



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

**HELD AT MBABANE**

**SWMZ 524/09**

In the matter between:-

**SMAPISA**

**APPLICANT**

And

**SMAWU**

**RESPONDENT**

CORAM:

**Arbitrator**

: K. Manana

**For Applicant**

: Mr. T. Simelane

**For Respondent**

: Mr. A. Fakudze

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**Preliminary Ruling On A Point Of Law**

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## **PARTIES AND REPRESENTATION**

- 1.** The Applicant is **Swaziland Manufacturing and Processing Industry Staff Association (SMAPISA)**, an organization registered in accordance to **Section 27** of the **Industrial Relations Act 2000**, as amended.
  
- 2.** The Respondent is **Swaziland Manufacturing and Allied Workers Union (SMAWU)**, a trade union duly registered in terms of the same section of the law as referred to above.
  
- 3.** The proceedings were held at the **CMAC Offices, 4<sup>th</sup> Floor SNAT Building, Manzini** and were recorded both electronically and manually.
  
- 4.** Appearing for the Applicant was Mr. Tom Simelane whilst Mr. Alex Fakudze appeared on behalf of the Respondent. Both gentlemen are union officials and they both have considerable experience with proceedings of this nature.

## **BACKGROUND OF THE DISPUTE**

- 5.** On the 29<sup>th</sup> July 2009 the Applicant wrote a letter to the Respondent requesting recognition as a collective employee representative for all unionisable employees within the Respondent's organization.

- 6.** The Respondent was in terms of Section 42 (3) of the Industrial Relations Industrial Act 2000, as amended, expected to reply to the Applicant in writing within 21 days, stating her response to the Applicant's request.
- 7.** There was no such response from the Respondent save for quite a number of unfulfilled promises and appointments that never materialized, made between the parties.
- 8.** The question whether or not the Applicant satisfied the requirements of Section 42 in their entirety was never made an issue by the Respondent.
- 9.** The Applicant then referred a dispute to the Commission on the 20<sup>th</sup> October 2009 where she sought the assistance of the Commission in her quest to be granted recognition by the Respondent. The matter was duly conciliated upon but could not be resolved. It was then referred to arbitration as per Section 42(9) of the Industrial Relations Act as aforementioned and I was appointed arbitrator.
- 10.** During the first arbitration sitting, the Respondent, through its representative Mr. A. Fakudze, raised a preliminary point of law. Mr. Fakudze argued that the members of the Applicant were not eligible to be called "staff" within the specific meaning set out in the Industrial Relations Act 2000, as amended.
- 11.** Mr. T. Simelane on the other hand argued, on behalf of the Applicant, that as employees they had a right to freedom of

association. This right, according to him, endowed the Applicant's membership with the liberty to form and join any association of their choice.

### **ISSUE IN DISPUTE**

**12.** I have to determine whether the members of the Applicant are eligible to be members of a staff association and whether they are "staff" within the meaning of the term "staff" in Section 2 of the Industrial Relations Act 2000, as amended.

### **SURVEY OF EVIDENCE AND ARGUMENT**

**13.** The Respondent submitted that the purported members of the Applicant were not "staff" as envisaged by Section 2 of the Industrial Relations Act 2000 as amended.

**14.** Mr. Fakudze stated that according to the Respondent's understanding, the membership of the Applicant comprised of field officers, a legal advisor, a receptionist and cleaners.

**15.** It was Mr. Fakudze's contention therefore that with the exception of the Legal Advisor none of the Applicant's members as aforesaid were engaged in a supervisory or confidential decision making capacity.

**16.** The thrust of the Respondent's argument was that the members of the Applicant lacked all the crucial elements to qualify to be staff. They were thus better suited to join a trade union, not a staff association.

**17.** The Applicant's representative, Mr. Simelane, on the other hand argued that in line with Sections 30, 39 and 98 of the Industrial Relations Act 2000 as amended, they had the right to belong to any organization of their choice.

**18.** He stated that the employer had no right to infringe on the employee's right to belong or not to belong to an organization of that employee's choice.

**19.** It was Mr. Simelane's contention that the conduct of the Respondent to deny the Applicant's members recognition on the strength of the above stated reasons amounted to an attempt by the Respondent to unlawfully restrain the employees from exercising their lawful rights as conferred to them by the Industrial Relations Act 2000 as amended.

**20.** Of particular note is the fact that other than the above argument, Mr. Simelane did not tender any evidence or additional argument to oppose or counter the Respondent's contention regarding the composition of the Applicant's membership and in particular that they were not engaged in any decision making or confidential positions.

### **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

**21.** According to **Section 2** of the **Industrial Relations Act, 2000 as amended**, "*Staff*" means an employee who;

- a) *has authority on behalf of the employer to employ, transfer, suspend, lay off, recall, promote, dismiss, reward, discipline other employees or authorize such action, when the exercise thereof is not of a purely 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 access to other confidential information substantially affecting the conduct of the business to the employer.*

**22.** From the above definition, it is clear that it is only employees who are responsible for the formulation of policy, day to day decision making, discipline, financial management and all other management functions that can form and belong to a staff association.

**23.** The members of the Applicant, with the exception of the Legal Advisor are not engaged in such a position.

**24.** I turn now to **Section 98 of the same Act** which section contains the basic employee rights. According to this section; *“an employee may-*

- a) *take part in the formation of any trade union or staff association or federation as the case may be;*

- b) be a member of any trade union or staff association and take part in its lawful activities outside working hours or with the consent of the employer, within working hours;*
- c) hold office in any trade unions, staff association or federation;...”*

**25.** Whilst this section may give employees the right to freedom of association, this right is subject to permissible limitation as evidenced by the different categories within which this right can be realized. The different categories being a trade union, staff association or a federation.

**26.** Whilst Executives, managers and confidential employees are precluded from joining an organization open to lower grade workers e.g. a trade union, ordinary lower grade employees are also precluded from forming an organization which falls within the exclusive reserve of Managers and confidential employees, e.g. a staff association. (See **Staff Association of SwaziSpa Holdings v SwaziSpa Holdings Limited**, Case No.110/2003 in the Industrial Court of Swaziland)

**27.** With the above in mind, it follows therefore that a staff association can only bargain on behalf of staff whereas a trade union can bargain on behalf of general employees with the exception of staff.

**28.** From the submissions made by both parties, it remains clear that the Applicant’s membership is comprised of

employees whose responsibilities fall short of the requirements laid down in **Section 2** of the **Act** as quoted earlier on in this ruling.

**29.** The Applicant has not been able to oppose the Respondent's assertion that Applicant's membership, other than the Legal Advisor, is not engaged in any decision making capacity.

**30.** He did not show that the Applicant's members in their respective positions of employment exercise independent judgment in their work or stand in a confidential position within their employment.

**31.** There was also no argument advanced by the Applicant to indicate that her members contribute in the making of general company policy and that they have access to vital and confidential information substantially affecting the conduct of the Respondent's business.

**32.** Under the circumstances, the only reasonable conclusion that one can arrive at, is that the Applicant's membership, except the Legal advisor, lack all of the key elements to qualify to be staff. They are not therefore eligible to form a staff association.



**33.** With the above said, the Applicant's membership are not without a remedy; they can still join or form a trade union and defend their interests.

**AWARD**

**34.** I accordingly uphold the Respondent's point of law.

- a) I dismiss the Applicant's dispute in its entirety.
- b) The Applicant's membership is hereby advised to form or join a recognized trade union to defend their interests.
- c) There is no order as to costs

**SIGNED AT MANZINI ON THIS ..... DAY OF SEPTEMBER, 2010.**

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**KNOWLEDGE MANANA  
CMAC ARBITRATOR**