



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1564/2016

In the matter between:

**FIRST NATIONAL BANK SWAZILAND
LIMITED**

First Applicant

**FIRST NATIONAL BANK (SWAZILAND) PENSION
FUND**

Second Applicant

And

**SWAZILAND UNION OF FINANCIAL
INSTITUTIONS AND ALLIED WORKERS**

First Respondent

JUSTICE NKOSINATHI NKONYANE N.O.

Second Respondent

GILBERT NDZINISA N.O.

Third Respondent

SIMON MVUBU N.O.

Fourth Respondent

Neutral citation: *First National Bank Swaziland Limited and Another v Swaziland Union of Financial Institutions and Allied Workers and 3 Others (1564/2016) [2017] SZHC 77 (21st April 2017)*

Coram: M. Dlamini J.
Heard: 02nd March 2017
Delivered: 21st April 2017

- **It must be emphasized that the duty of the court is to sift evidence presented to it with a view to determine material and relevant evidence referred to in our law of evidence as *facta probanda*. Evidence which is inconsistent with admitted facts falls under *facta probacta* and must be rejected. It cannot be put on the imaginary scales of justice.**
- **members of the Fund are not its employees and there is no agreement between the Fund and the Union to the effect that Union may negotiate on behalf of members of the Fund.**

Summary: Are the applicants obliged to deal direct with the first respondent in the matter of pension fund conversion? This question was answered in the affirmative by the Industrial Court, thereby issued an interdict against the applicants from dealing direct with members of the Union. The applicants seek for a review before me.

The Parties

[1] The first applicant is First National Bank (Swaziland) Pension fund (the Fund), a pension fund duly established in terms of Retirement Funds Act

and having its registered office at 2nd Floor, Sales House Building, Mbabane.

[2] The second applicant is First National Bank (Swaziland) Limited, a financial institution duly established in terms of the laws of the Kingdom of Swaziland, having its principal place of business at 2nd Floor Sales House Building Mbabane, Swaziland (the Bank).

[3] The first respondent is Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) a trade union duly established in accordance with the laws of the Kingdom of Swaziland, having its place of business at SUFIAW House, Dzeliwe Street, Mbabane. I shall henceforth refer to the first respondent as the Union.

[4] The second respondent is the presiding judge in the Industrial Court and he sat with the third and fourth respondents as assessors:

Grounds for review

[5] The applicants' main ground for review is that the Industrial Court has no jurisdiction to entertain the Union's application. The reason is that the Fund and its members do not enjoy any employer - employee relationship. The rest of the grounds for review are the usual common law grounds such as failure to consider relevant evidence.

Evidence before court a quo

The Union

[6] The Union contended in its founding affidavit, that the Bank established the Fund for its employees or former employees and their dependants. The Union signed two agreements with the Bank viz., the Recognition Agreement and the Collective Agreement. Article 3.2 of the Recognition Agreement provides that the Bank recognizes that its employees have a right to belong to the Union and that the Union has the sole prerogative to bargain for and on behalf of the Bank's employees. Article 14 of the Collective Agreement refers to "*the pension fund administered by the second respondent a condition of employment of the applicants' (Union) members,*"¹ according to the Union.

[7] The Union contends that the Fund and the Bank are directly engaging its members (employees) in discussing the conversion of the Fund from defined benefit to hybrid defined contribution pension fund. It therefore seeks for an interdict following that it has a clear right in terms of article 3.2 of the Recognition Agreement and 14 of the collective Agreement.

The fund and the Bank

[8] The fund contended *inter alia* that the Fund is a separate and distinct entity, regulated by the Financial Services Regulatory Authority under the Registrar of Retirement Funds. It is composed of four members appointed by the Fund and four elected by members of the Fund. The process undertaken by the Fund to convert it into hybrid is a decision not initiated or influenced by the second applicant.

[9] It is not denied that the Bank concluded a Recognition and Collective agreement with the Union. However, no such agreements exist between the Union and the Fund.

¹ see page 9 para 11 of the founding affidavit and words in brackets mine

The court a quo's decision

[10] On the question of jurisdiction, the court below held:²

“The court will also dismiss the point of law relating to the lack of jurisdiction by this Court. Presently, the Industrial Court is not being called upon to resolve a retirement or pension fund dispute. That is clearly the preserve of the High Court of Swaziland or the ombudsman. The question presently before the industrial court is whether there was a contravention of Article 3.2 of the Recognition Agreement as read together with Article 14 of the Collective Agreement by the 1st Respondent in so far as the consultation process is concerned. The point of law is therefore dismissed.”

[11] On the merits, the court below placed reliance on the correspondence bearing letter-heads of the Bank and found that the bank was dealing direct with the members and this was contrary to both the Recognition and Collective Agreements. In the result the court granted the interdict sought by the Union against both the Bank and the Fund to deal direct with the members of the Union.

Issue

[12] Did the court take into consideration relevant circumstances of the case? Simply put, did the court apply its mind into the issues at hand?

Determination

[13] It is common cause between the parties that the Recognition Agreement and the Collective Agreement was entered into between the Union and the

² see page 131 para 18 of the Industrial Court record of Case No. 194/2016

Bank. From this circumstance therefore, it is correct to say that where, for instance, a matter relating to pension benefits arising between the parties to the Recognition and the Collective Agreement, viz. Union and the Bank, the Bank has no right to engage members of the Union who happen to be employees, directly. The Bank, in terms of clause 3.2 of the Recognition Agreement read with clause 14 of the Collective Agreement is obliged to speak to its employees through the Union. The duty upon the Bank to refrain from dealing direct with its employees emanates from the two agreements. In other words, the authority upon the Union to represent its members or the Bank's employees in matters arising from employer-employee relationship emanates from the two Agreements. In brief, the two Agreements are a *nexus* between the Union and the Bank. Now what of the Fund? The Fund has deposed:

“5.5 The fund is a separate and distinct legal entity from the first respondent and accordingly, the power to make and/or amend any rules vests in the Trustees as mandated by the membership of the Fund.”

[14] It defined the members of the Fund as follows:

“5.4 There are eight Trustees who are at the helm of the Fund. Four of these Trustees are appointed by the first respondent and the other four are elected by the members of the fund.”

[15] In its reply to paragraphs 5.4 and 5.5 the Union states:

*“5. AD PARAGRAPH 3, 4 AND 5.1 – 5.5
I take no issue with the allegations.*

[16] From the above it is common cause that firstly, the Fund is not a party to the Recognition and the Collective Agreements. Nothing binds the Fund to deal with its members through either the Bank or the Union. Neither is the principle of *alteri stipulari* (contract entered on behalf of and for the benefit

of a third party) raised by Union. In summary there is no *nexus* between the Fund and the Union by reason that the Fund is not a party to the two agreements and therefore it is not bound by its terms. The Fund further highlighted:

“5.2 *The fund is registered with the Registrar of Retirement Funds and accordingly is regulated by the Financial Services Regulatory Authority in accordance with the provisions of the Retirement Funds Act 2005 as read with the Financial Services Regulatory Authority Act 2010.*

5.3 *As a regulated entity, the actions and / or major decisions of the Fund are subject to the scrutiny and approval of the Regulator. This includes the decision making processes, which require that the members of the Fund, have an equal say to that of the employer in the affairs of the Fund.”*

[17] Of which the Union replied:

“5. *AD PARAGRAPH 3, 4 AND 5.1 – 5.5*
I take no issue with the allegations.

[18] From the undisputed circumstance that the conversion of the pension scheme is a decision designed solely by the Fund and not the Bank, it follows that there is no legal duty upon both the Bank and the Fund to engage the Union. This is because members of the Fund, in law are not members of the Union although members of the Union are members of the Bank. The Bank is not liable to engage the Union because the matter of conversion of the pension benefits is not within its prerogative, as accepted by the Union in its reply under paragraph 5. If there is any doubt on this matter, the Fund pointed out:³

“6.2 *The nature and character of the pension fund, including whether it is a defined benefit or defined contribution or any other detail, would be*

³ see page 83 paragraph 6.2 of the book of pleadings

determined by the pension fund in accordance with the provisions of the Retirement Funds Act.”

[19] The Union replied:⁴

“8. AD PARAGRAPH 6.1, 6.2, 6.3 – 6.5

8.1 *The Applicant does not have any qualms with these allegations save to emphasize that of the 1st Respondent arising from the Recognition Agreement prohibits any form of direct negotiations with the applicant’s members.*

8.2 *If the 1st Respondent only addressed the consent seeking form “JS4” to non members of the Applicant that would be in order. For as long as clause 3.2 is operative, any form of negotiations which excludes the Applicants remains to be out lowed.”*

[20] The hold at the face of the above admission viz., that the Fund is a distinct legal entity; that the decision to convert the contribution to the Fund is a decision taken solely by the Fund in compliance with the terms of the Retirement Fund Act, an Act managed by the Registrar of Retirement Funds and not the Bank; the Fund is not a party to the two Agreements, the allegations by the Union that the Fund and the Bank are liable to deal with the employees of the Bank through the Union is devoid of any legal basis.

[21] I note the averments by the Union which the court relied on in order to grant the order sought:⁵

“13. *The Respondents either jointly or individually have sought to bypass the Applicant and have negotiated with individual employees including members of the Applicant on the issue of the Pension. To this extent, I annex hereto a copy of a typical letter sent to the employees without this terms of employment affecting the conversion of the pension being ever discussed with the Applicant. A copy of the letter is annexed hereto marked “JS4”. (my emphasis)*

⁴ see page 10 para 18 of book of pleadings

⁵ see page 10 para 13 of book of pleadings

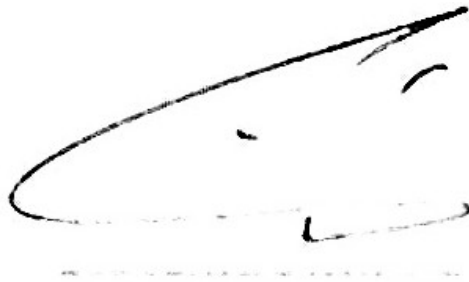
- [22] This letter (JS4) does reflect the signatory thereto as the Fund. It only gives the impression that the Fund uses the Bank's stationary for its business and nothing further. This is fortified by the Union's admission that the Fund is a distinct legal entity from the Bank and the content therefore indicates that it was the Fund writing.
- [23] There is another correspondence marked "JS6" which was considered by the *court a quo* in reaching its decision. This note, although in the Bank's letterhead, is unsigned. There is therefore no justiciable reason to state that the said note emanates from the Bank especially in view of "JS4" which demonstrates clearly that the Fund uses stationary from the Bank. At any rate, even if one were to accept for a second that "JS6" was authored by the Bank, it would be grossly injustice to put weight on the unsigned document and ignore the volume of correspondences and documents in the likes of annexures marked LK3 and LT1 (minutes of the Fund's meeting discussing the conversion) LK4 (document setting out requirements as a member of the Fund) and LT3 (resolution by Fund) together with the admissions by the Union on the legal status of the Fund and the architect of the conversion of the fund.
- [24] It must be emphasized that the duty of the court is to sift evidence presented to it with a view to determine material and relevant evidence referred to in our law of evidence as *facta –probanda*. Evidence which is inconsistent with admitted facts falls under *facta probacta* and must be rejected. It cannot be put on the imaginary scales of justice.
- [25] The above observation leads me to the main question in this matter as raised by the Fund and the Bank whether the Industrial Court has jurisdiction over the matter.

[26] I have already pointed out that it is not disputed that the conversion sought is as a result of the Fund complying with the enabling Act. The Fund is a distinct legal entity with its members not enjoying any employer-employee relationship. The Bank is not an architect of the conversion but the Fund. In the above, the submission that the Industrial Court has no jurisdiction in the matter holds water.

[27] In the result it was erroneous to interdict the Bank as it was not its decision to convert the fund. Further, the Fund could not be interdicted on behalf of the Union as there is no agreement between the Fund and the Union giving rise to a legal obligation to negotiate with its members through the Union.

[28] In the final analysis, the following orders are entered:

1. The Applicant's review application succeeds;
 - 2.2.1 The judgment of the *court a quo* is hereby reviewed and set aside;
 - 2.2 The orders granted by the *court a quo* in favour of the Union are hereby dismissed.
3. Costs of Senior Counsel to follow the event against the first respondent only.

A handwritten signature in black ink, appearing to be 'M. Dlamini', written over a faint horizontal line.

**M. DLAMINI
JUDGE**

For Applicants: P. Kennedy SC instructed by Robinson Bertram

For Respondents: V. Soni SC instructed by M. P. Simelane Attorneys