

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO.296/2002

In the matter between:

**SWAZILAND UNION OF FINANCIAL INSTITUTIONS
AND ALLIED WORKERS UNION ("SUFIAW") APPLICANT**

And

**STANDARD BANK SWAZILAND LIMITED (FORMERLY
BARCLAYS BANK OF SWAZILAND LIMITED
RESPONDENT**

CORAM;

NKOSINATHI NKONYANE: ACTING JUDGE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR APPLICANT: MR. A. LUKHELE

FOR RESPONDENT: MR. M. SIBANDZE

**RULING ON NOTICE TO
AMEND 22.08.06**

[1] When this matter was in court on 23.03.06, there were indications that the respondent might want to file an application to amend its pleadings.

[2] The respondent was accordingly given until 31.03.06 to do that. When the matter was called on that day, the respondent had not filed the notice to amend, An order for costs was made against the respondent and the matter was referred to the Registrar's office to allocate three more days.

[3] The Registrar however decided to allocate two days being 14.08.06 and 15.08.06.

[4] On Friday 11.08.06 the respondent eventually filed its notice to amend, four months later and on a day preceding the resumption of the trial on Monday 14.08.06. There was no good explanation for the delay. The respondent's attorney merely apologized to the applicant's attorney for the late filing of the notice to amend.

[5] There is no provision for application for an amendment in this court's rules. The High Court rules therefore become applicable in such situations in line with the provisions of Rule 10 of this court's rules.

[6] The notice to amend filed by the respondent is not, however, in conformity with the provisions of Rule 28 of the High Court's rules. The notice does not give the applicant an opportunity to file its objection within ten days if it has any, in terms of Rule 28(2).

[7] Mr. Lukhele for the applicant indicated that he was opposing the application. The matter was thereafter postponed until the following day, 15.08.06. On that day Mr. Lukhele was prepared to argue the matter and did not ask for a postponement to lodge an objection to

the proposed amendment.

[8] Mr. Lukhele argued that the application should be rejected by the court as the procedure for amendment had been violated by the respondent. He argued that the amendment would occasion his client prejudice as the first witness had given his evidence-in-chief, and was still under cross-examination.

[9] Mr. Sibandze, for the respondent, argued to the contrary and asked the court to allow the proposed amendment. He argued that any prejudice that the applicant could possibly suffer could be mitigated by an order for costs.

[10] The Law applicable:-

In an application for amendment the court has a discretion to allow or refuse a party to amend its pleadings at any time before judgement.

[See: **HERBSTEIN AND VAN WINSEN - "THE CIVIL PRACTICE FO THE SUPREMENT COURT OF SOUTH AFRICA" [1977] 4th EDITION AT PP 514 - 530**]

[11] The learned authors further stated at page 516 that the vital consideration in the decision whether to grant an amendment is whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and where appropriate, a postponement.

[12] What is clear to the court is that the respondent unduly delayed in filing its notice to amend after it had shown the intention to do so, It is also clear to the court that the applicant was unfairly treated by not being given enough notice. The court however is of the view that these can be mitigated by an order for costs against the respondent.

[13] Furthermore it is clear that the respondent failed to strictly comply with the provisions of Rule 28 of the High Court's rules, However, in matters of procedure the court has a discretion. The court must exercise its discretion judiciously and in a manner that will not or will not likely to result in a miscarriage of justice. In this matter, after perusal of the court record, it seems that the defence that the respondent seeks to introduce by the proposed amendment was put to PW1 during the cross-examination. The annexures to the amendment being "x3" and "x4" were put to PW1 and were marked annexures "D" and "E" respectively.

[14] It seems to the court therefore that the proposed amendment is more of a formality so that the defence raised during cross-examination, becomes part of the pleadings by the respondent

[15] In the light of the above observations and taking into account all the circumstances of the case, the court will allow the amendment.

[16] The court will accordingly make the following order;

A. THE AMENDMENT IS ALLOWED AND THE RESPONDENT'S REPLY TO APPEAR AS SO AMENDED.

B. THE RESPONDENT IS ORDERED TO PAY THE COSTS.

C. THE APPLICANT TO FILE ITS REPLICATION, IF IT WANTS TO, WITHIN FOURTEEN DAYS AFTER THE DELIVERY OF THIS RULING.

D. THE MATTER IS REFERRED TO THE REGISTRAR'S OFFICE TO ALLOCATE THREE MORE DAYS.

NKOSINATHI NKONYANE AJ.

INDUSTRIAL COURT