

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 23/94

In the matter between:

SWAZILAND UNION OF FINANCIAL Appellant

INSTITUTIONS AND ALLIED WORKERS

vs

SWAZILAND INSURANCE BROKERS (PTY) Respondent

LTD

CORAM : KOTZE J.A.

STEYN J.A.

TEBBUTT J.A.

FOR THE APPELLANT

FOR THE RESPONDENT

JUDGMENT

18 APRIL 1995

The issue for determination by the Court in this appeal is whether a firm of insurance brokers is a financial institution or is allied to a financial institution.

The appellant is an industry union duly constituted and registered in terms of the Industrial Relations Act No.4

2

- 2 -

of 1980. In terms of Section 18 of the Act it filed its constitution with the Labour Commissioner who on 19 May 1983 issued it with a Certificate of Registration. It subsequently changed its name and on 7 July 1986 a new Certificate of Registration was duly issued to it in its present name viz Swaziland Union of Financial Institutions and Allied Workers. One of the major objectives of the appellant is reflected in Rule 3.1 of its constitution. It is -

"To secure the complete organisation of all eligible workers in Swaziland employed in the financial and allied institutions"

Membership of the union, in terms of Rule 4.1 of its constitution, is open to all eligible workers in Swaziland "employed in financial and allied institutions".

Respondent is a company carrying on the business of insurance brokers in Swaziland. On 6 July 1993 the appellant wrote to the respondent seeking recognition in terms of Section 36(1) of the Act as the exclusive collective employee representative for all categories of respondent's employees except managers and above. The respondent refused to grant appellant recognition on the ground inter alia that it, the respondent, is not a financial institution and does not fall within the industry in which the appellant operates. Aggrieved by this refusal, the appellant sought a ruling from the Industrial Court of Swaziland as to whether or not the appellant is entitled to recognition in respect of respondent's employees and by consent, the parties asked the Industrial Court particularly

3

- 3 -

to decide whether respondent is a member of the industry in which the appellant union is in law entitled to operate. The Court ruled that it is not and that appellant is accordingly not entitled to seek recognition in respect of respondent's employees. An appeal by the appellant to the High Court against that ruling also failed. Appellant now comes, on further appeal to this Court.

It is convenient to set out the relevant statutory enactments and the relevant sections of the appellant's constitution as a first step in this Court's determination of the issue.

The Act regulates the relationship between employers and employees in regard to the collective negotiation of terms and conditions of employment.

Section 2 of the Act, which is the definition section, defines an industry union as

"a combination of employees, other than staff, the principal purpose of which is the regulation of relations between employees and employers in a particular industry"

"Industry" is defined in Section 2 as

"a sector of economic activity wherein the employers provide a similar service, or are engaged in the manufacture, processing, purchase

4

- 4 -

and sale of a similar product or similar products"

An industry union is a category of "organisation" in terms of the definition of that word in Section 2 of the Act and Section 17(1) provides that an organisation seeking registration must submit a written constitution to the Labour Commissioner. That constitution must, in terms of Section 19 of the Act, include the "name of the organisation and the undertaking or industry in which its activities on behalf of employers or employees will be carried on" (Section 19(a)).

Section 20(1) of the Act provides, in elaboration of the heading to the section reading "Organisations to be confined to one industry", that

"An industry union may have as members, and may purport to represent, only persons who are currently or usually employed in the industry in which that industry union is active or who have

distinct occupational qualifications for employment in that industry".

As already set out, appellant's name is "Swaziland Union of Financial Institutions and Allied Workers" (my underlining) and Rules 3.1 and 4.1 of its constitution set out, in compliance with Section 19(a) of the Act, that the undertaking or industry in which its activities on behalf of employees will be carried on are "financial and allied institutions".

The meaning of a "financial institution" , apart

5

- 5 -

from the dictionary definitions of that term, has received legislative recognition in Swaziland.

A financial institution in terms of dictionary definitions, is an institution dealing with "financial" matters. Chambers Dictionary defines "financial" as " pertaining to finance" and "finance" in turn is defined as "the art of managing or administering money (especially public money)". The Shorter Oxford English Dictionary also defines "financial" as "pertaining to finance or money matters" and "finance" as "the management of money". The legislative enactment to which I refer, is the Financial Institutions (Consolidation) Order No.23 of 1975. It defines a "financial institution" as "any person carrying on banking business" and "banking business" is, in its turn, defined as:

"the business of receiving funds from the public or from members thereof through the acceptance of money, deposits payable upon demand or after a fixed period or after notice, or any similar operation through the sale or placement of bonds, certificates, notes or other securities and the use of such funds either in whole or in part for loans, advances, investments or any other operation authorised either by law or by customary banking practices for the account and at the risk of the person doing such business".

It is also important to note that the Building Societies Act, 1962 defines a "building society" as an association of persons

6

- 6 -

"whose principal object is the making, out of funds derived from the issue of shares to and the acceptance of deposits from the public or from subscriptions by members, of advances for any purpose upon the security of the mortgage of urban immovable property".

There is also in Swaziland the Central Bank of Swaziland whose objects include the promotion of monetary stability and a sound financial structure and to foster financial conditions conducive to balanced economic development. It has an important role in relation to financial institutions. I shall return to the aspect of building societies and the Central Bank in due course.

It is quite clear, in my view, that the activities of financial institutions is, in terms of the relevant legislation, confined to banking business. In an amendment to the Financial Institutions (Consolidation) Order as contained in Bill No. 6 of 1990, the definition of a "financial institution" was amplified to include "the business of a stock broker or dealer in stocks, bonds or shares" . Apart from the fact that it is uncertain if the Bill ever passed into law it does not, however so widen the ambit of what the Legislature has seen fit to define as the function of a financial institution, to include any institution to which members of the public may pay money. It is obvious,

to my mind, that the Legislature intended that the business of a financial institution was to receive money from members of the public and to invest it on behalf of those members for their account and at their risk in accordance with common banking practice. A building

7

- 7 -

society's activities being largely similar, would in my view, be allied to those of a financial institution. "Allied" has been defined as "in close association" or "having common properties" (Penguin English Dictionary s.v. "Allied") or "united, joined especially by kindred or affinity" and "connected in nature or qualities" (Shorter English Dictionary s.v. "Allied").

Similarly the activities of the Central Bank are in my opinion, "allied" to those of financial institutions.

"Insurance business" however, is completely different from "banking business". Insurance is a contract of indemnity. In the South African Courts it has been said to be one in which members of the public pay a premium in return for which the insurer agrees to provide for those members indemnity against certain risks or upon the happening of a certain event. (see *Lewis Ltd v Norwich Union Fire Insurance Co. Ltd* 1916 AD 509 at 519, *van der Keesel : Theses* 712). It has been similarly defined in England (see *Prudential Insurance Co. v Inland Revenue Commissioners* (1904) 2 KB 658 at 663, 664). That this is the business of insurance has also been recognised by the Legislature in Swaziland. It is common cause that the Swaziland Royal Insurance Corporation is the only authorised insurer in Swaziland and thus enjoys a monopoly on insurance business qua insurer in Swaziland. It owes its existence to the Swaziland Royal Insurance Corporation Order No. 32 of 1973 which in terms of Section 3(1) established the Corporation "to carry on insurance business of all classes".

"Insurance business" is defined in the Act as "the business of, or the relation to, the issue of,

8

- 8 -

or the undertaking of liability under life policies or to make good or indemnify the insured against any loss or damage, including liability to pay damages or compensation contingent upon the happening of any specified event".

In my view the activities of insurers are not the same as financial institutions which the Legislature has seen fit to define as banking business, the one being the investment of money for the account and at the risk of members of the public, the other being the provision of indemnity against risks for such members of the public who pay premiums to the insurer concerned.

Mr. Dunseith, who appeared for the appellant, contended that the Industrial Relations Act should be construed in a flexible manner and that employees should be free to join unions which operate in related, if not exactly similar fields of activity. The provisions of the Financial Institutions (Consolidation) Order of 1975 were, so he submitted, irrelevant to the issue presently under consideration. In any event, so his argument proceeded, insurance companies in their present-day activities invest monies on their clients' behalf and in this regard, operated pension funds and unit trusts.

Mr. Dunseith's arguments, however, appear to me to fly in the face of a number of considerations.

Firstly, it is in my view clear from the provisions of the Industrial Relations Act that the policy of the Legislature in enacting

9

- 9 -

it was to provide a mechanism for the effective control of employer-employee relations and, in particular, the collective negotiation of the terms and conditions of employment and the settlement of disputes in regard to the latter. To this end the Legislature sought to confine an employee organisation to the specific industry in which such organisation is active. Section 20(1), read with the definition section, Section 2, makes that clear. The whole concept of an industry basis runs like a golden thread through the tapestry of the Act. It does not allow for an industry union whose members may wish to seek recognition outside their own particular industry, to do so. The fact that only one company, in the small population and limited economic environment of Swaziland, may be operative in an industry does not detract from that concept. I say this because Mr. Dunseith submitted that it would be impractical in the Swaziland milieu to have an industry union confined only to the insurance industry where only one insurer operates within the industry and has a monopoly in that milieu. That may be but that is the effect, in my view, of the Act. Secondly, the Legislature has itself sought to define the economic activity of financial institutions. One cannot, as Mr. Dunseith submitted, ignore the provisions of the Financial Institutions (Consolidation) Order. Thirdly the economic activity wherein financial institutions are engaged is completely dissimilar from that in which an insurer is engaged. They do not, either from a general consideration of the business they undertake or from the definitions of their business by the Legislature, provide a similar service. This Court cannot take judicial cognisance of the fact, as Mr. Dunseith has invited us to do, that insurers themselves conduct investment vehicles such as unit

10

- 10 -

trusts. They may do so through subsidiary companies in which they are merely shareholders. We have before us no evidence that this is not so. In any event from the very definition of an insurer's business as laid down by the Legislature it is different from that of a financial institution. Fourthly, it must be accepted that the Legislature in enacting its conceptual policy of industry confinement in the Act must have been aware of the differing definitions of the economic activity of financial institutions as contained in the earlier Acts of 1975 and 1973 vis-a-vis insurers. For these considerations, I hold that an insurer is not a financial institution.

Mr. Dunseith has drawn our attention to the fact that appellant is recognised in terms of Section 36(1) of the Act as the exclusive collective employee representative for employees of certain banking institutions in Swaziland, including the Central Bank, and the Swaziland Building Society Limited. It is also recognised as such in relation to the Swaziland Royal Insurance Corporation. All the banks are, of course, financial institutions within the definition of that term in the Financial Institutions (Consolidation) Order and as I have said earlier, the Central Bank and building society would be allied to financial institutions. What then of the Swaziland Royal Insurance Corporation? Mr. Flynn, for the respondent submitted that the recognition of appellant in respect of the Corporation's employees may be in contravention of Section 20(1) of the Industrial Relations Act in that it (appellant) is not the industry union in the industry in which the Corporation operates. It is not necessary for this Court to consider that. Suffice

11

to say that the fact that there has been recognition of the appellant in relation to the Corporation does not mean, as I have held, that an insurer's economic activities are similar to those of a financial institution and that they operate within the same industry.

An insurance broker's activities are also not similar to those of a financial institution nor are they allied to the latter. Respondent is a registered insurance broker in terms of the Control of Insurance Order of 1973 and the regulations made under that Order. In terms of the latter an insurance broker is defined as

"a person who undertakes as his principal business the selling or serving (sic) of any kind of insurance on behalf of an insurance company or underwriter, but shall not include a person who is an employee of such company or underwriter".

Respondent is thus an agent in law. It acts as the insurer's agent to obtain insurance. It may also act as such agent in collecting premiums. As an agent in law for an insurer it cannot be a financial institution. Nor, if that insurer is not one on the definitions cited above, can it be allied to a financial institution.

It follows that I find that the Industrial Court was correct in its ruling and the High Court similarly correct in dismissing the appeal against that ruling. The appeal to this Court accordingly fails.

12

I would dismiss the appeal, with costs.

TEBBUTT J.A.

KOTZE J.A.

I agree.

The appeal is dismissed, with costs.

STEYN J.A.

I agree

Delivered on 21 April 1995.