IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

CASE NO. 199/2013

In the matter between:-

NONHLANHLA MKHONTA	**1ST APPLICANT**
GRACE LITCHFIELD	**2ND APPLICANT**
SAMUKELISO DLAMINI	**3RD APPLICANT**
LOMASHUMI DLAMINI	**4TH APPLICANT**
VELI DLAMINI	**5TH APPLICANT**
NOMSA SIBANDZE	**6TH APPLICANT**
SELBY SIMELANE	**7TH APPLICANT**
MSIMISI DLAMINI	**8TH APPLICANT**
KHETSEKILE MKHWANAZI	**9TH APPLICANT**
SIPHO TSELA	**10TH APPLICANT**
HSAI MOOK	**11TH APPLICANT**
NCAMSILE MBULI	**12TH APPLICANT**
SISI SIMELANE	**13TH APPLICANT**

AND

NEDBANK SWAZILAND LIMITED	**1ST RESPONDENT**
SUFIAW	**2ND RESPONDENT**

Neutral citation : Nonhlanhla Mkhonta & 12 Others V Nedbank Swaziland Limited & Another *(199/2013)[2013] SZIC 27 (September 26, 2013)*

CORAM : DLAMINI J,

(Sitting with D. Nhlengetfwa & P. Mamba- Nominated Members of the Court)

Heard : 02 AUGUST 2013

Delivered : 26 SEPTEMBER 2013

Summary: ***Labour law - Industrial relations – Agency shop agreement – Agency shop agreement is a collective agreement – failure to comply with provisions of section 55 of IR Act 2000 as amended renders agreement invalid and unenforceable.***

1. This matter before court was brought on a certificate of urgency by the Applicants wherein they sought orders as follows;

- ***That the rules relating to service and time limits be dispensed with and that this matter to be heard as one of urgency. (Sic)***

- ***That the 1st Respondent be interdicted and/or restrained from deducting any further monies from the Applicant's salaries and paying them to the 2nd Respondent.***

- ***That prayer 1 above operates forthwith as an Interim Order pending the finalization of this application.***

- ***That a rule nisi do hereby issue calling on the Respondents to show cause on a date to be stated by the above honourable court why prayers 1 and 2 should not be made final.***

- ***That the Respondents pay costs of this application.***
- ***Further and/or alternative relief.***

2. The application is opposed by the 2nd Respondent however, when the matter was initially called, a consent order was issued interdicting the 1st Respondent from paying amounts deducted as agency fees to the 2nd Respondent, but that such monies be kept in a separate account. The Applicants are employees of the 1st Respondent a financial institution

operating in the country. The 2nd Respondent is a trade union registered in terms of the laws of the country.

3. Perhaps it should be pointed out that this matter has quite some history. It has already served before the High Court where it was initially enrolled as a constitutional matter in which the constitutionality of the amendment to section 44 of the Industrial Relations Act 2000 was in issue. But it would seem there was then a change of tact by the Applicants' counsel who then apparently decided that it was premature for the full bench to consider the constitutional question at that stage. This Court is left to wonder as to why it was necessary for the High court to continue to be seized with the matter when the parties decided that it was no longer necessary for it to determine the constitutional question? In terms of section 8 (1) of the Industrial Relations Act 2000, as amended, it is only this Court that has exclusive jurisdiction in matters that arise between employers, employees and trade unions. Further to that and in terms of section 151(3) of the Constitution of this kingdom the High Court has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction.

4. That aside and coming back to the present matter now serving before this Court, the 13 Applicants were initially all represented by Attorney Mr. S. Mdladla and the 1st Respondent by Attorney Ms. Mngomezulu – on a watching brief. Attorney Mr. B.S. Dlamini represented the 2ndRespondent. The Court gave the parties a date for argument of the matter and the parties were to have filed all necessary pleadings for the matter to be heard and determined by the Court on the set date. However before the date given by the Court for argument, there was first a notice of appointment and substitution of attorneys filed on behalf the 2nd Applicant. In that notice Attorneys S.V. Mdladla and Associates withdrew as attorneys of record for the 2nd Applicant and Attorneys Robinson Bertram were appointed. There

was also an application filed by the Labour Commissioner in which she sought to have Attorney General granted leave to intervene as a party on such terms and conditions as the Court considers appropriate. That application was opposed by the Applicants but for purposes of this ruling it is unnecessary at this stage to delve into the finer details of same.

5. On behalf of the 2nd Applicant Attorney Z. Jele filed a notice of intention to raise points of law. In the notice it was indicated that the 2nd Applicant did not wish to make any factual submissions. The points of law raised are that;

- *The agency shop agreement concluded between the first and second Respondents is invalid and therefore unenforceable, in that it does not comply with the provisions of section 44 as read with section 55 of the Industrial Relations Act.*
- *The agreement cannot be operationalised until the suspensive conditions pertaining to its enforceability are complied with.*

6. Attorney Jele requested that the points *in limine* raised be heard and a ruling be made before the merits of the matter could be ventilated, hence now this ruling of the Court. The nub of the points in limine raised on behalf of the 2nd Applicant is that the agency shop agreement between the 1st and 2nd Respondents does not comply with the provisions of section 44 as read with section 55 of the Act. As such it is not binding and cannot be enforced.

7. In support of this argument above Attorney Jele started off by first tracing the common law position on collective agreements. He thereafter pointed out that the common law position had since been altered by the legislative promulgation of section 55 of the Industrial Relations Act. He submitted that for a collective agreement to be binding and enforceable it has to meet

the peremptory requirements of section 55. The section 55 peremptory requisites are as follows;

- *That the agreement must be in writing and signed by both parties. [see section 55(1)(a)]*
- *That the agreement must provide for effective procedures for the avoidance and settlement of disputes within the industry and individual undertakings covered by the agreement. [see section 55(1)(b)]*
- *That the agreement must be for a specified period of not less than twelve months and not more than twenty four months. [see section 55(1)(c)]*
- *That it must contain provision for the settlement of all differences arising out of the interpretation, application and administration of the agreement. [see section 55(1)(d)]*
- *That the parties are then to submit the signed collective agreement to this Court – with a copy to the Labour Commissioner – with a request for its registration. [see section 55(2)]*

8. Jele further pointed out that in terms of section 56, on receipt of the collective agreement the court shall consider the agreement and within twenty one days either registers it or refuse to do so if it does not comply with the provisions of the Act or any other law. The main reason of submitting the signed collective agreement to this Court, Jele further submitted, is to ensure that it complies with the provisions of section 55, especially subsection 1 (a) and (b) thereof. This, according to him, is because the legislature encourages internal dispute resolution in the workplace.

9. Coming to the agency shop agreement concluded between the 1st and 2nd Respondents, the 2nd Applicant's attorney pointed out that a cursory reading of same indicates that it does not comply with the peremptory provisions of section 55 of the Act. First he stated that it does not comply with section 55(1) (b) in that it does not provide for effective procedures for the avoidance and settlement of disputes within the 1st Respondent's undertaking. Secondly it does not comply with the provisions of section 55(1) (d) in that it does not contain provision for the settlement of all differences arising out of the interpretation, application and administration of the agreement. And the present matter now before this Court is perfect illustration of the absence of such a proviso. Lastly, Jele pointed out that because the agreement has not been submitted to this Court for registration – regardless of the fact that it has a provision for such submission – therefore it is not yet registered and cannot be enforced against the affected employees. As such, so the argument concluded, the agency shop agreement is not binding and cannot be enforced. He therefore applied that it be set aside as void and not enforceable.

10. For the 2nd Respondent, Attorney Dlamini, in his very brief submissions and arguments, started off by referring the Court to the notice of application as initially filed by the Applicants. Thereat, he pointed out that in terms of prayer 2 the Applicants are before Court for an injunction against the 1st Respondent from deducting any monies from the Applicants' salaries and paying them to the 2nd Respondent. That, according Attorney Dlamini, is the gist of what the Court should be concentrating on and not what the 2nd Applicant's attorney has ventured into. In essence what Attorney Dlamini was arguing before Court is that the submissions and arguments by Attorney Jele have nothing to do with the application serving before Court and as such they should not even be considered the Court. Further submission by the 2nd Respondent's counsel was to the effect that the

agency shop agreement between the 1st and 2nd Respondents herein is regulated by section 44 of the Industrial Relations Act as opposed to section 55 as contended by the 2nd Applicant's counsel.

11. It is trite that issues of law can be raised at any stage during proceedings. Principally the points or issues of law are at the heart of a matter and as such ought to be determined at the 'threshold' since the conclusion thereto – conclusion of law – may mean that the matter is disposed of even without venturing into the merits. They are answered by applying the relevant legal principles and interpretation of the law applicable to the particular facts of a case. And any of the litigants, procedurally and as of right, may raise same. It is therefore an ill informed submission by Attorney Dlamini that the points of law cannot be raised at this stage and that they have nothing to do with the present application serving before Court. The mere fact that the points of law brought to the Respondents' notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. The consideration of these points involves no unfairness to the Respondents, and therefore this Court is bound to deal with them. The principle regulating such is that no such unfairness can exist if the facts upon which the legal point depends are common cause or if they are clear beyond doubt – see ***Cole v Government of the Union of South Africa 1910 AD 263 at 272-3***. Indeed the points of law raised for and on behalf of the 2nd Applicant are on the validity of the agency shop agreement between the Respondents, which is common cause. The Court therefore has to interrogate its validity *viz*' the Industrial Relations Act. Does it pass the muster or measure up to the required standard so to speak?

12. Agency shop agreements are regulated under section 44 of the Industrial Relations Act, 2000 – as amended. In terms of section 44(1) the Act provides as follows;

"A representative trade union, staff association and an employer or employers' organization may conclude a ***collective agreement to be known as an agency shop agreement*** *requiring the employer to deduct an agreed agency fee from the wages of its employees who are identified in the agreement and who are not members of the trade union." (Court's underlining)*

13. From the above it is without doubt that in terms of section 44(1), an agency shop agreement is a collective agreement. One need not be a rocket scientist to figure this out. That being the case it follows that being such, and to be valid at law, all agency shop agreements have to measure up to the peremptory standard of section 55 under Part VII of the Industrial Relations Act. Section 55 (headed Collective agreements) provides as follows;

"(1) A collective agreement shall –

(a) Be in writing and signed by the parties to the agreement;

(b) Contain effective procedures for the avoidance and settlement of disputes within the industry and individual undertakings covered by the agreement;

(c) Be for a specific period of not less than twelve months, unless modified by the parties by mutual consent;

(d) Contain provision for the settlement of all differences arising out of the interpretation, application and administration of the agreement.''

14. In terms of section 55(1)(a) the collective agreement shall be in writing and must have been signed by the parties to it. The agency shop agreement between the 1st and 2nd Respondents is in writing and has been signed by

both the employer and the trade union in question. It therefore meets this requirement of the Act in that respect.

15. The second requirement of the Act is that the collective agreement shall contain effective procedures for the avoidance and settlement of disputes within the industry and individual undertakings covered by it – section 55(1)(b). A thorough reading of the memorandum of agreement between the two Respondents herein indicates that it makes contains no provisions for the avoidance and settlement of disputes in the undertaking of the 1st Respondent – much against the Industrial Relations Act.

16. The next requirement is that the collective agreement shall be for a specific period of not less than twelve months, unless modified by the parties by mutual consent. In this regard, the agency shop agreement herein meets this requirement. It provides that *'the level of fees deducted in terms of this agreement will run for a period of twelve months from date of signature…'* It provides for the deduction of the agency shop fees at the rate of 1.5% of the affected employees for a period of twelve months from date of signature. Thereafter the parties modified it to align the amount deducted to that of the union members.

17. The fourth requirement, which is in terms of section 55(1) (d), is that the collective agreement shall contain provisions for the settlement of all differences arising out of the interpretation, application and administration of the agreement. Again a reading of the agency shop agreement between the Respondents herein indicates that it does not address this peremptory requirement and therefore runs afoul of to the Act. To the Court, it seems that the agency shop agreement between the Respondents herein only concerns itself with the deduction of the agency fees from the wages of the

Applicant employees, to the total exclusion of other paramount issues such as how best to deal with disputes or even its interpretation.

18. The code of good practice provides as follows under schedule 38;

> "*All employees have a right to seek redress for grievances and management should establish, with employee representatives of organizations concerned, or where no organization has been recognized, through other means, arrangements under which individual employees can raise grievances and have them settled fairly and promptly. There should be a formal procedure, except in very small establishments where there is close personal contact between the employer and employees. Where organizations are recognized, management should establish a procedure with them for settling collective disputes. Individual disputes and collective disputes are often dealt with through the same procedure. Where there are separate procedures they should be linked so that an issue can, if necessary, pass from one to the other, since a grievance may develop into a dispute."*

19. The above guidelines, as encapsulated in the code of good practice, are meant for prompt and fair settlement of grievances in the workplace before they unnecessarily escalate to disputes. And all employees - whether unionized or not - have a right to internally seek redress for any grievance they may have. The legislature, in its wisdom, made it compulsory that collective agreements, which include agency shop agreements, should contain effective procedures in place for the avoidance and settlement of disputes. Over and above that, should there be differences between the parties on the interpretation, application and administration of that agreement, they should be able resolve them internally and by referring to

specific provisions in the agreement itself regulating such. And if the collective agreement or agency shop agreement does not have any provisions in that regard, then it obviously does not measure up to the required standard and as such stands to be declared invalid.

20. In terms of section 55(2) of the Act once the collective agreement has been signed, the parties shall submit it to this Court with a request for its registration. And upon receipt thereof, it is a peremptory requirement of the law that the Court considers it within 21 days – see section 56. So that this Court may even refuse to register that collective agreement on certain grounds – see section 56(2) (a) – (d). This in effect means that for a collective agreement to be valid and effective it must also have the approval of this Court. And in the case of this agency shop agreement before this Court, it was never brought before this Court for consideration. Even though there is a provision for its submission before this Court for its registration, the Court points out that there is a certain procedure to be followed before the agreement can be effective. It is only when this Court has decided that the agreement passes the muster that it will be given its full effect in terms of the law. In considering it, the Court does not, and in fact in terms of the law it shall not, refuse to register it by reason of minor defects.

21. It is therefore a finding of this Court that the agency shop agreement entered into by the 1st and 2nd Respondents does not measure up to the required statutory standard. And for that reason the Court orders as follows;

a) The agency shop agreement entered into by the 1st and 2nd Respondents dated the 06th May 2013, be and is hereby declared invalid and as such unenforceable for want of compliance with the peremptory statutory formalities.

b) The interim order granted by this Court on 12 June 2013, be and is hereby discharged.

c) The Court makes no order as to costs.

The members agree.

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T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 26TH DAY OF SEPTEMBER 2013

For the 2nd Applicant: Attorney Z.D. Jele (Robinson Betram Attorneys).
For the 2nd Respondent: Attorney B.S.Dlamini (Dunseith Attorneys).

For the rest of the Applicants: Attorney S.V. Mdladla (S.V. Mdladla & Associates)
For 1st Respondent: Attorney Ms. S. Mngomezulu (Musa M. Sibandze Attoneys)