



IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Case No. 7/2013

In the matter between

**SWAZILAND UNION OF FINANCIAL
INSTITUTIONS AND ALLIED WORKERS**

Appellant

and

**NONHLANHLA MKHONTA
GRACE LITCHFIELD
SAMUKELISO DLAMINI
LOMASHUMI DLAMINI
VELI DLAMINI
NOMSA SIBANDZE
SELBY SIMELANE
MSIMISI DLAMINI
KHETSEKILE MKHWANAZI
SIPHO TSELA
HSAI MOOK
NCAMSILE MBULI
SISI SIMELANE
NEDBANK SWAZILAND LIMITED**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent
Twelfth Respondent
Thirteenth Respondent
Fourteenth Respondent**

Neutral citation: *Swaziland Union of Financial Institutions and Allied Workers vs Nonhlanhla Mkhonta & 13 Others (7/2013)*
[2014] SZICA 01 (19th March 2014)

Coram: **M.M. RAMODIBEDI JP, ANNANDALE AJA, AND MAMBA AJA**

Heard: **03 March, 2014**

Delivered: **19 March 2014**

- [1] Labour Law – employer and trade union entering into written Agency shop/collective agreement whereby employer mandated to deduct certain monies from salaries of non-unionised employees who object to this.
- [2] Labour Law – application for an interdict by non-unionised employees to restrain employer from effecting deductions from their salaries pursuant to Agency shop agreement and remitting such deductions to union without employees’ consent. Employees successfully claiming agreement unenforceable as failing to comply with s55 of the Industrial Relations Act 5/2000 (as amended).
- [3] Labour Law – agency shop agreement –what such agreement to contain or provide for as per sections 55, 56 and 57 of IRA 5 of 2000 (as amended). Agreement must be in writing, be for a certain period, provide mechanism for avoidance and settlement of disputes and settlement of differences arising from interpretation, application and administration of agreement and must be registered by the Industrial Court – Non compliance therewith renders agreement unenforceable. Appeal dismissed.
- [4] Labour dispute – Costs of Appeal – general rule no award for costs on such matters. However, where respondents needlessly put out of pocket by noting of an indefensible appeal – respondents may be awarded the costs of such appeal.

THE COURT

- [1] This is an appeal that should not have been filed at all.

[2] The appellant is the Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) (hereinafter referred to as the appellant) and as its name indicates, it is a union of employees within the financial and allied sectors or institutions in Swaziland. One such institution is the fourteenth respondent (hereinafter referred to as the Bank). The rest of the respondents herein are employees of the bank. These employees are non-unionised and are therefore not members of the Appellant. They are in this judgment simply referred to as the respondents unless reference is made to a specific respondent.

[3] On 6 May 2013, the appellant and the bank concluded a written Agency Shop Agreement whereby inter alia, the bank was mandated to deduct monthly an equivalent of 1.5% of basic salary of its employees who are ‘non managerial and benefit from the union’s negotiated outcomes such as collective agreements ...salary settlements and kindred efforts but are not union members...’ The monies so deducted were to be remitted by the bank to the appellant and were to be separated from monies paid to the appellant by its members. Likewise, the agreement provided that the appellant would maintain a separate account for these monies and also provide and submit an

audited financial statement in respect thereof to the Commissioner of Labour.

- [4] It is also significant to note that the said agreement also provided that the parties were to submit the agreement to the Industrial Court 'for registration'. The agreement was to endue for a period of 12 months from the date of signature thereof. There are of course other terms of the agreement which, however, are, for purposes of this appeal, irrelevant or inconsequential or not germane thereto.
- [5] Following the conclusion of the said Agency Shop Agreement and acting on the terms thereof, the bank started making deductions from the respondents' salaries or wages with effect from the end of May 2013. These deductions were without the consent or authorization of the respondents. As the respondents were unhappy with this exercise or action by the bank, they collectively filed an application in the court below to interdict and restrain the bank from making such deductions.
- [6] In support of their application, the respondents argued that the deductions in question were illegal and in violation of sections 56 and 64 of the

Employment Act 5 of 1980. But more specifically and fundamentally, the second respondent argued that the very basis or foundation of the deductions, being the Agency Shop Agreement, was unlawful or invalid and thus could not be used to effect the deductions complained of. She argued that the agreement does not comply with the provisions of section 44 as read with section 55 of the Industrial Relations Act 5 of 2000 (as amended) (hereinafter referred to as the IRA). The application ultimately turned on and was decided on this legal point, which was decided in favour of the respondents. We shall revert to this decision presently.

[7] In relevant parts Section 44 of the IRA provides:

“(1) A representative trade union, staff association and an employer or employers’ organisation 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.

...

(3)An Agency Shop Agreement is binding only if it provides that -

(a) employees who are not members of the representative trade union or staff association are not compelled to become members of that trade union.

(b) the agreed agency fee must be equivalent to, or less than -

(i) the amount of the subscription payable by the members of the representative trade union;

(ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or

(iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee' -

(c) the amount deducted must be paid into a separate account administered by the representative trade union; and

(d) no part of the amount deducted may be -

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of employees.” ...

[8] The pertinent provisions of sections 55 and 56 of the IRA are to the following effect:

“55.(1) A collective agreement shall –

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

(b) Provide for 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 and not more than twenty-four 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.

(2) After a collective agreement has been signed by the parties, it shall be submitted to the Court with a copy to the

Commissioner of Labour together with a request by the parties for the registration of the agreement by the Court.

(3) A collective agreement shall take effect on any date agreed upon by the parties in writing and may contain retrospective provisions.

(4) Nothing in this section shall affect or be deemed to affect the validity of a collective agreement which is valid and subsisting immediately before the coming into force of this Act and such agreement shall remain in force until it lapses by effluxion of time, or until it is replaced by a collective agreement registered under the provisions of section 56, whichever is the earlier.

56. *(1) On receipt of a collective agreement, the Court shall consider the agreement and within twenty-one days of receipt shall -*

(a) register the agreement without amendment; or

(b) with the consent of the parties thereto, register the agreement with such amendments or modifications as it may consider necessary in accordance with this;

(c) refer it back to the parties for further negotiation on matters which the Court considers sufficient ground under subsection (2) for refusal to register the agreement.

(2) The Court may refuse to register a collective agreement on any of the following grounds;

(a) that it conflicts with any of the provisions of this Act or any other law;

(b) that the agreement provides for terms and conditions of employment less favourable to employees than those provided by any law;

(c) that it discriminates against any person on the ground of race, colour, religion, creed, national extraction, tribal or clan extraction, political opinion or

affiliation, social origin or social status, sex, pregnancy, marital status or disability;

(d) without prejudice to the generality of paragraph (a), that it requires membership or non membership in any organizations as a condition for obtaining or retaining employment.

....

(4) Notwithstanding the provisions of subsection (2), the court shall not, by reason of a minor defect, refuse to register the agreement but shall order such defect to be corrected.”

[9] As a rule of our common law, collective agreements concluded between employer and employee organisations do not form part of an employees terms and conditions of employment unless the terms thereof comply with the relevant Employment Act. Thus the terms of such agreements are not enforceable unless they are in compliance with the requirements of the labour laws, namely, the IRA in the instant case. (See in this regard

Transvaal Pressed Nuts & Bolts and Rivets (PTY) LTD v President Industrial Court and Others (1989) 10 ILJ 48 N at 70 and Consolidated Frame Cotton Corporation LTD v Minister of Manpower and Others, 1985 (1) SA 191 (N) (1985) 6ICJ 159 (N), to which we were referred by Counsel for the second Respondent). In the latter case Booyesen J at 198-199 said:

“It would furthermore be reasonable to accept that the settlement agreement concluded in the knowledge that , firstly, there is authority in Britain (which I believe applies equally here) that collective bargaining agreements are by no means always enforceable at law (*Ford Motor Co LTD v Amalgamated Union of Engineering & Foundry Workers [1969] 2 QB 303*, secondly, agreements concluded at industrial council level do not constitute contractually binding agreements but take the form of “gentlemen’s agreements” until promulgation, whereupon they acquire the force of subordinate legislation (*S v Prefabricated Housing Corporation (Pty) Ltd and Another 1974 (1) SA 535 (A) ...*”

- [10] As already stated above, section 55 of the IRA requires, in mandatory terms, that a collective agreement, which shall be known as an Agency Shop Agreement must:

- (a) be in writing and signed by both parties thereto;
- (b) provide for effective procedures for the avoidance and settlement of disputes within the industry concerned,
- (c) be for a specified period which shall not exceed twenty four months and
- (d) have provision for the settlement of all differences arising from or out of the interpretation, application and administration of the agreement. Over and above these requirements, the Act decrees that the agreement must be submitted to the Industrial Court for consideration and registration. (per section 55(2).)

[11] It is clear from the above that all the pre requisites enumerated above must be met before the agreement in question could be said to have been validly concluded in compliance with the IRA provisions. That the agreement under consideration herein is in writing and signed by the parties thereto and also for a duration within the permissible time period, is not enough or sufficient compliance with the law. It cannot, by any stretch of the imagination or reasoning be said that the failure to provide for effective procedure for the avoidance and settlement of disputes or differences arising from or out of the interpretation application and administration of the

agreement is a minor omission that could be condoned as the Appellant's Counsel seemed to suggest in paragraph 2.3 of his heads of argument. The inference is very strong indeed that if the legislature had viewed such omissions as minor, it would not have bothered to list or enumerate them as requirements to be embodied or contained in the relevant agreement. Besides, the Act makes it mandatory that the agreement must be submitted for consideration and registration by the Court below. Plainly, this must be done by the parties thereto collectively or even individually. It is this act of registration that makes the agreement binding and enforceable (see section 57 (1) of the IRA). This was, it is common cause, not done. It is our judgment that this Court as an appellate court, cannot and should not consider or deem the agreement registered as this would clearly be tantamount to usurping the powers of the Industrial Court on such an issue. A further glaring omission in the appellant's papers herein is the absence of a date of coming into effect of the agreement. This is contrary to section 55 (3) of the IRA.

- [12] We note that the court a quo stated that the omissions referred to above were not minor and thus could not be condoned. It ruled further that even if the agreement had been submitted to it for consideration and registration, it

would have declined to register the agreement. It therefore came to the conclusion that was inevitable or inescapable in the circumstances, that the agreement “...does not measure up to the required statutory standard; and it is hereby declared invalid and as such unenforceable for want of compliance with the peremptory statutory requirements’. This conclusion is in our judgment, unassailable. The appellant has, frankly, dismally failed to suggest the contrary to us. That being the case, the judgment of the court a quo is upheld or confirmed. The appeal is dismissed.

[13] The Respondents have prayed for an order for the costs of the appeal. As a general rule and practice in this jurisdiction, no order for costs is normally granted in such cases. The reason for this is a recognition of the nature of industrial relations or employment disputes or cases. The employer-employee relationship is, in the main intricate, delicate, close and founded on trust and harmonious inter relationship. The courts are enjoined to foster this. (see section 4 of the IRA).

[14] The instant appeal, however, falls outside the above general rule. As stated in paragraph 1 above, this appeal was totally without any merit or justification. Counsel for the appellant was constrained to admit as much

during argument before us. He however, rather inauspiciously we think, urged us to instead reconsider and reconcile two judgments by the High Court which judgments were totally irrelevant to this appeal. We were not persuaded to do so.

[15] The respondents are ordinary employees of the bank. They have clearly been needlessly put out of pocket by instructing counsel to defend this unmeritorious appeal. The appellant has throughout the time of this dispute had the benefit of Counsel. With that in mind, we are unable to understand why the clear, lucid and legally logical judgment of the court a quo could be appealed against. For that reason, we hold that the appellant has to pay the respondents' costs of this appeal and it is so ordered.

[16] The bank has not joined issue in this appeal and abides the decision of this court.

[17] For the foregoing reasons we make the following order:

(a) The appeal is dismissed.

(b) The appellant is ordered to pay the respondents' costs of this appeal.

M.M. RAMODIBEDI JP

J.P. ANNANDALE AJA

M.D. MAMBA AJA

For the Appellant	:	Mr. A.M. Lukhele
For 1st, 3rd, 4th to 13th Respondents	:	Mr S. V. Mdladla
For the 2nd Respondent	:	Mr. Z.D. Jele
For the 14th Respondent (abiding decision of the court)	:	Ms. S. Mngomezulu