargaining unit" or "collective bargaining", we must then have recourse to other Industrial Law sources,

8.14 Grogan Workplace Law 8th edition p363 defines a bargaining unit as;

"that part of a workforce or workplace in which a union claims recognition and from which the members on whose behalf it negotiates are drawn".

8.15 A workplace has been defined as the place or places where the employees of an employer work.

8.16 The Industrial Relations Act 2000 as amended defines "trade union" as "a combination of employees, the principal purpose of which is the regulation of relations between employees and employers" see Section 2.

8.17 Section 3 of the Industrial Relations Act 2000 as amended defines employee as;

" a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other

arrangement involving control by, or sustained dependence for the provision of work upon, another person".

8.18 If a trade union is a combination of employees whose purpose is to regulate the relationship between themselves and the employer and employees are persons providing services, under the control or sustained dependence and supervision of another, then it means that these employees must be the trade union's constituency and therefore its bargaining unit.

8.19 The foregoing conclusion must be correct because the Act differentiates between an employee and staff. Staff is defined as;

(a) "an employee who has authority on behalf of the employer to employ, transfer, suspend, lay off, recall, promote, dismiss, re ward, discipline other employees or authorize such action, when the exercise thereof is not solely of a routine or clerical nature, but

requires the use of independent judgment;
(b) participates in the making of general company policy; or
(c) works in a capacity which requires the employee to have full knowledge of the financial position of the employer; or
(d) has free personal access to other confidential information substantially affecting the conduct

of the business of the employer".

8.20 Staff are permitted by the Act to also form an association, the principal purpose of which is to regulate the relations between staff and an employer or employers. From the distinction drawn above it is clear that in terms of the Industrial Relations Act 2000 as amended an employee is that person who is at the lower end of the undertakings hierarchy and a staff employee is at a higher level.

-21 -

8.21 The different characteristics of the two components of employees mean that these may not collectively bargain as one unit, because of the inherent conflict in their interests and the nature and scope of their responsibilities at the workplace.

8.22 The remarks of NDERI NDUMA J.P. in LIDLELANTFONGENI STAFF ASSOCIATION (L.I.S.A) v SWAZILAND NATIONAL PROVIDENT FUND BOARD (I C CASE NO: 50/04" are apposite. This is what the learned Judge had to say at page 7 of his judgment.

"in terms of Section 109, setting out the code of practice for employers and employees, Regulation 2 thereof states that the principal aim of management is to conduct the business of the undertaking successfully... on the other hand, regulation 6 states that the principal aim of employee organizations is to promote the interests of their members... it is without a doubt that the inter relationship between management

-22-

and employee organization is not mutually exclusive, however necessary conflict is inevitable in the pursuit of their goals",

8.23 In my view all employees whose work is entirely dependent and under the control of another person, in other words those at the lower end of the undertaking's hierarchy are eligible to join and be represented in collective bargaining by a trade union.

Even though the Industrial Court of Appeal in the matter between NEDBANK SWAZILAND LIMITED v SUFIAW ICA case no: 11/06 allowed the appeal because the Court aquo had misdirected itself by ordering that the parties should amend the recognition agreement to include employees who previously did not form part of the bargaining unit as per the agreement, it did not interfere with a finding on who was eligible to representation by a trade union.

8.24 The Industrial Court, as the Court aquo in the NEDBANK case had found that the Constitution

-23-

Act No: 1 of 2005 did not discriminate between permanent, contract, casual or temporary employees and held that all the above categories are eligible to representation by the trade union.

8.25 Reverting to the facts of the matter before arbitration, it is clear from the Recognition Agreement that the parties agreed that the Applicant was recognized by the Respondent to be the sole bargaining agent for all employees of the Respondent who are in the bargaining unit. On the strength of the above cited authorities, it is my opinion that all employees means that part of the workforce that are unionsable, including permanent, temporary or so called fixed term employees and casuals.

8.26 The Respondent's ground of refusing to make the authorized deduction was that these employees did not form part of the Applicant's bargaining unit, because the union never negotiated in the past for them as fixed term employees.

-24-

8.27 This argument has no merit, in my view. Firstly, there is a Recognition Agreement which unambiguously includes these workers's when it states all employees of the Respondent. Secondly, the Respondent despite alleging that Applicant had deliberately and or purposely bargained for the permanent employees only for five (5) years, did not adduce any document either in the form of

proposals for negotiation or minutes of meetings where Applicant had disassociated itself from the fixed term employees.

8.28 It was also argued by the Respondent that the Applicant's action of not recruiting the fixed term employees five years after the Recognition Agreement was signed is proof that these workers were never considered by it as part of CAWUSWA's bargaining unit. I do not agree with this conclusion. The Respondent in terms of the Recognition Agreement agreed to recognize the rights of the union as enshrined in the Industrial Relation Act 2000. Whom, when and how the Applicant recruited members who are employees of the Respondent, before or after it was

-25-

recognized remains a prerogative of the trade union, suffice that the provisions of the Industrial Relations Act, 2000 as amended must be observed.

8.29 The Respondent has contended further that the Applicant had proposed that the categories of employees to form the bargaining unit would be a result of a negotiated process. In my view, this was a proposal that was made at the stage of the application for recognition. When the agreement was concluded, the parties agreed that all the Respondent's employees who are in the bargaining unit were represented by the Applicant as sole bargaining agent. This matter is distinguishable from the NEDBANK case.

See SWAZILAND NATIONAL ASSOCIATION OF CIVIL SERVANTS V SWAZILAND GOVERNMENT (I C CASE NO: 62/05).

See also SWAWU V TUNTEX TEXTILE (PTY) LTD (I C CASE NO: 53/2000).

-26-

8.30 Having found that the employees in respect of whose stop order forms the Respondent is requested to process are eligible to join and be represented by the Applicant and it being common cause that they are not staff. I now turn to look at the provisions of the Act which the Applicant is relying on as a basis for the request for deduction of fees.

8.31 Section 43 (1) (2) and (4) of the Industrial Relations Act 2000 as amended provides;
"an employee may deliver to an organization of which that employee is a member or of which that employee is eligible for membership, and which has been recognized under Section 42, a written authorization for a periodic deduction from the employee's wages of fees duly payable by the employee to the organization,... an organization which has received an authorization under sub-section may request the employer in writing to make the authorized deduction and remit to the organization

-27-

... an employer who receives a request in accordance with sub-section (2) shall make the authorized deduction and shall promptly remit to the organization the funds so collected".

8.32 From the above provisions, it is noted that a trade union that fulfills the requirements of Section 43 of the Act is entitled to be paid the fees deducted from its member's wages, However, sub-section 3 provides that an employer may demand proof of authorization in its original form or a certified copy, as the case may be.

8.33 It is common cause that the Applicant followed the prerequisites for an authorized deduction of fees from the Respondent's employees' wages. The latter reserves the residual right to demand proof of the authorization, however, this is not one of its grounds for opposition.

-28-

9. CONCLUSION

9.1 I conclude that the sixteen fixed term contract employees whose stop order forms are collectively marked exhibit "c" form part of the Applicant's bargaining unit.

9.2 The Applicant has substantially complied with the provisions of Section 43 of the Industrial Relations Act 2000 as amended, and is therefore entitled to have fees deducted from the members' wages and remitted to it.

9.3 The Respondent may require the Applicant to authenticate the authorization forms in terms of Section 43 (3) of the Act.

9.4 The requests for deductions were made by the Applicant in June 2008 and the Respondent responded in the same month. Following the refusal by the Respondent to make the deduction, the Applicant reported a dispute to the Commission in June 2008. The dispute remained within the jurisdiction of CMAC until the conclusion

of the arbitration proceedings. In my view Respondent's objection was not **mala fide** or deliberately calculated to prejudice the Applicant.

9.5 For the aforegoing reasons, it would not be just and equitable to backdate the deductions to June 2008. Moreover, the delay cannot be attributed to one party only. The current status of these employees is not known.

9.6 The following order is therefore made;

10. AWARD

10.1 The Respondent is ordered to implement the stop order facility as requested by the Applicant.

10.2 The Respondent is further directed to remit the fees twenty one (21) days after this award has been served upon her.

10.3 The Applicant shall forward to the Respondent updated stop order forms.
10.4 No order for costs is made.

DATED AT MANZINI ON THIS 23th DAY OF APRIL 2009

VELAPHI DLAMINI

CMAC ARBITRATOR