

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 205/06

In the matter between:

NEDBANK SWAZILAND

APPLICANT

and

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

RESPONDENT

CORAM:

NKOSINATHI NKONYANE:

ACTING JUDGE

GILBERT NDZINISA:

MEMBER

DAN MANGO:

MEMBER

FOR APPLICANT:

ADV. P. FLYNN

FOR RESPONDENT:

A.M. LUKHELE

JUDGEMENT 05.06.06

[1] This is an application that was brought before the court by the applicant on a certificate of urgency on the 15 May 2006.

[2] Each party filed the relevant papers before the court and the matter was argued on the 18th May 2006 on the question of urgency.

[3] The court ruled that the applicant failed to establish urgency. The application was not, however dismissed in its entirety, but the court ordered that it should take its normal course.

[4] The applicant filed an urgent application to the High Court for the review of the court's order. The High Court upheld the application and the matter was sent back to this court to have it dealt with on the basis of urgency.

[5] The court accordingly set the matter down for argument on the merits on the 29th May 2006.

[6] The applicant is seeking an order in the following terms:-

"1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a **rule nisi** be issued with immediate and interim effect, calling upon the respondent to show cause on a date to be appointed by the above Honourable Court, why an order in the following terms should not be made final:-

2.1 That the demands which are the subject matter of the strike contemplated by the respondent, pertaining to casual, temporary and "contracted" employees and the demands relating to the terms and conditions of employment of such employees do not fall within the sphere of recognition of the respondent.

2.2 The strike action contemplated by the respondent, insofar as it includes the matters referred to in 2.1 above is unlawful.

3. That the prayers contained in paragraphs 2, 2.1, 2.2, and **2.3**, above operate with immediate interim effect pending the final determination by the Honourable Court.

4. Cost be awarded against the respondent only in the event that the respondent opposes the application.

5. Granting further and / or alternative relief;"

[7] The applicant's case is that the respondent (hereinafter referred to as "the Union") has no right to represent or negotiate on behalf of contract, temporary, casual and employees who are employed by labour brokers and seconded to the applicant on temporary or fixed term contracts. The applicant argued that in terms of the recognition agreement between the parties, the Union representation was limited to the permanent employees of the applicant.

[8] The recognition agreement was annexed to the applicant's application and marked "AD1". The applicant relied on clause 2.1.6 thereof which states that:-

"Bargaining unit shall mean all permanent employees of the bank who are employed in positions other than those listed in Annexure 5."

[9] Annexure 5 is a staff list. In short, in terms of the recognition agreement the Union's recognition is in respect of all permanent employees of the applicant, excluding staff members.

[10] The Union argued to the contrary that it was entitled in law to represent the said workers. The Union further argued that on previous occasions the applicant allowed it to represent such employees. The Union relied, for its argument on annexures "B" "C" and "D" of the answering affidavit.

[11] Annexure "B" is the constitution of the Union. Rule 3 thereof lays down the objects of the Union. Rule 3.1 states one of the objects as:-

"To secure the complete organization of all eligible workers in Swaziland

employed in the Financial and Allied Institutions."

Rule 3.2 states that:-

"To obtain and maintain just and equitable rates of wages salaries, hours of work and other conditions of work and generally to project the interests of its members".

Section 3.4 states that:-

"To regulate the relations and to settle disputes between its members and employers and among members by amicable agreement wherever possible."

[12] Annexure "C" is a document containing articles of agreement between the applicant and the Union. The first four paragraph thereof have the following :-

"Whereas the Union represents employees of the bank employed by contract/temporary basis (hereinafter referred to as employees);

And whereas the said employees have been appointed to a clerkship in the service of the bank and it is now desired to record the terms and conditions applicable and relative to the clerkship of such employees;

Now therefore the bank and the Union mutually agree each with the other as follows:-

1. The employees' employment shall continue for a fixed - term

commencing on the 01st October 2000 to terminate on the 31st March 2001."

[13] Annexure "C" was relied upon by the Union as proof that on a previous occasion it did negotiate with the applicant on behalf of contract/temporary workers.

[14] Annexure "D" is the current collective agreement, which was entered into between the applicant and the Union on the 30th March 2001. Article 1.3 thereof deals with "Atypical Employment contracts." Article 1.3.1 states that:-

"No employee shall be employed on a temporary basis in a permanent position beyond six months. Any replacement of such employee by another for a similar task shall be deemed as a circumvention of the Agreement."

Article 1.3.2 states that:-

"The employment of temporary staff for special projects shall not exceed eighteen months."

[15] The Union also relied on these articles as evidence that it had the right to represent the temporary workers in question. The introduction of the collective agreement states that that agreement was entered into by the parties and the Union representing employees eligible for representation by the Union in terms of Article 2.1.6 of the recognition agreement as amended. Before the court no version of the amended recognition agreement was produced.

[16] The Union explained in its papers and in court however that the amendment had reference to the period when the applicant was formed and took over the banking business from Standard Chartered Bank. From the evidence before the court it seems therefore that the amendment was only in

respect of the employer's name and not any of the terms of the recognition agreement.

The question that the court must answer is whether the Union has the authority to represent workers during negotiations who are not part of its bargaining unit. This question must be distinguished from the question whether the Union has the right to negotiate on behalf of the employees in question.

The court will start by addressing the second part of the question. In terms of the Constitution of the Kingdom of Swaziland Act of 2005 a worker has a right to collective bargaining and representation. Section 32(2) thereof states that:-

"(2) A worker has a right to -

4. Freely form, join or not join a trade union for the promotion and protection of the economic interest of that worker; and

5. Collective bargaining and representation."

The Constitution does not make a distinction between permanent, contract, casual or temporary employees.

In terms of rule 3.1 of the Union's constitution, one of its objects is to secure the complete organization of all eligible workers in Swaziland employed in the Financial and Allied institutions. There is no doubt that the workers in question work in a financial institution. They are, therefore, clearly eligible to representation by the Union.

It is beyond any doubt, in the light of the above-mentioned provisions of the Constitution that the said workers have a right to collective bargaining and representation.

As regards the first part of the question whether the union has the right to

represent workers who are not part of its bargaining unit, the court will point out the following;

A recognition agreement is the means by which a union acquires the right or authority to speak on behalf of the workers in an undertaking. The recognition agreement was signed by both parties. It follows therefore that each party is bound by the provisions of the recognition agreement. The bargaining unit was defined in the agreement as meaning all permanent employees of the applicant excluding staff members.

The parties therefore circumscribed the membership of the bargaining unit. The Union argued that the position must be taken as having since changed because the applicant did allow the union to represent temporary and/or contract workers on two previous occasions. This argument is however watered down by the provision of article 17.3 of the recognition agreement which provides that:-

nNo relaxation or indulgence which the bank or the Union may grant to the other parties shall constitute a waiver by the grantor of any of its rights under this agreement"

[25] The Union is therefore bound by that provision of the collective agreement regarding the members of the bargaining unit.

[25] Since it is now clear that in terms of the Constitution every worker in the country has the right to join a trade union and also has the right to collective bargaining and representation, it follows therefore that the union can represent the said workers once they are made part of the bargaining unit. Further, as already pointed out herein, the said workers are eligible to be represented by the Union as they work in a financial institution. The workers in question are not however permanent employees as provided by the recognition agreement.

[26] All that the parties must do is to amend the recognition agreement to include the workers in question as they have a Constitutional right to collective representation.

[27] The Union is recognized by the applicant as the collective employee representative in terms of the Industrial Relations Act. That means the Union has already met or achieved the required percentage of fully paid up workers, which is a prerequisite for recognition. There was no allegation or evidence that for a continuous period of more than three months in any calendar year, the percentage of fully paid up members has fallen below the percentage fixed by the Act.

[28] From the foregoing observations it is clear therefore that; the Union has the right to represent the said workers as they have a constitutional right to collective bargaining and representation; the said workers are eligible to be represented by the Union as they work for a bank, which is a financial institution; the Union is recognized by the applicant as the collective employee representative at its undertaking.

[29] There was no evidence that the workers in question also participated in the voting for the strike.

[29] Taking into account all the above-mentioned observations the court will make the following order:-

- 1. The Union had no right to negotiate on behalf of the workers not falling within its bargaining unit as envisaged by the recognition agreement.**

- 2. The said workers cannot lawfully participate in the contemplated strike action.**

3. The parties are to amend the recognition agreement so as to include the said workers as they have a Constitutional right to collective bargaining and representation, and thereafter to engage in negotiations of the said workers' conditions of employment.

4. The workers who are part of the bargaining unit as defined by the recognition agreement are entitled to exercise their right to strike.

5. Each party to pay its own costs.

The members agree.

**NKOSINATHI NKONYANE AJ.
INDUSTRIAL COURT**