



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 36/2018 (B)

In the matter between:

SWAZILAND NURSES ASSOCIATION

Applicant

And

MINISTRY OF PUBLIC SERVICE

1st Respondent

JOINT NEGOTIATION FORUM

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral citation: Swaziland Nurses Association v Ministry of Public Service and 2 Others (36/2018 (B)) [2018] SZIC 70 (17 July 2018)

Coram: **NSIBANDE S. J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 26 June 2018

Date Delivered: 17 July 2018

Summary: Labour Law – Applicant applying to set aside Respondent’s decision to exclude Secretary General from collective bargaining process on basis that he is no longer employed by Respondent.

Held – The Recognition Agreement identifies who can be members of the bargaining unit – Identifies employees as those in employ of Government – Applicant’s Secretary General no longer in employ of Government can longer be in bargaining unit – Application dismissed.

JUDGMENT

- [1] The Applicant is the Swaziland Nurses Association, an organisation duly registered in terms in the **Industrial Relations Act of 2000 as amended** and recognised in terms of the same Act by the Government.
- [2] The first Respondent is the Ministry of Public Service. The 2nd Respondent is the Joint Negotiating Forum, presided over by the Principal Secretary of the first Respondent as its Chairman.
- [3] On 7th March 2018, the Applicant was scheduled to meet two times with the Government Negotiating Team. The first meeting involved other public service unions and on the agenda was to do with the Cost of Living Adjustments that the parties were discussing. The 2nd meeting was to be

between the Applicant and the Government Negotiating Team to discuss the issue of changes to on-call allowances affecting the Applicant's members and brought about by the ***“on-call Allowance Standardisation Circular No.1 of 2018.”*** At the first meeting, the Chairperson of the 2nd Respondent objected to the presence of one Mr. Sibusiso Lushaba, the Secretary General of the Applicant. The basis of the 2nd Respondent's objection was that the said Mr Lushaba is no longer under the employ of the Swaziland Government as he had tendered his resignation from employment. The Government negotiating team refused to continue with the meeting in Mr. Lushaba's presence. The meeting between the Applicant and the Government Negotiating Team failed to proceed in the face of the objection raised and the Applicant's insistence that its Secretary General remain in the meeting.

- [5] The Applicant, being aggrieved by what it perceived as an attempt, by the Respondents to pick and choose who could represent it at the bargaining table, filed the current application. The application is opposed.
- [6] The Applicant contends that the refusal to allow its Secretary General to sit at meetings between the parties to represent its members is unlawful and in breach of the Recognition agreement between the Applicant and the Government of Eswatini.

- [7] It is common cause that Mr Lushaba the elected Secretary General of the Applicant resigned from the employ of the Government of Eswatini by letter dated 27th August 2017. It is this act of resignation that has caused the dispute between the parties.
- [8] The Applicant submits that in terms of its constitution Mr Lushaba remains its member despite his resignation from the employ of Government. In terms of **article 5 (i)** of the Applicant's **constitution** "*any nurse registered with the Nursing Council of Swaziland is eligible for membership.*" Two receipts were attached to the Applicant's replying affidavit purport to show that Mr. Lushaba is a nurse registered with the Nursing Council of Swaziland. It was the Applicant's argument that because Mr. Lushaba remained its member he was therefore properly in office to represent the Applicant despite his resignation. This was more so because **clause 5.2 of the recognition agreement** allowed both Applicant and Government to nominate members of their negotiating teams and Mr Lushaba was one of those representatives nominated in terms of that clause.
- [9] The Respondents' attack on the Secretary General's right to represent Applicant at the bargaining unit was based on their contention that he was no longer a member of applicant. The Respondents agreed that Mr Lushaba had been nominated to represent the Applicant at the bargaining unit and further recognised the Applicant's right to nominate representatives in terms of

article 5.2 of the recognition agreement. The Respondents however submitted that a person nominated to represent applicant must be a member of applicant. The Respondents submitted that Mr Lushaba was not a member of applicant because: 1. Article 5.1 of the Applicant's constitution and the receipts relating to payment for membership to the Nurse's Council do not on their own confirm membership; That because he had resigned his employ, and was not employed anywhere as a Nurse then he could not be a member of a trade union. The Court was referred to the **Workplace Law by Professor John Grogan at page 322 – 323**. It was also the Respondents' submission that the receipts from the Nursing Council were not enough to prove Mr Lushaba's membership in Applicant. Not only was the Membership for the year 2018 paid in April 2018 (after the objection had been raised), there was no receipt from the applicant to show that despite his resignation, he remained a paid up member of the applicant. He was not eligible to sit at the bargaining table at least in March 2018. Finally it was argued that in **terms of clause 5.3 of the Recognition Agreement**, Mr Lushaba does not meet the requirements set out for him to sit at the bargaining table.

[11] Applicant referred the Court to Article 5 (vi) of its constitution stating that a member in arrears shall loses his membership after a period exceeding one calendar year unless such member is on study leave or ill. It was argued that even if it could be said that Mr. Lushaba was in arrears (which was denied)

with his membership subscription, he had not ceased to be member because the calendar year had not passed with him being in arrears.

[12] The Recognition and Collective Agreement between the parties defines ‘employee’ and employer as well as “Member” and “Association”. In terms of the agreement; “(i) **“Employer** shall mean the Government of Swaziland and its representatives.

(ii) **Employees** shall mean Nurses in the employment of the Employer (the Government of Swaziland and its representative)

(iii) **Members** shall mean employees who have joined the association in accordance with this Agreement; and

(iv) **“Association”** shall mean the Swaziland Nursing Association and its representatives.”

[12] In light of these definitions one is inclined to agree with the Respondents’ argument that the termination of Mr Lushaba’s employment by his resignation, terminated his right to sit at the bargaining table on behalf of the applicant. This is so because while both parties are entitled to nominate members of their negotiating teams such members must be employees as described by the agreement. Employees are identified as nurses in the employment of the Swaziland Government. Since Mr Lushaba resigned, he is no longer an employee in terms of the Recognition Agreement and is

ineligible to be nominated as a member of the negotiating team of the Applicant.

[13] Further, we align ourselves with the cited reading from **Grogan J. Workplace Law 9th Edition at 323**, that Union Membership is open only to employees. While he was dealing with the definition of the employee in terms of the South African situation, ours is similar. Mr. Lushaba is no longer an employee of the Government of Eswatini and his continued sitting at the bargaining table can not be correct in an environment where workplace issues are being discussed between Employer and Employee.

In the circumstances the application is dismissed. There is no order as to costs.

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant:

Mr. S. Madzinane
(Madzinane Attorneys)

For Respondent:

Mr. Dlamini
(Attorney General's Chambers)