



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 184/2017

In the matter between:

**SWAZILAND MANUFACTURING AND ALLIED
WORKERS UNION SMAWU**

Applicant

and

**AMALGAMATED TRADE UNION
OF SWAZILAND (ATUSWA)**

1st Respondent

COMMISSIONER OF LABOUR

2nd Respondent

Consolidated With:

Case No: 186/17

**AMALGAMATED TRADE UNION
OF SWAZILAND (ATUSWA)**

Applicant

And

JUSTICE THINTITHA MTSETFWA

1st Respondent

ROSE HADZEBE

2nd Respondent

POLYCARP STEWART

3rd Respondent

ALFRED DLAMINI

4th Respondent

GABSILE FAITH MKHONTA

5th Respondent

MIRRIAM ZWANE

6th Respondent

**SWAZILAND MANUFACTURING AND
ALLIED WORKERS UNION (SMAWU)**

7th Respondent

Neutral citation: *Swaziland Manufacturing & Allied Workers Union (SMAWU) v Amalgamated Trade Union of Swaziland & Others (184/2017) [2018] SZIC 31 (April 26, 2017)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: 03/04/18

Delivered judgement: 26/04/18

JUDGEMENT

1. The Applicant under case number 184/17 launched an urgent application before the Court for an order in the following terms;

- “1. Dispensing with the normal forms and time limits provided for in the rules of the above Honourable Court and enroll this matter as one of urgency.
2. Condoning any non-compliance with the rules of the Court relating to time limits, manner of service of the Court process and documents and any other procedural requirements.
3. That a rule nisi do hereby issue returnable on a date to be determined by the above Honourable Court calling upon the First Respondent to show cause why an order in the following terms should not be made final;
 - 3.1 Declaring that the First Respondent is a separate and distinct organization from the Applicant.
 - 3.2 Interdicting and restraining the First Respondent from interfering in the affairs and business of the Applicant by claiming rights and duties of the Applicant.
 - 3.3 Interdicting and restraining the First Respondent from exercising any of the organizational rights granted to the Applicant pending the finalization of this matter.
 - 3.4 Prayer 3.2 above operates with immediate and interim effect.
4. Costs of this application be awarded against the First Respondent.

5. Further and/or alternative relief as the Court may deem appropriate.”

2. The application appeared before the Court on 13th June, 2017, on a Tuesday. On Thursday, 15th June, 2017, the 1st Applicant launched an urgent application under case number 186/17 seeking an order in the following terms;
 - “1. Dispensing with the Rules of Court as relate to forms service and time limits and enrolling this matter as one of urgency.

 2. That a rule nisi operative with immediate and interim effect pending finalization of this application do hereby issue as follows:
 - 2.1 Setting aside all letters issued by the Respondents to various employers where the Applicant is de facto recognized as the employees representative purporting to revive the Swaziland Manufacturing and Allied Workers Union (SMAWU) and to substitute the same in Applicant’s stead.

 - 2.2 That the Applicant continues with all pending and/or ongoing negotiations with employers on behalf of its members pending the outcome of this application.

 - 2.3 That all union subscriptions continue to be made payable to the Applicant pending finalization of this application.

3. That the Respondents be called upon to show cause why an order in the following terms should not be issued;

3.1 Declaring that the Swaziland Manufacturing and Allied Workers Union (SMAWU) merged with various trade unions to form the Amalgamated Trade Union of Swaziland (ATUSWA);

3.2 Declaring that all rights and duties of SMAWU were assumed by the Applicant pursuant to the merger of SMAWU to form the Amalgamated Trade Union of Swaziland (ATUSWA).

3.3 Interdicting the Respondents' from interfering with the business of the Applicant and its (Applicant's) relations with its members and/or employers where Applicant is recognized.

4. Directing the Respondents to pay costs of suit on the scale as between attorney and own client jointly and severally, the one paying, the other to be absolved.

5 Granting Applicant such further and/or alternative relief as the Court may deem fit.”

4. Although the pleadings are bulky, the question for the Court to decide is simple, that is, whether the Applicant in case number 184/17 (SMAWU) did amalgamate with other existing trade unions to form a

combined or amalgamated trade union by the name of ATUSWA, the Applicant in case number 186/17.

5. From the pleadings filed in Court, it transpired that there was a dispute of fact whether or not there was an agreement by SMAWU and other trade unions to be part of the combination of trade unions, ATUSWA. The parties agreed that that issue be referred to oral evidence as it became apparent that it could not be resolved on the papers.
6. If the Court finds that there was an agreement by SMAWU and other trade unions to form a combined trade union by the name of ATUSWA, then *cadit quaestio*, the Applicant's (SMAWU) application in case number 184/17 will be dismissed, and the Applicant's (ATUSWA) application in case number 186/17 will be upheld.
7. On behalf of SMAWU four witnesses testified before the Court. On behalf of ATUSWA two witnesses were led in evidence before the Court. The intention of the evidence of the witnesses paraded by SMAWU was to tell the Court that there was no agreement by the members of SMAWU to join the combination of trade unions which led to the formation of ATUSWA.
8. AW1, Miriam Zwane, told the Court that she joined SMAWU in 1999. She told the Court that on 31st August 2013, SMAWU convened a Special General Meeting that was held at Caritas in Manzini. The Special General Meeting had been convened for the

sole purpose of discussing and voting on the merger with other trade unions to form ATUSWA. She said the meeting did not proceed because of lack of quorum. She said one member by the name of Joseph Skhosana, moved a motion that since there were few people in attendance, the meeting should be postponed. She said the motion was not opposed and the meeting was postponed.

9. During cross examination she agreed that the purpose of the meeting was to discuss the merger or amalgamation. AW1 also told the Court that they were not given the opportunity to vote whether the seventy five per cent (75%) of those present agreed that the meeting should proceed or not. She said the meeting would sometimes get out of hand because the members were questioning the presence of Wonder Mkhonza and another person who was from a South African based trade union by the name of NUMSA. When asked how was Joseph Skhosana's motion adopted if there was no voting, AW1 said the Chairperson, Justice Mtsetfwa agreed that the meeting be postponed. When pressed further with the question whether or not there was a voting process, AW1 then said there was a voting process in line with the requirements of SMAWU's Constitution. She denied that the members that were present did vote to dissolve SMAWU and participate in the formation of a new trade union by the name of ATUSWA.

10. AW2, Justice Thintitha Mtsetfwa, told the Court that he was present in the meeting that was held on 31st August 2013 at Caritas, Manzini. He told the Court that he was the chairperson and that he had to call

the meeting off after Joseph Skhosana had raised a motion which was seconded by Miriam Zwane, AW1, to the effect that there was lack of quorum. He said even though the meeting was officially cancelled, they however continued to discuss other matters. He denied that any resolution was taken to dissolve SMAWU. When he was shown the resolution document (**Page 167 of SMAWU Bundle of Documents**), AW2 told the Court that he does not recall signing the document.

11. During cross examination, AW2 told the Court that the motion to postpone the meeting was not decided by vote as it was unopposed. AW2 agreed that he attended ATUSWA Congress which was held at Esibayeni Lodge in his capacity as SMAWU chairperson.
12. AW3, Brian Mazibuko, told the Court that there was no resolution that was passed on 31st August 2013 that mandated anyone to attend the ATUSWA Congress. During cross examination he was asked as to how long did the meeting last and he said he thinks it lasted less than an hour as he left and did not stay until the end.
13. AW4, Rosemary Hadebe, told the Court that the motion that was raised by Joseph Skhosana was not opposed. She told the Court that she attended ATUSWA Congress at Esibayeni in her personal capacity. During cross examination she agreed that she used to be an employee of Tex Ray and that she is no longer employed. She said she ceased to work for Tex Ray in 2014 when the company closed down due to lose of AGOA by the country. She agreed that the purpose of the meeting at Esibanyeni Lodge was to launch ATUSWA.

14. On behalf of ATUSWA, AW1, Wonder Mkhonza, told the Court that he was present in the meeting convened by SMAWU on 31st August 2013 at Caritas. He said that meeting was a culmination of the rally that was held at Salesian Sports Ground on 07th July 2013 where the workers of various trade unions agreed that the trade unions to which they belonged to should unite and form one trade union. He told the Court that SMAWU was represented during the launching of ATUSWA at Esibayeni Lodge. He told the Court that ATUSWA was finally registered by the office of the Commissioner of Labour on 09th May, 2016. He told the Court that members of SMAWU participated in all the processes that led to the formation of ATUSWA.
15. ATUSWA's second witness, Sabelo Zwelithini Sihlongonyane told the Court that he is the Deputy General Secretary of ATUSWA and also a shop steward and is employed by Mondelez in Matsapha. He told the Court that he was present in the meeting convened by SMAWU on 31st August, 2013 at Caritas. He was the General Secretary of SMAWU at that time. He said the purpose of the meeting was to deliberate on the issue of the merger in preparation of the formation of ATUSWA. He said a resolution was taken in that meeting to dissolve SMAWU. He said the members present in that meeting did sign the attendance register and that the meeting proceeded until after lunch. He said the meeting was financed by NUMSA and that the attendance register was given to the NUMSA representative for accountability purposes. He told the Court that the chairman of SMAWU, Justice Thintitha Mtsetfwa and other members of the National Executive Committee (NEC) of SMAWU were

present when ATUSWA was launched at Esibayeni Lodge. He said Joseph Skhosana was also present at the launch. He said Joseph Skhosana never moved any motion to have the meeting postponed. He said Joseph Skhosana could not have been in a position to do that as he did not know how many people had registered.

16. Zwelithini Sihlongonyane further told the Court that it was him and Justice Thintitha Mtsetfwa who signed the resolution document. He said during the latest National General Council of ATUSWA held on 11th March 2017, former branches of SMAWU attended. He told the Court that since the meeting held on 31st August 2013 and after the ATUSWA Congress and the registration of ATUSWA on 09th May 2016, SMAWU ceased to exist.

17. During cross examination Zwelithini Sihlongonyane told the Court that only two unions changed their minds before the ATUSWA Congress. He said these were SCAWU and SATU. He told the Court that no meeting was held to adopt the minutes as the decision had already been taken by the members to participate in the amalgamation and the NEC had the mandate to facilitate the amalgamation process.

18. **ANALYSIS OF THE EVIDENCE AND THE APPLICABLE LAW:**

As already pointed out by the Court, the main issue for the Court to decide is whether or not SMAWU was dissolved and its membership taken over by the new union by the name of ATUSWA as the result of the amalgamation.

19. In its papers and during the leading of viva voce evidence, SMAWU tried very hard to deny the existence of the resolution to dissolve and be part of the new trade union, ATUSWA. The Court says SMAWU tried very hard because all the evidence before the Court points to one conclusion, that is, a group of trade unions did agree to merge and form an amalgamated trade union called ATUSWA.

20. RESOLUTION TO DISSOLVE:-

There was clear evidence before the Court of the resolution. The resolution document appears on **page 167 of SMAWU's Bundle of Documents** and it is also marked **"AT5"**. This document was signed by both the former Secretary General, Zwelithini Sihlongonyane and the former President, Justice Thintitha Mtsetfwa. Faced with this evidence, Justice Thintitha Mtsetfwa suddenly appeared to suffer from amnesia and resorted to disowning the document. He said he was not sure whether the signature was his, but he said it did look like it. He also said he did not recall signing the document. The Court had the advantage of observing the witnesses in the witness stand. Justice Mtsetfwa was clearly uncomfortable and agitated when confronted by ATUSWA's lawyer on this issue. During cross examination he then said the signature could be his, but he does not recall signing.

21. Justice Mtsetfwa appeared to the Court as an outright liar who was simply bent on denying clear evidence when it suited him. The only other signatory to the document was Zwelithini Sihlongonyane who

signed in his capacity as the then Secretary General of SMAWU. Zwelithini Sihlongonyane told the Court that it was him and Justice Mtswetfwa who signed the document after the meeting that was held on 31st August 2013. The Court will therefore accept the evidence of Zwelithini Sihlongonyane on this issue and dismiss the evidence of Justice Mtsetfwa as false, exaggeration and imaginative concoction.

22. RESOLUTION TO AMALGAMATE.

SMAWU's case in its papers and during viva voce evidence was that there was no resolution taken by the workers during the meeting held on 31st August 2013. There was a dispute about the number of workers who attended the meeting on 31st August 2013. All SMAWU's witnesses told the Court that there was no resolution taken on that day because the meeting was postponed due to poor attendance. Zwelithini Sihlongonyane who was the Secretary General told the Court that the meeting was properly constituted. He said he was aware of that because the members were registering with him. AW1, Miriam Zwane and AW2, Justice Mtsetfwa contradicted each other on the issue of whether or not there was a voting to postpone the meeting. Miriam Zwane during cross examination said there was a voting. AW2, Justice Mtsetfwas said there was no voting. The cross examination of Justice Mtsetfwa went as follows;

“Q. Miriam Zwane said the issue was put to a vote how do you reconcile that evidence.

A. *There was no voting as the motion was not opposed.*”

23. AW1, Miriam Zwane also contradicted herself during cross examination. She first told the Court that the members present were not given the opportunity to vote whether they agreed that the meeting should continue. She was then asked how was the motion that was raised by Joseph Skhosana adopted if there was no voting. She answered as follows;

“A. *The chair Justice Mtsetfwa agreed that the meeting be postponed and another meeting be called.*

Q. *Was there a voting on that decision?*

A. *Yes.....*”

24. AW3, Brian Mazibuko’s evidence is also unreliable as he contradicted himself during cross examination. He told the Court that the meeting was called off because of lack of quorum. However, when asked as to how long did the meeting take, he told the Court that he thinks it was less than an hour because he left but some members remained behind. Clearly, AW3 is not in a position to tell the Court how long did the meeting last as he left before it came to an end.

25. AW4, Rosemary Radebe's evidence did not take SMAWU's case any further. She simply regurgitated what the other witnesses had said with the help of her representative Mr. Fakudze who made some gestures to assist her. This conduct by Mr. Fakudze was disturbing and highly unprofessional and unacceptable in Court. This conduct by Mr. Fakudze led to ATUSWA's attorney Mr. Mavuso being agitated and standing up to raise an objection.

26. ATUSWA's witnesses Wonder Mkhonza and Zwelithini Sabelo Sihlongonyane were calm and relaxed in the witness stand. They gave their evidence with clarity. They were not discredited during cross examination. The Court will therefore come to the conclusion that they were creditworthy witnesses. The Court will therefore accept their version on the issue of the resolution to dissolve SMAWU and amalgamate with other trade unions because of the following reasons;

26.1 There is documentary evidence of the resolution to dissolve SMAWU and amalgamate with other trade unions which was signed by both the former Secretary General of SMAWU, Zwelithini Sabelo Sihlongonyane, and the former President of SMAWU, Justice Mtsetfwa. (*page 167 of SMAWU's Bundle of Documents, Annexure "AT5"*)

26.2 The members of the National Executive Committee (NEC) of SMAWU were actively involved in all the processes that led to the formation of the new union, ATUSWA.

- 26.3 Miriam Zwane (AW1), Justice Mtsetfwa (AW2) Rosemary Radebe (AW4) attended the official launch of ATUSWA at Esibayeni Lodge in 2013. The official launching of ATUSWA was a culmination of the resolution by the workers at the Rally at Salesian Sports Ground and the subsequent resolutions taken by the various trade unions including SMAWU to combine and form one trade union.
- 26.4 The minutes of the meeting held on 31st August, 2013 clearly show that the members did take a resolution to amalgamate. ***(Page171 of SMAWU Bundle of Documents, Annexure “AT7”)***
- 26.5 It is not in dispute that ATUSWA was indeed thereafter registered on 09th May, 2016. ***(See: page 193 of SMAWU Bundle of Documents, Annexure “AT9”).***
- 26.6 The evidence by Zwelithini Sihlongonyane that Joseph Skhosana was also present during the launch of ATUSWA at Esibayeni Lodge was not disputed. That conduct by Joseph Skhosana goes against the grain of the evidence by SMAWU’s witnesses, who told the Court that he was against the holding of the meeting on 31st August, 2013 where the resolution to amalgamate was taken.

26.7 The evidence revealed that the SMAWU NEC members who attended the launching of ATUSWA were given ATUSWA branded t-shirts to wear. When asked as to why they accepted and wore these t-shirts if they were against the formation of ATUSWA, they said they accepted these t-shirts as gifts. It is highly unlikely that someone would attend the meeting of an organization and put on a branded t-shirt of that organization if he is opposed to what is taking place or what that organization stands for.

26.8 The evidence of SMAWU witnesses that there was no amalgamation is incompatible with the fact that Justice Mtsetfwa was the President of ATUSWA from 2013 when it was launched until he was suspended in April 2017.

27. The Law:-

Amalgamation of trade unions in Swaziland is regulated by Section 41 of the **Industrial Relations Act No.1 of 2000 as amended**. Section 41 (b) and (c) provides that;

“(b) An organization which is registered under this Act may, in the manner provided for in its constitution and subject to the provisions of this Act, amalgamate with any other organization.

(c) In the event of amalgamation, the newly constituted organization shall assume all the rights and duties of its predecessor organizations unless the Court on good cause

shown upon the application of an interested party directs otherwise.”

Organization is described in the definition Section of the Act as meaning “*a trade union, staff association or employers association in good standing as the context may require.*” Amalgamation is not a magic word. To amalgamate simply means to combine or unite in order to form one structure. In casu, the evidence revealed that various trade unions including SMAWU and SPRAWU agreed to combine and form one trade union by the name of ATUSWA.

28.The Act provides clearly that after the amalgamation, the new organization or trade union shall assume all the rights and duties of its predecessor or defunct trade unions. In casu, the newly established trade union is ATUSWA. In terms of the law ATUSWA “*shall assume all the rights and duties of its predecessor organizations*”. It should follow therefore that the rights and duties that SMAWU or SPRAWU had over their membership, have been assumed by the new trade union, ATUSWA. If, for example, there were negotiations that were going on before the amalgamation, the new trade union having assumed all the rights and duties of its predecessors, should now take over and continue with the negotiations.

29. SMAWU’s representative, Mr. Fakudze, came up with a strange interpretation of Section 41. According to Mr. Fakudze, ATUSWA should produce proof of individual worker membership. He gave the impression that that was also the view of the Commissioner of Labour

who, according to Fakudze, eventually registered ATUSWA as a trade union and not as an amalgamation. He went on to argue that

ATUSWA was eventually registered as a trade union and not as an amalgamation. He went on to argue that there was no provision for the registration of amalgamations in the Act. He argued that there was no provision for amalgamation in the constitution of SMAWU and that the Commissioner of Labour instructed the trade unions to amend their constitutions and include a clause for amalgamation.

- 30.** There is no requirement in terms of the Act that the new trade union should engage on a recruitment exercise of members. The reason for that is very clear; the new trade union takes over the membership of the defunct trade unions that have amalgamated. As already pointed out herein, there is no magic or mystery in the word “amalgamation”. It simply means a combination of different units to form one structure. In the matrix of the present application, various trade unions combined to form one trade union, ATUSWA.
- 31.** Mr. Fakudze’s argument that the amalgamation was not in order because the Constitution of SMAWU does not have a clause on amalgamation has no substance. Mr. Fakudze gave a wrong interpretation to the phrase “.....*in the manner provided for in its constitution*” To amalgamate is a decision that must be taken by each trade union. Trade unions take decisions by voting or passing of resolutions. That is the “*manner provided for*” in the trade union’s constitution.

32. In terms of SMAWU constitution that was filed in Court under a certificate of filing with Court stamp dated 17th July 2017, under Article 3.20, dealing with the objects it is provided that;

“3.20 To do such lawful things as may appear to be in the interests of the union and its members and which are not inconsistent with the objects or any matters specifically provided for in this constitution”.

For SMAWU to amalgamate with other trade unions is a “lawful thing” because amalgamation is provided for in Section 41 of the Industrial Relations Act.

33. In Article 27 there is a provision for dissolution. Article 27.1 provides that;

“The Union shall not be dissolved except with the resolution of the Annual General Meeting or Special General Meeting, which shall nominate the beneficiaries.”

In the present case, there is therefore no doubt that the dissolution was “*in the manner provided for in its constitution*” as the resolution was taken in during a Special General Meeting.

34. Section 41 also provides very clearly that the newly formed entity is a trade union. Section 41(c) provides that; ***“In the event of amalgamation, the newly constituted organization shall assume all***

the rights and duties of its predecessor organizations....” As already pointed out in this judgement, in terms of Section 2, the interpretation Section, ‘organization’ means a trade union. There was therefore nothing wrong or unlawful by the Commissioner of Labour when he registered the newly formed organization as a trade union. The position of the law is very clear and unambiguous that trade unions may amalgamate and form a trade union.

35. In the light of the evidence before the Court, the proper application of the law is that all the trade unions that amalgamated ceased to exist and are now defunct. Their membership, rights and duties were assumed by the newly formed trade union, ATUSWA.

36. CONCLUSION:

The Court having rejected the evidence by SMAWU witnesses, it follows that SMAWU’s application under case number 184/17 ought to be dismissed and it is accordingly dismissed. The Court having accepted the evidence of the witnesses who testified on behalf of ATUSWA, it follows that ATUSWA’s application under case number 186/17 ought to succeed and it is accordingly upheld.

37. COSTS:

On behalf of ATUSWA the Court was entreated to make an order for costs on the punitive scale. The evidence before the Court clearly revealed that Justice Mtsetfwa fully participated in the formation of ATUSWA. Miriam Zwane was cited in the legal proceedings and she also filed a confirmatory affidavit in support of the bid to oppose the

application by ATUSWA. She therefore fully aligned herself with the legal proceedings. In terms of **Annexure “AA2”** Rosemary Hadebe attended a workshop that was held in Durban organized by ILO as an ATUSWA delegate. Justice Mtsetfwa, the former President of SMAWU was the first president of the newly formed union, ATUSWA when it was launched in 2013. He is a signatory to the bank account of ATUSWA in his capacity as the President. The evidence however revealed that Miriam Zwane was only a shop steward of the defunct union, thus her representative raised an objection that she was not properly cited as she had no role in taking the decision to oppose the application. The same objection was raised on behalf of 3rd Respondent, Polycarp Stewart. Respondents 1, 2, 4, 5 and 6 were all represented by Mr. Fakudze. The evidence before the Court revealed that 7th Respondent is now defunct as the result of the amalgamation. There was no objection raised by Respondents 1, 2, 4 and 5 that they did not give instructions to Mr. Fakudze to represent them in Court and oppose the application. Taking into account all these factors the Court will make an order for costs against the 1st, 2nd, 4th and 5th Respondents in case number 186/17. The order for costs to be on the scale as between attorney and own client. The Respondents are jointly and severally liable, any one paying the others to be absolved.

38. The members agree.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant :

Mr. T.C. Mavuso

(Attorney at Motsa Mavuso Attorneys)

For 3rd and 6th Respondents:

Mr. Shadrach Masuku

(Labour Law Consultant)

For 1st, 2nd, 4th, 5th, & 7th Respondents:

Mr. A. Fakudze

(Labour Law Consultant)