



IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

Case NO. 487/12

In the matter between:

**SWAZILAND MANUFACTURING & ALLIED
WORKERS UNION FOR:**

**33 UNIONISABLE EMPLOYEES OF THE RESPONDENT
NOBUHLE MASUKU
SIKELELA LUKHELE**

**1st Applicant
2nd Applicant
3rd Applicant**

And

SWAZILAND POULTRY PROCESSORS [PTY] LTD

Respondent

Neutral citation: *Swaziland Manufacturing & Allied Workers Union & Others v Swaziland Poultry Processors (Pty) Ltd (487[2012] SZIC 7 (MARCH 4 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : 15th FEBRUARY 2013

Ruling delivered: 04th MARCH 2013

Summary:

The Applicants instituted motion proceedings against the Respondent employer alleging victimization at the workplace. The application was opposed by the Respondent employer which vehemently denied the allegations made against it. The Respondent raised points of law inter alia that there are disputes of fact which ought to have been foreseen by the Applicants.

Held—There are serious disputes of fact which cannot be resolved on the papers before the court which ought to have been foreseen by the Applicants. Points of law upheld accordingly.

**RULING ON POINTS OF LAW RAISED
04.03.13**

[1] The Applicants have instituted the present proceedings under a certificate of urgency. They are seeking an order as follows:-

“1. Dispensing with the normal requirements relating to time limits, manner of service and procedure prescribed for ordinary applications and that this matter be enrolled and

heard as one of urgency in terms of the Rules of the above Honourable Court.

2. *Condoning any non-compliance with the Rules of this Court in so far as they provide for institutions and hearing of ordinary applications.*

3. *That a rule nisi operating with interim and immediate effect returnable on a date to be determined by the above Honourable Court be issued calling upon the Respondent to show case why an order in terms of set out in progress should not be confirmed and made a final order of Court.*
 - 3.1 *Interdicting and restraining the Respondent from replacing the Union members, Further Applicants at their expiry of their fixed term contract with non-union members.*

 - 3.2 *Interdicting and restraining the Respondent from making non affiliation to the Union as a condition for employment and for renewal of the fixed term contracts.*

- 3.3 *Interdicting and restraining the Respondent for acting mala fide by not renewing the fixed term contracts due to be renewed, as he has threatened not to renew all the contracts of union members in future.*
- 3.4 *Ordering the Respondent to renew the contracts of all the employees which the Respondent has bluntly refused to renew due to their affiliation to the Union with payments of arrears accruing therein.*
- 3.5 *Directing the Respondent to comply with **Section 3.3, 3.5, 10.1 and 102** of the Recognition and Procedural Agreement existing between the parties SMAWU and the Respondent; and also comply with **Section 43(4)** of the Industrial Relations Act of 2000 as amended.*
- 3.6 *Directing the Respondent to comply with **Clause 9, Clause 10, Clause 12, Clause 14 and Clause 16** of the Collective Agreement existing between the Union and the Respondent, pertaining to employees in this application.*

3.7 Directing the Respondent to confirm, as permanent employees the further Applicants who are employees of the Respondent as it is clear that the Respondent nature of business is of continuous and permanent nature.

3.8 Costs of suit.

3.9 Further and / or alternative relief as the court may deem appropriate.”

[2] The Applicants’ application is opposed by the Respondent which duly filed an Answering Affidavit deposed thereto by Philisiwe Gama, who stated therein that she is the Human Resources Officer of the Respondent. The Applicants thereafter filed a Replying Affidavit.

[3] In its Answering Affidavit the Respondent raised points of law. The court is therefore presently called upon to make a ruling on the points of law raised by the Respondent.

[4] The Respondents raised the following points of law:

- 4.1 *The Applicants' application is littered with disputes of fact – which were, or should have been anticipated by the Applicants.*
- 4.2 *The 33 affected employees referred to in the application are not named.*
- 4.3 *The requirements of an interdict have not been met by the Applicants' application.*
- 4.4 *The 1st Applicant has no locus standi in judicio.*
- [5] Both parties filed Heads of Argument. The matter was argued before the court on 15.02.13. The court will address the points of law as follows:-

5.1 ***DISPUTES OF FACT:-***

There is no doubt to the court that the application is full of disputed facts which cannot be resolved by motion proceedings. The gist of the Applicants' application is that the Respondent is victimizing the employees who are on contract and who are members of the Union, contrary to the provision of **Article 3.5 of the Recognition and Procedural Agreement**. This is vehemently denied by the Respondent. These allegations of victimization are

so serious that the Applicants could not have failed to anticipate that they would be denied by the Respondent. This point of law is accordingly upheld.

5.2 ***THE 33 UNNAMED APPLICANTS:-***

There was no annexure to the Applicants' application specifying or listing the names of the 33 affected employees. If the court were to grant the order sought, it will be impossible to enforce it as the names of the 33 employees are not known. A court should not make an order that cannot be enforced. This point of law is also upheld.

5.3 ***REQUIREMENTS OF AN INTERDICT:-***

It was argued on behalf of the Respondent that the Applicants have a plethora of other remedies under the Industrial Relations Act and in particular under Part Viii. Indeed the evidence before court shows that there is a Recognition and Procedural Agreement between the parties. There is a grievance procedure in that document at page 38 marked "ANNEXURE F". The court will not entertain applications brought to it by Applicants who ignore their constitutions at the workplace. The core of the Industrial Relations Act is that parties must approach the court only as a last resort. In

the present case the parties did not even engage each other in terms of their own grievance procedure. It cannot be said therefore that there was no other remedy available. The point of law is accordingly upheld.

5.4 **LOCUS STANDI IN JUDICIO:-**

It was argued that the union has no *locus standi in judicio* in the claims that are personal to the workers. It was argued that the union has locus standi only in the matters that relate to the Recognition and Procedural Agreement. The court was referred to the case of **Swaziland Agriculture and plantation Workers' Union v. United Plantations (Swaziland) Limited, case No. 79/98** as authority for this proposition. That decision was made by this court in 1998. The Industrial Relations landscape has since changed over the years. It is now accepted that a union may represent its members in labour courts even when it is not seeking a relief for itself. (See ; **John Grogan: Workplace Law, 8th edition p. 327.**) The chief mandate conferred on a union by its members is to negotiate on their behalf for the improvement of their wages and conditions of service. The matter is before the court because the employees are aggrieved by the conditions of service at the workplace. It is the duty of the union to take up the matter with the employer, if it is not resolved, to take it to court. It is sufficient in the

Labour Court for the union to state in the application that the union is instituting the application on behalf of (“OBO”) certain specified members. As already stated, it is the core mandate of a trade union to represent the interests of its members at the workplace. This point of law is therefore dismissed.

- [6] The three points of law raised having been upheld, the application must be dismissed accordingly.
- [7] The Respondent prayed that the application be dismissed with costs. The court will not grant the order for costs as the Respondent did not succeed in all the points of law raised.
- [8] As an aside, the court will repeat the comments made in court that if the parties were properly advised, this matter would not have come to court at all. The right of any employee to freely join a trade union is guaranteed both in the Industrial Relations Act and the Constitution of the Kingdom of Swaziland without any discrimination based on permanent employment, temporary employment or employment on contract basis. The Constitution provides in section 32 (2) that;

“A worker has the right to-

(a) Freely form, join or not to join trade union for the promotion and protection of the economic interests of that worker; and

(b) Collective bargaining and representation.”

[8] The Constitution is the supreme law of the land.

[8] Again, Part 1X of the Industrial Relations Act dealing with freedom of association and the right to organize provides as follows in section 98;

“Basic employee rights.

98. An employee may-

(a) take part in 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 union, staff association or federation;**
- (d) take part in the election of workplace trade union representative or staff association representative, or be a candidate for such elections;**
- (e) in the capacity of the workplace trade union representative or staff association representative;**
- (f) exercise any right conferred or recognized by this Act, and assist any employee, staff association or trade to exercise such rights.”**

[9] These rights are basic, they are not conditional on whether the employee is temporary, permanent or on fixed term contract.

[10] Taking into account all the factors and circumstances of this case, the court will make the following order;

- a) The application is dismissed.
- b) There is no order as to costs.

[11] The members are in agreement.

N. NKONYANE J
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS : MR DERRICK BONGUMUSA DLAMINI
(LABOUR LAW PRACTITIONER)

FOR RESPONDENT : MR. MUSA M. SIBANDZE
(MUSA M. SIBANDZE ATTORNEYS)