IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 242/2010

In the matter between:

NATIONAL CHICKS (SWAZILAND) (PTY) LTD **APPLICANT**

AND

SWAZILAND MANUFACTURING &
ALLIED WORKERS UNION
RESPONDENT

CORAM:

D. MAZIBUKO **JUDGE**

A. M. NKAMBULE **MEMBER**

M. T.E. MTETWA **MEMBER**

FOR APPLICANT **: S. SIMELANE**

FOR RESPONDENT **:ALEX FAKUDZE**

JUDGEMENT-10th MARCH 2011

Application to withdraw recognition of a Trade Union. Employer entitled to apply direct to Court and bypass CMAC. Joinder of interested party. Joinder of individual union members not necessary where union is cited in an application for withdrawal

of recognition. Section 42 of the Industrial Relations Act 1/2000 as amended due for further amendment.

1. The Applicant is NATIONAL CHICKS SWAZILAND PTY LTD, a company duly registered and incorporated in terms of the Companies Act of Swaziland. The Applicant carries on business at Nokwane within the Manzini district.

2. The Respondent is SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION a trade union duly registered in terms of the laws of Swaziland. The Respondent has opposed the matter and in particular raised points of law and further pleaded over on the merits.

3. By written agreement dated 21st July 2005, the Applicant gave the Respondent recognition as the employee representative at the Applicant's undertaking. At that time the Applicant had 19 (nineteen) employees of which 13 (thirteen) were union members. A copy of the recognition agreement is attached to the founding affidavit marked **NCI.**

4. About 20th February 2008 the Applicant avers that it had increased its work force within the bargaining unit to 45 (forty five) employees. At that time the Respondent had only 11 (eleven) members at the Applicant's workplace. Some of the Respondent's members had allegedly withdrawn their membership from the union.

5. About 20th February 2008 the Applicant wrote to the Respondent and raised a concern about the Respondent's diminishing membership. According to the Applicant the Respondent's members were less than the statutory requirement of a 50% (fifty percent) minimum. The letter is attached to the founding affidavit marked **NC2.** This state of affairs continued even up to the 31st May 2010. The Respondent has failed to increase its membership despite notice from the Applicant. By statute the Applicant was referring to The Industrial Relations Act. No. 1 of 2000 as amended (hereinafter referred to as the Act).

6. The Applicant has applied to Court for an order for de-recognition of the Respondent as the union representing the Applicant's employees at the Applicant's workplace. The word de-recognition is used by the parties to mean withdrawal of the recognition. The Applicant alleges that it has complied with the statutory requirements preceding a de-recognition application.

7. In particular the Applicant avers that it gave the Respondent the statutory 90 (ninety) days notice to increase its membership or face de-recognition. The notice referred to is annexure **NC2.** At the time annexure **NC2** was issued the Respondent allegedly had 12(twelve) members while the Applicant had 45 (forty five) employees in the bargaining unit. According to the Applicant the Respondent had 26.6 % (twenty six point six percent) representation during that time.

8. On the contrary the Respondent denies that her membership has declined below the statutory minimum. The Respondent avers that she acquired 21 (twenty one) new members who are in the bargaining unit at the Applicant's workplace.

9. On the 11th January 2010 the Respondent served on the Applicant a letter introducing the new members. The letter further requested the Applicant to commence deducting from the salaries of the new members a sum of E20.00 (Twenty Emalangeni) per employee as union dues. A list of the 21 (twenty one) names is attached to the said letter. The letter as well as the annexure is attached to the Respondent's affidavit marked **SMW 1.**

10. At the time the 21 (twenty one) new members joined the Respondent (union), she (Respondent) already had 13 (thirteen) existing members. The Respondent alleges further that the existing members plus the new recruits amounted to a total of 34 (thirty four) members in all at the Applicant's undertaking in January 2010. Still in January 2010 the Applicant avers that it had45 (forty five) employees. The Respondent has concluded therefore that at the material time she had 75% (seventy five percent) representation at the Applicant's undertaking. Accordingly the Respondent denies that she has failed to meet the 50% (fifty percent) statutory requirement.

11. The Applicant does not deny that a list of 21 (twenty one) names was sent to her as contained in annexure **SMW 1** in January 2010. The

Applicant however denies that by so doing the Respondent complied with the Act. According to the Applicant in order for an employee to qualify for a union membership, that employee must be a fully paid up member of the union. The list of names submitted by the Respondent as per annexure **SMW 1** are not fully paid up union members.

12. Furthermore, the Applicant argued that some of the names listed in annexure **SMW 1** are no longer employed by the Applicant. In particular Nomathemba Sihlongonyane and Sabelo Hlatjwayo are mentioned as employees in annexure **SMW 1** yet they have ceased working for the Applicant.

13. *In limine,* the Respondent has raised the point that there is a foreseeable and material dispute of fact which cannot be resolved on affidavit.
There is a dispute regarding whether the 21 (twenty one) employees listed in annexure **SMW 1** are fully paid up union members or not. The Applicant avers that these recruits are not fully paid union members. Therefore they do not qualify to be considered new union members. For the purposes of counting union members the Applicant will ignore the (twenty one) alleged new recruits. The Respondent holds a contrary view.

14. The Respondent argues that the 21 (twenty one) recruits are fully paid up union members because they have signed the required stop-order forms. According to the Respondent it is a signed stop-order

form that qualifies an employee to be considered a fully paid up union member.

15. It is noted by Court that there are 21 (twenty one) stop order forms signed by various individuals which are attached to annexure **SMW 1.** The Applicant has not disputed receipt of the said stop order forms and the contents therein. The parties differ in the interpretation of the phrase **fully paid up member** of the union. This phrase appears in the section 42 (5) (a) of the Act. The real dispute therefore between the parties is one of law and not of fact. This phrase is also the basis of the Applicant's case on the merits. The Court will treat this issue as an item for the merits of the application.

16. A second point raised *in limine* relates to the Applicant failing to utilize the dispute resolution procedures that are provided in the Act. The Act provides especially in Part VIII that disputes between employer and employee should be reported to CM AC for a speedy resolution. By CM AC is meant the Conciliation Mediation and Arbitration Commission established in terms of section 62 (1) and 64 (1), (b) and (c) of the Act.

17. The Respondent argues that the matter before Court has not been conciliated and therefore it is not ready to be brought to Court for determination. In terms of Rule 14 (6) (b) an application before Court which requires to be dealt with under Part VIII of the Act should be accompanied by a certificate of unresolved dispute. An exception is allowed where the matter is solely for determination of a question of

law. The present matter is for determination of a question of law and fact (according to the Applicant).

18 Rule 14 (6), (b) reads as follows;

> "*The Applicant shall attach to the affidavit -(a)*
>
> (b) *in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law.*

The question before Court is whether the dispute that has been raised by the Respondent or the entire application is one which requires to be dealt with under Part VIII of the Act or not.

19. The matter before Court is governed by section 42 (II) (a) of the Act. This section reads as follows;

> "*An employer may make an application to the Industrial Court for the withdrawal of recognition if -*
>
> *(a)the organisation's representativeness falls below the representativeness contemplated in subsection (5) (a) for a continuous period of more than three months;...*"

20. Section 42(11) (a) authorises an employer to file an application direct with the Court for an order for the withdrawal of a

recognition of a union. In other words there is no need for an employer to report a dispute under Part VIII of the Act if the matter before Court is the withdrawal of the recognition of a union. Section 42 (II) (c) should be read with section 42 (5) (a). Rule 14 (6) (b) does not apply in this case. The matter before Court does not require to be dealt with under Part VIII of the Act.

21. The Application before Court is for the withdrawal of the recognition of a union (Respondent). The Application is based on an allegation that the union has less than 50% (fifty percent) members at the Applicant's workplace. This application therefore falls squarely within the provision of section 42 (II) (a). The Applicant is authorised by the Act to file his application direct with the Court and by pass the CMAC dispute resolution process. It does not make any difference whether the Respondent has raised a material dispute of fact or not. This point *in limine* is therefore dismissed.

22. The third point raised *in limine* concerns failure on the Applicant to join as co-Respondents the members of the union (Respondent) in the matter before Court. A third party is entitled to be joined in legal proceedings if the order sought may affect his rights and interests. Failure to join an interested party may result in a delay or dismissal of the matter before Court.

23. A recent local case on a joinder of parties is that of MFOMFO NKAMBULE vs THE GOVERNMENT OF SWAZILAND and 2 others, High Court case No. 1965/2006. The Applicant moved an application which was dismissed for failure to join a certain third party.

The Court found that, that third party had a direct and substantial interest in the relief sought in the application. This Court agrees with the principle as stated in that case.

24. In the matter before Court the only Respondent is the union. The union (Respondent) is the representative of the employees of the Applicant in the bargaining unit at the Applicant's undertaking. The Respondent was given due recognition by the Applicant in the terms of annexure **NCI.** The Respondent has acknowledged in her answering affidavit its mandate to represent the rights and interests of its members.

25. The Court finds no need therefore to join the union members individually in this lawsuit as co-Respondents together with the union. The rights and interests of the union members (employees) in this lawsuit are intertwined with those of the union, which represents them. The union is the agent through which the members have chosen to speak and to be spoken to at work and in Court.

26. The Union has no rights and interest of its own in this lawsuit which exists independently of its members. The attention of the Court has

not been drawn to any issue in this matter that may adversely affect the union members if they are not joined as co-Respondents.
The union members have not applied for joinder either though they had an opportunity to do so. The Court does not find any irregularity on the Applicant's part in citing the union as the only Respondent. The issue of non-joinder does not arise in this case. The third point *in limine* is accordingly dismissed.

27. In her fourth and last point *in limine,* the Respondent argues that the Applicant has failed to give the Respondent (union) notice of the intended legal action in the event that the Respondent fails to comply with the statutory requirement of 50% (fifty percent) minimum membership. According to the Respondent a notice was legally required before legal action is instituted by the Applicant.

28. There is no provision in the Act that requires notice to be given to the union before legal action is taken for an order for withdrawal of recognition. The Act empowers the employer to institute legal action for withdrawal of recognition if the union fails to secure a minimum of fifty percent (50%) employee representation for a certain period of time. Section 42 (II) (a) requires that, that state of affairs must be for a continuous period of more that three (3) months.

All that the employer needs to prove before Court is that for a continuous period of more than three (3) months the union has failed to secure a fifty percent (50%) employee representation at the

workplace. A notice to institute legal action is not a legal requirement. It may be prudent though, for the employer to give the union notice prior to the taking of legal action in order to avoid incurring unnecessary costs. The fourth point *in limine* is accordingly dismissed.

29. Even if there was a legal requirement to give notice of intended legal action, the Applicant would still have succeeded in discharging that requirement. By letter dated 20th February 2008 (annexure **NC2)** the Applicant gave the Respondent sufficient notice of intended legal action. The Court accepts that in that letter the Applicant misquoted the relevant legislation and misread section 42 (5) (a) of the Act. However the notice to take the necessary legal steps to withdraw recognition was given. The Respondent was not entitled to ignore annexure **NC2** simply because of the Applicant's aforementioned error. The content of the letter is clear despite the errors. The fourth point *in limine* is without merit and is accordingly dismissed.

30. The matter hinges on the interpretation of the phrase ***fully paid up union members.*** According to the Respondent a group of 21 (twenty one) new recruits were introduced to the Applicant undercover of annexure **SMW1.** The Applicant rejected the union recruits on the basis that they were not fully paid up union members.

31. The Act does not define the phrase *fully paid up union members.* The Act has used the phrase in several instances. Section 42 (5) (a) reads as follows;

> "*The employer shall recognize a trade union or staff association that has been issued with a certificate under Section 27 if-*
>
> > *(a) fifty percent of the employees in respect of which the trade union or staff association seeks recognition are* ***fully paid up members*** *of the organization.*
>
> (Emphasis added)

32. According to Section 42 (5) (a) and 42 (13) of the Act it is necessary for a union that is seeking recognition to prove to the employer that the union recruits are **fully paid up** union members. In the absence of the requisite proof, the employer is entitled to refuse to recognise the union.

33. After recognition is granted, the union is expected to continue recruiting new members in order to maintain the fifty percent (50%) minimum membership at the employer's undertaking. A union recruit must have the requisite qualification of being *fully paid up union member* in order to be considered by the employer.

34. Section 42 (6) reads as follows:

> "*for purposes of determining whether a trade union or staff association represents fifty percent of the employees in respect of which it seeks recognition, a stop-order form duly*

signed by the employee shall be sufficient proof that the employee is a ***full member*** *of the union, and in the case of any disagreement a head count shall be conducted*".

(Emphasis added)

35. Section 42 (6) of the Act talks of a ***full member*** of the union. Sections 42 (5) (a) and 42 (13) talk of a ***fully paid up union member.*** From a reading of the whole section 42 it is a determination of the Court that the legislature uses these two (2) phrases interchangeably. The Court will likewise treat these phrases in the same manner. Where the phrase *full member* appears as in section 42 (6) the Court will read that phrase to mean *fully paid up union member.*

36. From the argument advanced by both counsel before Court it became clear that no payment is made or expected when an employee is recruited to join a trade union. So the phrase *fully paid up union member* is misleading. The phrase *full member is more* appropriate. The legislature is requested to amend section 42 so that there is uniformity in the phrase used to describe employees who have recently joined a trade union.

37. According to section 42 (6) of the Act an employee who has signed a stop-order form shall be considered a *fully paid up union member.* In January 2010 the Respondent introduced to the Applicant twenty one

(21) signed stop-order forms purportedly signed by union recruits. It is not in dispute that the stop-order forms were duly signed by the union recruits who are employees of the Applicant. Applying the provision of section 42 (6) the Court finds that the twenty one (21) union recruits who signed the stop order forms are ***fully paid up union members.***

38. According to the Applicant when annexure **NC2** was issued (20th February 2008) the Respondent had 12 (twelve) members. The Respondent introduced 21 (twenty one) new members in January 2010 in terms of annexure **SMW 1.** According to the Applicant certain 2 (two) new union members left the Applicant's undertaking namely Sabelo Hlatjwayo and Nomathemba Sihlongonyane. That means that the number of the new members was reduced to 19 (nineteen). The total number of union members as at January 2010 is therefore 31 (thirty one) i.e (12 + 19 members).

39. The Applicant had a total of 45 (forty five) employees in the bargaining unit in January 2010. The union therefore had 68% (sixty eight percent) representation at the Applicant's undertaking at the material time. The Respondent (union) has a convincing majority to continue enjoying recognition. The application fails on the merits.

40. Under normal circumstances costs follow the event. The Respondent has succeeded on the merits. The Applicant was also successful in resisting the points *in limine.* It is fair that each party pays its own costs.

41. Wherefore the Court makes the following order;

(a) The application is dismissed.

(b)Each party pays its own costs. The members agree.

D MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT