IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 1360/2011

In the matter between:

CELANI MHLANGA & 20 OTHERS **APPLICANTS**

and

NEDBANK SWAZILAND LIMITED **1ST RESPONDENT**
SWAZILAND UNION OF FINANCIAL
INSTITUTIONS & ALLIED WORKERS
UNION (SUFIAW) **2ND**
RESPONDENT
SWAZILAND GOVERNMENT **3RD**
RESPONDENT
THE ATTORNEY GENERAL **4TH**
RESPONDENT

Neutral citation : Celani Mhlanga and 21 Others v Nedbank (1360/11) [2012]
SZHC 59 (SEPTEMBER 2012)

Coram (Full bench) : S.B. MAPHALALA P.J., MABUZA J., and HLOPHE J.

Heard : 9 MARCH 2012

Delivered : 21 NOVEMBER 2012

Summary : **Labour Law – Agency Shop Agreements – Deduction of agency fee from wages of non-union members without their written consent – Applicants non-union members – Applicants challenge deductions as contrary to provisions of section 56 (1) (2) and (3) of the Employment Act of 1980 - Applicants allege that such deduction attracts sanction in section 64 (c) of the Employment Act, 1980 - Application dismissed – Deduction of agency fee without consent of non-union member sanctioned by section 44 (1) of the Industrial Relations Act No. 3/2005 (as amended).**

[1] On the 15th April 2011 the Applicants herein sought the following prayers:

1. That the usual forms and procedures relating to the institution of these proceedings be dispensed with and allowing the matter to be heard and enrolled as one of urgency.

2. That the 2nd Respondent be interdicted and/or restrained from signing the Agency Agreement with the 1st Respondent.

3. That the Honourable Court declares Section 44 (4) of the Industrial Relations Act No. 3/2005 as amended to be offensive to Clauses 25 (5) and 32 (2) of the Constitution of Swaziland/alternatively that the Honourable Court strike out the amendment as being unconstitutional.

4. That prayer (2) hereof operates forthwith as an Interim Order pending the finalization of prayer (3) hereinabove.

5. Costs of this application.

[2] They obtained an interim order that:

(a) The 2nd Respondent is hereby interdicted and or restrained from signing the Agency agreement with the 1st Respondent; and

(b) That a Rule nisi returnable on the 3rd June, 2011 do hereby issue calling upon the Respondents to show cause why

prayers 1, 2, 3, 4 and 5 as set out in (1) above should not be made final.

[3] The interim order has now to be confirmed or discharged. The 2nd, 3rd and 4th Respondents oppose the confirmation of the order. The interim order was obtained from my brother Hlophe J sitting alone but because of the constitutional challenge invoked in prayer 3 of the application, this necessitated a sitting of a full bench to deliberate over same.

[4] On the 15th April 2011 the 19th Applicant Siphelele Hlatshwayo filed a notice of withdrawal from the matter herein.

[5] Before dealing with the matter on its merits there are several technical issues which must be identified and put to rest.

[6] First, there are 20 Applicants before us who are represented by Mr. Celani Mhlanga an adult male who is employed by the 1st Respondent. He deposed to the founding affidavit in which he did not state that he was representing the other 19 Applicants nor did he disclose his authority to represent them nor did they state in their confirmatory affidavits that he was representing them. However since there was no

objection raised by the opposing litigants; it is not necessary for the court to belabor the point, the court will deal with the substance of the matter.

[7] Second, that the confirmatory affidavits do not contain a prayer. Mr. Mabila raised this issue and it would seem that the point is well taken. Does this make the whole application fatally defective? I think not and therefore condone the anomaly.

[8] Third, a point of law was taken with respect to the 1st Respondent; that it lacked ***locus standi*** herein because none of its own constitutional rights had been, were being or were likely to be infringed. The points ***in limine*** is in my view well taken but in view of the fact that the 1st Respondent did not proceed to challenge section 44 of the Act from a constitutional perspective, he instead challenged it purely on a legal point; that in my view gave the 1st Respondent ***locus standi*** in that it has a real and substantial interest in the outcome of the matter as it is one of the two parties intending to enter into an agency shop agreement with the 2nd Respondent. It will also be effecting the deductions from the salaries of the various non union members. The point in law fails in that regard.

[9] Fourth, a complaint was raised on behalf of the 2nd, 3rd and 4th Respondents that by no longer arguing the matter from a constitutional perspective, the new arguments introduced a new cause of action from the bar which argument could not sustain the prayers sought in the notice of motion without an amendment. Mr. Mabila contended that as prayer 3 had fallen away; and that being the case so did prayer 4 as there was no longer a prayer 3 to finalise.

[10] My response is that a valid interim interdict was granted on the 15th April 2011 and is still valid and must be discharged or confirmed. This can be done by using the information before us. Prayer 3 did not fall away, the law supporting its request merely changed otherwise the parties remain the same and the main complaint about the discriminatory operation of section 44 (1) the same. That is the core of the application which cannot be merely dismissed on technical grounds.

[11] Fifth, Mr. Mabila argued a point that the application could not succeed because it either lacked some requirements of a final interdict or that those stated for example a clear right had not been alleged and proved. He argued that the Applicants did not state that they were going to

suffer irreparable harm nor did they allege and prove that they had no alternative relief. I agree with Mr. Mabila and must uphold his stated points of law. However, as the Supreme Court of Appeal has cautioned many times that matters should not be dismissed on points of law, the merits should be dealt with as well. See **Shell Oil Swaziland Ltd. v Motor World (Pty) Ltd T/A Sir Motors** Appeal case no. 23/2000 (unreported). We shall proceed to deal with the matter on its merits.

[12] Sixth, Mr. Vilakati argued that as the case now turned on the interpretation and application of the Industrial Relations Act and the Employment Act this Court lacked jurisdiction to hear it. He contended that section 8 of the Industrial Relations Act conferred exclusive jurisdiction on the Industrial Court over all disputes between employer and employee concerning the construction and interpretation of the Industrial Relations Act and the Employment Act and that this exclusive jurisdiction is buttressed by section 151 of the Constitution.

[13] My answer to this argument is that it would not be practical to send the matter for re-hearing to the Industrial Court. This would not only be time consuming but also costly. It came to us as a constitutional matter

and half-way through it changed direction and was no longer constitutional matter.

[14] Seventh, Mr. Mabila was concerned that the Applicants in abandoning their initial argument were now seeking a declaratory order. That the Applicants were now requesting the Court, in the absence of a similar provision to the South African one in our Industrial Relations Act, that the employer could not effect the deductions without the consent of the non union member. Section 25 (4) (a) of the Labour Relations Act 1995 of South Africa provides that:

> "Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an employee without the employee's authorization".

[15] Mr. Mabila urged on us that the requirements for a declarator have not been pleaded and any reliance on it cannot be upheld. Our view is that the reference to section 25 (4) (a) by the Applicants was to enable us to compare the two provisions; ours and that of South Africa and to make an informed decision and not a declaratory order.

[16] I turn now to the merits of the case. The Applicants are employees of the 1st Respondent a banking or financial institution which is registered in terms of the laws of Swaziland (the Bank). The 2nd Respondent is a legally registered trade union whose members are derived from the financial institution and allied workers in Swaziland (SUFIAW).

[17] The deponent to the founding affidavit Mr. Celani Mhlanga says that on the 5th April 2011 he received notification from the Bank's Head of Human Resources, Mr. Sithole that the Bank was about to sign an agency shop agreement with SUFIAW. The notification stated that the Bank had been approached by SUFIAW with a proposal to negotiate an agency shop agreement effective on April 2011. The proposal agreement is annexed to his founding affidavit as Annexure B. Annexure B incorporates the contents of the agreement sought to be signed.

[18] The Applicants are opposed to the agency shop agreement and want SUFIAW to be interdicted and or restrained from signing the said agreement with the Bank. They are opposed to the agency shop agreement for a number of reasons which are set out in the founding affidavit.

[19] The Agency shop agreement is sanctioned by section 44 of the Industrial Relations Act No. 1/2000 (the Act). When section 44 first appeared it had four sub-sections. The relevant sections provide as follows:

Subsection (1) provides that:

> "A representative trade union … 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".

Subsection (4) provided that:

> "An employee shall not be bound by an Agency agreement and no amount of that employee's wages shall be deducted **under this section** unless that employee has consented in writing". (My emphasis).

[20] By Act No. 2/2005 section 44 of the Industrial Relations Act No. 1/2000 was amended by deleting subsection (4). The effect of the deletion is that it is no longer necessary to obtain the written consent of

an employee to deduct an agency fee from employees wages in terms of section 44 (1).

[21] Section 44 (3) of the Act makes further provision in respect of non-union members fees deductions and those are embodied in the agreement (Annexure 6) namely: that an agency shop agreement is binding only if it provides that no employee of the employer shall be compelled to join the union (section 3 (a)); that the fees deducted should not be higher than those paid by the union members (section 3(d) (i)); the amount deducted monthly shall be 2% of base pay; the moneys deducted shall be paid into a separate account administered by the representative trade union (section 3 (c)).

[22] Initially and in terms of their affidavit(s) the Applicants' objections were threefold viz:

(a) They objected to the fee deductions because these were not sanctioned by the Employment Act of 1980.

(b) That the amendment of deleting section 44 (4) from the Act was offensive to the constitution particularly the bill of rights section 14 and 10 (b) (c).

(c) That by deducting their salaries they were being forced to associate with SUFIAW when they have no interest nor desire to do so.

[23] Even though the Applicants recognize that the reasoning behind the deduction is that they stand to benefit from any bargaining that the Union undertakes, they do not wish to be forced to associate with SUFIAW and say that the impugned provisions have the effect of indirectly forcing them to associate with the Union. That the deductions of their salary result in an association to which they object.

[24] I have set out the essence of the Applicants' objection in paragraph 22 herein above to highlight that the Applicant' objection is that by deducting their salaries they are being forced to associate with the Union. They have not set out what it is exactly about associating with the Union that is objectionable other than the act of deducting their money. They have not stated whether or not the Union uses their deducted money in furtherance of the prohibited acts set out in section 44 (d) of the Act which states that 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 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.

[25] Elsewhere in the Act, there is provision that the moneys deducted from non-Union members shall be kept in a separate account and the Union shall cause audited financial statements to be drawn up and these shall be submitted to the Commissioner of Labour together with its regular financial statements. The Commissioner of Labour ensures that the deducted money is not used for other purposes than is provided for in the law. The Applicants do not state whether their objection is based on the fact that the Union has violated the provisions of this section

[26] However, at the hearing hereof Mr. Mdladla for the Applicants changed his approach and abandoned his attack of section 44 (1) of the Act as being unconstitutional but on the basis that it was offensive to certain provisions of the Employment Act; for example section 56 (2) of the Employment Act provides that:

> "Any employer may, with the written authority of an employee, deduct from the wages payable to that employee, such amount as is stipulated in the authority as being the amount due from the employee as his membership fee or contribution to an organization of which the employee is a member".

Section 64 (c) states that:

> "Any employer who makes any deduction from the wages of an employee … contrary to the provisions of **this Part**; shall be guilty of an offence and shall be liable on conviction to a fine of not exceeding two thousand five hundred Emalangeni (E2,500.00) or imprisonment not exceeding three years or both and for a second or subsequent conviction to a fine not exceeding three thousand Emalangeni (E3,000.00) or to imprisonment not exceeding one year or both". (**This Part** means Part VI – Protection of Wages) (My emphasis).

[27] The Employment Act 1980 stipulates that an employee has to authorize the employer to deduct from his wages such amount or fee to pay to an organization to which the employee is a member; and further makes it a crime to so deduct without the employees authority. In terms of section 44 (1) of the Act there is no authority required by an employer to

deduct agency fees in respect of employees who are not Union members.

[28] The Applicants say that they are opposed to the deduction of the agency fee which is done without their consent and they are opposed to the fee being paid over to the Union as this forces them to associate with the Union and in the process violates their right to freedom of association. Such right is set out in section 25 (5) and 32 (2) of the Constitution of Swaziland.

Section 25 (5) provides that:

> "a person shall not be compelled to join or belong to an association".

Section 32 (2) (a) provides that:

> "a worker has a right to freely form, join or not to join a trade Union…"

[29] Mr. Mdladla's submission is that when Parliament deleted section 44 (4) of the Act it was because it knew that there was section 56 (1) and (2) and section 64 (c) of the Employment Act which regulated

deduction of agency fees; and that section 44 (4) was just a repetition of section 56 (1) and (2) of the Employment Act. But if the court should sanction section 44 (1) of the Act that there has to be deductions without consent then the constitutional challenge to section 44 (1) stands; and a proper law should be put in place that allows employees to consent to the deductions of an agency fee.

[30] Mr. Sibandze, attorney for the 1st Respondents aligned himself with the submissions of Mr. Mdladla for the Applicants. He argued that section 44 (4) of the Act was superfluous in light of section 56 and 64 (c) of the Employment Act which disallows deductions of an employee's salary without his or her consent under threat of criminal sanction should such deduction occur.

[31] Mr. Sibandze contends that section 44 (4) was superfluous to begin with because the deductions without the consent of the employees could not be done in view of sections 56 and 64 (c) of the Employment Act; it could not be done even before the advent of the Constitution of Swaziland. That the removal of section 44 (4) did not change the situation; what would have been required would have been a proactive and positive enabling provision similar to the South African situation.

He concludes this argument by saying that there is no need for the court to decide the issue on the basis of the constitutional point. To fortify his argument he referred us to the case of **Solidarity and Others v Minister of Public Service and Administration and Another** (2004) 25 ILJ 1964 (LC).

[32] I must with due respect disagree with both Mr. Mdladla and Mr. Sibandze with respect to their interpretation of section 56 (2). The written authority by an employee to the employer is for the latter to deduct a membership fee or contribution to an organization **of which the employee is a member** (My emphasis). The section does not refer to employees who do not belong to the organization referred to herein. In terms of the interpretation section "organization" has the same meaning as in the Industrial Relations Act; and in that "Act" organization means a trade union; staff association or employers association in good standing as the context may require. This section does not include non Union members.

[33] I agree with the submissions by Mr. Vilakati that section 44 (1) of the Act was brought into operation to cover non-union members who could not be compelled to contribute to the unions. Section 44 (4) was

removed because possibly the required written authority was hard to come by. It is worth noting that the Constitution is Act No. 1 of 2005 and the amendment to the Act is in Act No. 3 of 2005. The right to give the required consent to effect deductions was taken away immediately after the Act containing the Bill of Rights was passed. This in my view has significance in that Parliament deliberately took away this right fully knowing the contents of section 25 (5) and 32 (2) of the Constitution.

[34] The criminal sanction in section 64 (c) refers to an employer who makes deductions from the wages of an employee contrary to the provisions of **this Part**. **This Part** refers to Part VI of the Employment Act and not section 44 (1) of the Act or any part of the Industrial Relations Act (my emphasis).

[35] Mr. Sibandze while aligning himself with Mr. Mdladla's submissions made a further submission which centred around section 56 (3) which states that:

> "An employee may assign a part of the wages due to him under his contract of employment"

He argued that when an employee says to an employer that he is a member of a trade union and authorizes his employer to deduct from his/her salary and to pay the trade union, such employee would be assigning such amount of his wages. This then amounts to the employee giving his consent for the deduction.

[36] I disagree. Section 56 (2) provides specifically for the deduction of a fee in respect of a membership or contribution to an organization of which the employee is a member. Section 56 (3) of the Employment Act 5/1980 provides for all employees both union members and non union members. There is no provision specifically directed to non union members in respect of the payment of an agency fee. Section 44 (1) of the Industrial Relations Act No. 1/2000 cures this defect.

[37] What was the intention of the legislature in enacting section 44 (1)? I agree with Mr. Vilakati that it was to regulate agency shop agreements and to strike a balance between the interests of employees who do not wish to become members of a union and to avoid the unfairness of giving the non-union members a free ride. See Mclachlin J in **Lavigne v Ontario Public Servants Employees Union** (1991) 2 SCR 211; 1991

Can L1168 (SCC). Section 44 (4) did not strike this balance as it allowed non-union members a free ride in the sense that they could withhold their consent to the deduction of an agency fee from their salaries; thereby defeating the whole purpose of having agency shop agreements. The amendment in deleting section 44 (4) corrected this anomaly; thereby re-fortifying section 44 (1). The interpretation of section 44 (1) of the Industrial Relations Act vis-a-vis the Employment Act No. 5/1980 in **Commercial and Allied Workers Union of Swaziland v The Mall Spar (Pty) Ltd** SZIC 61 remains unassailable and unimpeachable and was in my view correctly decided.

[38] The matter being no longer a constitutional one, the application is dismissed with costs and the interim order granted on the 15th April 2011 is hereby discharged. Costs ordered to be paid by the Applicants and the 1st Respondent.

____

S.B. MAPHALALA
PRINCIPAL JUDGE OF THE HIGH COURT

I agree

Q.M. MABUZA

JUDGE OF THE HIGH COURT

For the Applicants	:	Mr. S. Mdladla
For the 1st Respondent	:	Mr. M. Sibandze
For the 2nd Respondent	:	Mr. M. Mabila
For the 3rd & 4th Respondents	:	Mr. M. Vilakati

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1360/11

In the matter between:-

CELANI MHLANGA AND 20 OTHERS	**Applicants**

and

NEDBANK SWAZILAND LTD	**1st Respondent**
SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS UNION (SUFIAW)	**2nd Respondent**
SWAZILAND GOVERNMENT	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

Neutral citation: *Celani Mhlanga and 20 others v Nedbank Swaziland Ltd and (3) others (1360/11)[2012] SZHC 59 (21st November 2012)*

Coram: S. B. Maphalala PJ.
(Full Bench) Q. M. Mabuza J.
N. J. Hlophe J.

For the Applicants: Mr. S. V. Mdladla
For the 1st Respondent: Mr. M. M. Sibandze
For the 2nd Respondent: Mr. M. T. Mabila
And 4th Respondent: Mr. M. Vilakati
Heard: 9th March 2012
Delivered: 21st November 2012

Summary

Interdicts – Whether requirements of an interdict properly pleaded – Although such requirements could have been more elegantly pleaded; a case for an interdict established when considering closely the averments made and the purpose of the order sought.

Jurisdiction – Matter initially brought to court for the determination of a constitutional question – Approach changed on commencement of argument – Alleged it is no longer necessary to determine constitutional question as matter can be decided on other legal grounds than the constitutional one – Whether this court has jurisdiction to hear and decide the questions which differ from the initial question – Such questions allegedly reserved for the jurisdiction of the Industrial Court – Court of the view it has the power to do so instead of reverting the matter to the Industrial Court.

Constitution – Employer and recognized union agreeing to deduct agency fees from non–union member employees' salaries - Whether constitutional to do so – Whether contemplated deductions amount to forcing employee's to join a union or to associate with one much against their will contrary to

sections 25(1) and (5) and 32 (2) (a) of the Constitution – Matter capable of being decided on other legal grounds hence not necessary to decide constitutional question.

Labour Law – Deduction of Agency fees from an employee's salary – Whether section 44 of the Industrial Relations Act 1 of 2000 as amended authorizes the deduction of agency fees or dues from an employee's salary without the employee's consent or even his being consulted – Section 44 of the Industrial Relations Act as amended does not provide for the deduction of agency fees without an employee's consent.

Labour Law – Wages of employee's protected – Only deductions covered in sections 56 and 57 may be deducted – Agency fees to be deducted in compliance with the Act only if assigned in terms of section 56(3) of the Employment Act of 1980 in the absence of any other law permitting it – Effect of amendment of section 44 (4) of the Industrial Relations Act in law.

Deduction of agency fees without an employee's consent a violation of section 64(c) of the Employment Act of 1980 therefore an offence.

[1] I have read the judgment of my sister, Justice Mabuza. Whilst I respectfully appreciate her views as expressed in the judgment, I respectfully disagree with them. My reasons for holding a different view are stated herein below.

[2] This matter has brought up various questions of law to be considered including deciding which ones ought to be determined in the disposal of the application. These questions include whether the constitutional question initially raised has to be decided in this matter; whether the case as pleaded by the Applicants does meet the requirements of an interdict as well as whether it is opened to the first Respondent to align himself with the applicant's case to the extent of urging a certain relief from this court. All these questions are over and above the central question which is whether or not it is open to an employer and a recognized union to deduct from the salaries or wages of employees who are not union members' agency dues or fees without their consent or even consultation.

[3] The background to the matter is that whilst claiming to be authorized or sanctioned by section 44 of the Industrial Relations Act no. 1 of 2000 as amended by section 10 of the Industrial Relations (Amendment) Act no. 3 of 2005, the 1st and 2nd Respondents prepared a draft Agency Shop Agreement in which they were *inter alia* agreeing that the 1st Respondent would deduct from the salary of each one of its employees who were not members of the recognized union and who comprised

among others the Applicants, a monthly sum amounting to 2% of the employee's basic salary as agency shop dues or fees. It apparently was the understanding of both parties, or even all the parties, that the agency shop fees or dues were by law to be deducted from the salary of each employee who although not a member of the recognized union, fell within the bargaining unit and payable to the union recognized in the undertaking irrespective of whether or not that employee consents to the deduction. This understanding was no doubt bolstered by the decision in the Industrial Court case of ***Commercial and Allied Workers Union of Swaziland (CAWUSWA) v The Mall Spar (PTY) LTD Industrial Court case no.300/2008,*** where the said court decided that the amendment of section 44 of the Industrial Relations Act 2000 by deleting subsection (4) was authorizing the deduction of Agency fees from Employees who are non – union members without their consent.

[4] For purposes of understanding the position, section 44 (4) of the Industrial Relations Act 2000, provided over and above its recognizing the notion of Agency Shop Agreements that such agreements did not bind Employees in an undertaking and that from their basic salary was not to be deducted without an employee's consent, agency fees. An amendment of the said section in 2005 through section 10 of the Industrial Relations Act (Amendment) no. 3 of 2005, deleted the said subsection. In the CAWUSWA case referred to above, this meant that the Legislature's intention in deleting the said subsection was authorizing *inter alia* the deduction from an employee's basic salary, agency fees.

[5] It seems to me that a decision to this matter lies in determining what the Amendment of section 44in the manner stated above meant. This I shall revert to later on in this judgment.

[6] The Applicant's case is that they learnt from their Human Resources Manager that there was henceforth to be signed An Agency Shop Agreement between the 1st and 2nd Respondents with the result that an amount equivalent to 2% of each non unionised employee's basic salary was to be deducted monthly and paid to the 2nd Respondent as agency fees. The employees concerned had not been consulted about this and had not agreed thereto. In their view what was happening was indirectly forcing them to become members of, or to associate with the 2nd Respondent union against their will.

[7] They contended this was against specific provisions of the Constitution of Swaziland which *inter alia* provided for freedom of association as well as the right of an employee not to be forced to join a union. Consequently they approached this court under a certificate of urgency seeking the reliefs set out herein below contending that in so far as the 1st and 2nd Respondents claimed to be authorized by section 44 of the Industrial Relations Act no.1 of 2000 as amended by section 10 of the Industrial Relations Amendment Act 3 of 2005, to deduct from their monthly salaries a sum equivalent to 2% of their basic salary, then section 44 of the Industrial Relations Act 2000 as amended was inconsistent with the Constitution of the Kingdom of Swaziland. This they contended necessitated that the said section be struck down over and above its being declared unconstitutional.

[8] The reliefs then sought by the Applicants in their complete form were as follows:-

(1) That the usual forms and proceedings relating to the institution of these proceedings be dispensed with and allowing the matter to be heard as one of urgency.

(2) That the 2nd Respondent (Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) be interdicted and/ or restrained from signing the Agency (Shop) Agreement with the 1st Respondent.

(3) That the Honourable Court declares section 44 (4) of the Industrial Relations Act no. 3/2005 as amended to be offensive to clauses 25 (10) and 32 (1) of the Constitution of Swaziland/ Alternatively that the Honourable Court strikes out (down?) the amendment as being unconstitutional.

(4) That prayer (2) hereof operates forthwith as an Interim Order pending the finalization of prayer (3) hereinabove.

(5) Costs of this application.

[9] A closer look at the reliefs sought as well as the application as a whole reveals that in essence three reliefs are being sought which are mainly an interdict against the signing of the Agency Shop Agreement by the 1st and 2nd Respondents; a declaratory order that the amendment of section 44 of the Industrial Relations Act 2000 by section 10 of the Industrial Relations Act (Amendment) of 2005 which deleted subsection (4) of

section 44, was null and void on account of its inconsistency with sections 25(1) and (5) as well as section 32(2) of the Constitution of Swaziland as well as an order striking out (down) the said amendment of section 44 of the Industrial Relations Act 2000 by section 10 of the Industrial Relations Act (Amendment) of 2005 as being unconstitutional.

[10] It was acknowledged during the argument of the matter that the way in which the 1st part of prayer 3 is framed, is confusing as a closer look of it suggests that the deleted subsection (4) of section 44 is still in place. It was however acknowledged that the said suggestion was merely a result of inelegant drafting but otherwise the relief sought was a declaratory order that the amendment to section 44 of the Industrial Relations Act 2000, by section (10) of Act 3 of 2005, deleting subsection 4 of the Principal Act was inconsistent with sections 25(1) and (5) as well as section 32(2) of the Constitution. In fact from the papers filed in opposition to the application, it is clear that this is how the prayer had been understood by all the parties concerned, none of whom was occasioned prejudice in my view by what is clearly an erroneous expression of the said prayer.

[11] For purposes of completeness the relevant sections and subsections of the Constitution complained of provide as follows:-

Section 25

(1) *A person has the right to freedom of peaceful assembly and association*.

(5) *A person shall not be compelled to join or belong to an association*.

Section 32

(2) *A worker has a right to*-

(a) *Freely form, join or not join a trade union for the promotion and protection of the economic interests of that worker*.

[12] Under normal circumstances one would have been called upon to determine the constitutionality or otherwise of the amendment to section 44 of the Industrial Relations Act 2000 by section 10 of the Industrial Relations (Amendment) Act no. 3 of 2005 together with striking down the said amendment in the event one came to the conclusion that same was indeed unconstitutional. I say one would have been called upon to determine the foregoing, because when the matter was argued there was a total change of tact from the Applicants who now contended, whilst aligning themselves with the case by the first Respondent, that it was premature to consider the constitutional question concerned at this stage.

[13] It was contended that the earlier approach had been a result of an erroneous belief that the amendment of section 44 of the Industrial Relations Act 2000 had the effect of compelling the non–unionised employees to contribute or pay "Agency Shop dues or fees". In so far as there was an error in this belief, it was submitted on behalf of the applicants and 1st Respondent during the hearing of the matter that the call for the determination of the constitutionality or otherwise of the said amendment was premature and that the issue before court was the determination of the question whether the amendment to section 44 of the Industrial Relations Act 2000 authorized the deduction of Agency

Fees from the Employees' salaries, when considering among others the provisions of the Employment Act of 1980.

[14] It indeed seems to me that this is the first hurdle to cross before one can determine the constitutionality of the amendment. It suffices for me to record that the 2nd to 4th Respondents did not agree with the notion that the amendment to section 44 of the Principal Act referred to above was unconstitutional in its meaning as arrived at in the ***CAWUSWA v The Mall Spar case (Supra)*** which is to the effect that those employees who were not union members were compelled to pay Agency Shop fees or dues.

[15] I need to state that the position of the law is now settled that a court should not ordinarily decide a constitutional question or issue if the matter can be decided on some other point, unless it is necessary to do so. The case of ***S v Mhlungu and others 1995 (3) SA 867 (CC) at 895 paragraph 59 D- F*** is instructive in this regard where Kentridge AJ stated the following:-

> "*I would lay it down as a general principle that where it is possible to decide any case civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under section 102 (1) would be in the interests of justice- for example, a criminal trial likely to last many months, where a declaration by this court would put an end to the whole prosecution. But those cases would be exceptional. One may compare the practice of the Supreme Court with regard to reviews of Criminal trials. It is only in very special circumstances that it would entertain a review before verdict".*

[16] Echoing the above position, Chaskalson P (as he then was) put the position as follows in ***Zantsi v Counsel of State, and others 1995 (4) SA 615 (CC) at 618 paragraph 54 C-D:-***

> "*It is only where it is necessary for the purpose of disposing of the Appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this court. It will only be necessary for this to be done where the Appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the interest of justice for a constitutional issue to be decided first, where there are compelling reasons that this should be done".*

[17] This position has also been upheld or applied in labour matters with the example being the case of **Solidarity And Others vs Minister of Public Service And Administration And Another (2004) 25 ILJ 1964 (LC**).

[18] When argument in the matter commenced Mr. Mdladla for the Applicant submitted that having considered the matter including the Heads of Argument filed by Mr. Sibandze for the 1st Respondent it was clear to him that he had to change his approach and contested strongly that in actual fact the matter could be decided on other grounds than on the initially contended constitutional issue. He admitted that the constitutional question initially relied upon did not arise when considering the provisions of the Employment Act of 1980 as read together with the amended to section 44 of the Industrial Relations Act of 2000 which was amended by section 10 of Act no. 3 of 2005 which deleted subsection 4 of section 44.

[19] An argument on this issue which in my view merits mention was that raised by Mr. Vilakati for the 3rd and 4th Respondents to the effect that if this court was no longer deciding the constitutional question, it then had no jurisdiction to decide the question of the effect of sections 56 (3) and 64 (c) of the Employment Act on the amendment of section 44 of the Industrial Relations Act 2000, in the manner alluded to herein above. This he submitted was the position because such a question would be a matter for the jurisdiction of the Industrial Court which had exclusive jurisdiction on labour matters according to section 8 of the Industrial Relations Act 2000.

[20] I cannot agree with this argument on the ground that this point was raised as a point of law on a matter properly serving before this court. In any event, the position is now settled that this court would have power to decide an issue in a matter it would otherwise revert to a lower court where the decision to that particular point is a foregone conclusion and a reference of the matter to the lower court would be a waste of time. Owing to the crisp provisions of sections 56 (3) and 64 (c) of the Employment Act of 1980 it seems to me that the Industrial Court would not reach a different conclusion to the one I have reached herein below, irrespective of the decision reached in ***CAWUSWA v The Mall Spar*** referred to above, which I agree with both Mr Mdladla and Mr Sibandze for the Applicants and 1st Respondent respectively, cannot stand as it was in my view, and I say this with respect, erroneous in law when considering among other considerations that it was a result of interpreting and reading into the law certain meanings in a case where the existing laws specifically provided what should happen.

[21] Owing to the extensive pleading of the matter in the papers as well as the extensive and incisive address made by all counsel involved, it seems to me that there are cogent reasons why this court should decide the matter itself instead of reverting it back to the Industrial Court. The position as stated in ***Traube vs Adminstrator Transvaal 1989 (2) SA 396 (T) at 408 BD***, finds reference herein, where it was expressed in the following words:-

> "In ***Johannesburg City Council v The Administrator of the Transvaal 1969 (2) SA 72***, Hiemstra J summarised, conveniently, the considerations which have been recognised in the relevant authorities. In the ordinary course, he said a matter of this kind will be referred back, because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. But it may not do so-
>
> (a) *If the end result is a foregone conclusion and a reference back will merely waste time; this criterion will be of particular importance if delay will be prejudicial to the applicant;*
>
> (b) *If the tribunal or functionary has exhibited bias to such a degree that a reference back would be unfair to the applicant;*
>
> (c) *If the tribunal or functionary has exhibited incompetence to such a degree that it would be unfair to the applicant to refer the matter back*."

[22] The common course state of the law stands as follows on the deductions that can be lawfully levied against the salary of an employee. A salary or wage of an employee is protected against certain deductions in terms of Part VI of the Employment Act of 1980. In fact all lawful or

authorized deductions are set out at section 56 of the said Act whilst section 57 provides for further deductions from an employee's wage or salary.

[23] The effect of these sections is that all deductions to be made against an employee's wage or salary ought to be in line with what they provide. Any advances other than as provided for in the Employment Act are outlawed by section 64 (c) of the Employment Act which in fact criminalizes any deduction from an employee's wage in any other manner than that provided for in part VI of the Employment Act of 1980. My reading of the sections concerned does not authorize the deduction of the Agency Shop fees or dues except where same is by consent of the employee concerned. In fact the closest there is that such deductions can be made are section 56 (2) and 56 (3) of the Act which provide that deductions of that nature ought to be with the employee's consent or should be a result of his assignment of that portion of his salary. Section 56 (2) and section 56 (3) of the Employment Act provide as follows verbatim:-

> Section 56 (2) "*Any employer may, with the written authority of an employee, deduct from the wages payable to that employee, such amount as is stipulated in the authority as being the amount due from the employee as his membership fee or contribution to an organization of which the employee is a member.*
>
> (3) *An employee may assign a part of the wages due to him under his contract of employment*".

[24] Section 57 provides for further restrictions such as deductions in instances where the employee agrees in writing that a reasonable amount for damaged or lost tools or other property belonging to an employer be deducted from his wage. Otherwise all such deductions including those allowed in section 56 of the Employment Act ought not exceed half of the Employee's salary. I have no doubt section 56 (2) and section 57 are therefore not applicable to the matter at hand. Instead it seems to me a deduction in respect of an Agency Shop Agreement can only be done in accord with section 56 (3) where an employee can assign a specific portion of his salary which means that the employee's consent shall therefore have to be sought and granted before any such a deduction is effected.

[25] On the other hand section 64 of the Employment Act of 1980 which is a penalty section, provides as follows:-

Section 64 *"An employer who-*

> *(c)Makes <u>any deduction</u> from the wages of an employee or receives any payment from an employee contrary to the provisions of this part:*
>
> *Shall be guilty of an offence and shall be liable on conviction to a fine of not exceeding two thousand five hundred Emalangeni or imprisonment not exceeding three years or both and for a second or subsequent conviction to a fine not exceeding three thousand Emalangeni or to imprisonment not exceeding one year or both*."

[26] As indicated above authorized deductions from an employee’s salary can only be for the items covered in section56 and 57 of the Employment Act. This means that a deduction for agency fees or dues from an employee’s salary or wage has to be covered under one of these two sections for it to be lawful. Section 64 therefore, makes any deductions outside these sections and indeed this Part of the Act an offence punishable in law as stated above.

[27] As shall be seen herein below, the deletion of subsection 4 of section 44 of the Industrial Relations Act 2000, by section 10 of the Industrial Relations Act (Amendment) 2005, does not change this position.

[28] In the year 2000, there was promulgated the Industrial Relations Act 2000, of which section 44 and the subsections thereto introduced the notion of Agency Shop Agreements including how they were to be implemented in as far as deductions were concerned. The relevant aspects of the section read as follows:-

Agency Shop Agreements

44 (1) *A representative trade union, staff association and an employer or employer’s organization may conclude a collective agreement to be known as an agency shop agreement requiring the employer to deduct <u>an agreed agency fee</u> from the wages of its employees who are identified in the agreement and who are not members of the trade union.*

(4) *An employee shall not be bound by an Agency Agreement and no amount of that employee’s wages shall be deducted under this section unless that employee has consented in writing”.*

[29] It shall be noted that although the effect of the said section (section 44) was to amend part VI of the Employment Act by adding a further lawful deduction, it recognized that such had to be consented to by the employee concerned. That is to say in my understanding, no part of section 44 allowed or authorized the deduction from an employee's salary, outside the provisions of sections 56, 57 and 64 of the Employment Act of 1980. Put differently any deduction without the consent of the employee would amount to a contravention of the said sections particularly if regard is had to section 64(c) of the Employment Act.

[30] Consequently, it is not, and has never been, the position of our law to allow a forceful deduction of an amount from an employee's salary or wage as agency fees. In fact this introduction of section 44 of the Industrial Relations Act 2000, never created a conflict between the two legislations. It is worthy of note that according to section 56 (2) of the Employment Act 2000, even a union member's salary ought to be deducted with regards to membership fees, with the concerned employee's express consent, which in my view makes it all the necessary that such consent be sought and be granted in the case of a non-member.

[31] In the year 2005, and by means of section 10 of the Industrial Relations Act (Amendment) 2005, the legislature deleted section 44 (4) of the Principal Act. The said section 10 provides as follows:-

Amendment to Section 44

10. *Section 44 of the Principal Act is amended by deleting subsection (4).*

[32] It was this amendment that was taken by the parties to be amounting to an authorization of a recognised union and an employer to deduct from the non – unionized employee's salary agency fees without such an employee's consent or even a say. Clearly I agree with Mr Sibandze that the foregoing was an erroneous understanding or conceptualization of the position for a proper reading of section 44 without subsection (4) merely introduces or recognizes the notion of Agency Shop Agreements without providing on how same was to be implemented, *visa vis* the non union member employee himself. In fact as I understand it, section 44 (1) in its current form still decrees that the deduction of agency fees be agreed to. I would say when it refers to the deduction of an agreed agency fee it means a fee that is agreed to by the employee himself for it is in my view unconceivable that union and an employee can simply agree on an amount to deduct from the employee's salary without his input or consultation.

[33] It was whilst interpreting the amendment of section 44 of the Industrial Relations Act 2000 (the deletion of subsection (4) thereof) that the Industrial Court in the CAWUSWA judgment came to the conclusion it compelled the deduction without an employees' consent. At the heart of this finding is that the amended section 44 of the Industrial Relations Act 2000, created a conflict between it and Part VI of the Employment Act 1980. This conflict, it was found, was in that the amendment by implication, authorized the deduction of agency fees from the basic

salaries of employees irrespective of their not being members of a union, an issue that Part VI of the Employment Act of 1980 prohibited.

[34] The conclusion that the amended section 44 of the Industrial Relations Act conflicted with sections 56 and 64 (Part VI) of the Employment Act was arrived at through an interpretation of the section which according to the Industrial Court in The Mall Spar case referred to above, was the only inference to be drawn from the Amendment aforesaid which is that the Legislature intended to allow deduction without consent from an employee's salary.

[35] With respect I beg to differ from the conclusion arrived at by the Industrial Court. Firstly I do not agree that the inference it drew was the only reasonable one because an equally reasonable inference to draw is that the Legislature was acknowledging that the said section was surplusage because what it tried to cover or provide for was already being provided for by sections 56 and 64 of the Employment Act of 1980.

Furthermore I am of the firm view that the need to interpret the meaning of the amendment did not arise in so far as it is common course that the said amendment did not leave a lacuna in so far as the proper position of the law was that Part VI of the Employment remained governing the position. Thirdly no sound reason has in my view been given why the Legislature would be taken to have intended to amend the Law in the manner interpreted instead of doing so expressly. That it did not remove the phrase requiring an agreement on the amount to be deducted provided for in section 44 (1) is an indicator it did not intend to amend

the Law for it to have the suggested effect. It would be borne in mind that the legislature is presumed to know the legal position and status of the law.

[36] It is for the foregoing reasons I cannot agree with the conclusion reached in ***Commercial and Allied Workers Union of Swaziland (CAWUSWA) v The Mall Spar Industrial Court case no. 300/2008***. The effect of my decision is therefore that the amendment of section 44of the Industrial Relations Act 2000 by section 10 of the Industrial Relations Act no. 3 (Amendment) 2005 does not authorize the deduction of agency fees from the salary of an employee without his consent. Put differently agency fees can be deducted from an employee's basic salary where he consents to such in writing, as is the case in the deduction of membership fees from union members. It was argued by Mr Vilakati for the 3rd Respondent that there was a need to discourage so called free riders, who are those who would benefit from what the recognized union would have negotiated without them having contributed anything. Whilst there may be a need to deal with the issue of free riders, I am of the view that such an issue needs to be addressed through proper laws being enacted by parliament in keeping with its primary function.

[37] It was in my view, a result of the interpretation I have concluded was erroneous that the 2nd Respondent called on the 1st Respondent to sign a prepared draft Agency Shop Agreement in terms of which 2% of the Employee's basic salary was to be deducted and made payable to the union without the employee's consent. It was as a result of this approach that the concerned employees, the Applicants herein, whilst fearing that there was to be deducted from their salaries the 2% equivalent from their

basic salaries, approached this court for the reliefs stated above including the declarator referred to, together with striking down the amendment aforesaid.

[38] Consequently in so far as there was an attempt between the 2nd Respondent and the 1st Respondent to deduct such amounts without an employee's consent such action was, I find, unlawful and was violating Part VI of the Employment Act of 1980, particularly section 56 (3) read with section 64 (c) of the said Act. Given the criminalization of any contrary conduct by section 64 (c) of the Employment Act 1980, the attempt to deduct the employee's salary without his written consent, is unlawful and therefore ought to be interdicted on this basis alone.

[39] It is because of the foregoing considerations that I am of the considered view that this court need not even consider the constitutionality of the amendment to section 44 of the Industrial Relations Act 2000 by the deletion of subsection (4) of the said section. The more compelling reason not to consider the constitutionality of the amendment of section 44 of the Industrial Relations Act 2000 is the acknowledgment by Applicant's Counsel Mr. Mdladla that in fact the said amendment does not bring about the violation of the Constitution in so far as other than acknowledging the notion of Agency Shop Agreements, the legislature does not authorize the Employer and the Employee organization to deduct the agency fees from an employee's salary without his consent.

[40] The question of what happens to the so called "free riders" need not be decided by this court in the circumstances of this matter because so far no deduction of an employee's salary can be carried out without

violating section 64 (c) of the Employment Act. I have no hesitation to find that the provision of section 44 of the Industrial Relations Act 2000 as amended if read with part VI of the Employment Act merely calls upon the employee concerned to consent to a deduction of any agency fees from his salary. I have no doubt that Parliament as the body mandated by the Constitution shall pass an appropriate law to take care of the so called free riders whilst it bears in mind the constitutionality of the said law.

[41] I am therefore convinced that the matter ought to end here with there being no need for me to deal with the constitutionality of section 44 of the Industrial Relations Act given that the section alone does no more than acknowledge the notion of Agency Shop Agreements and that if read with part VI of the Employment Act the deductions can be effected with the employee's consent.

[42] Purely on points of procedure, it was argued that the 1st Respondent had no *locus standi* to argue the case in the manner it did in so far as it urged for a particular result to be reached namely that the signing of the draft Agency Shop Agreement be interdicted.

[43] It is a fact that the 1st Respondent did not choose to be a party in the proceedings but was joined therein by the applicant's because it would have been a non - joinder not to include him as a party. I disagree that a party who is a necessary party should be muzzled and prevented from saying what he considers to be the reasons for his having taken a particular view of a matter. Clearly the 1st Respondent is of the view that the amendment to section 44 did not amount to an act of

unconstitutionality because the said subsection (4) of section 44 was surplusage in the first place in so far as the subsection was merely restating the position provided for in part VI of the Employment Act. This view I agree with as expressing the correct position of our law as stated herein above.

[44] There was also the contention that Applicants had failed to set out all the requirements of an interdict as not all of them were alleged. I disagree with this submission. In my understanding of the pleadings, the case by the Applicants is very clear. They are saying that the intended deduction from their salaries of the agency fees was violating the laws of Swaziland as it was being done without their consent, and was contrary to the Constitution of Swaziland and the Employment Act. I have no doubt all the parties understood the case in that light as I can tell from the pleadings and argument in court.

[45] I am of the view that whilst the Applicants may not have specifically mentioned all the requirements of an interdict, there is no doubt that the information relating to such requirements has been pleaded. That being the case, and having observed that no prejudice has been suffered by the Respondents as a result of the failure to specifically mention all the requirements of an interdict by the Applicants, such ought not result in the dismissal of an application of this nature. I bear in mind that an interdict is a discretionary remedy.

[46] That being the case I will not uphold the point on failure to plead the requirements of an interdict by the Applicants for the foregoing reasons. I am also minded not to appear as avoiding the real issues in the matter

as was observed in the ***Shell Oil Swaziland LTD v Motor World (PTY) LTD T/A Sir Motors Appeal Court case no.23/2000*** as well as in ***Savannah N. Maziya vs GDI Concepts (PTY) LTD High Court case no. 905/2009*** where the position was expressed as follows at page 7 of the said judgment:-

> *"Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the alter of technicalities. The rationale behind this trend is that Justice can only be done if the substance of a matter can be considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potential of occasioning a miscarriage of justice".*

[47] Consequently and because of the conclusion I have come to I make the following order:-

(i) The signing of the Agency Shop Agreement between the 1st and 2nd Respondent so as to deduct a certain sum as agency fees or dues from the Applicants' salaries without their consent be and is hereby interdicted and restrained.

(ii) Owing to the fact that the matter can be decided on other grounds other than on the constitutional question raised; the constitutionality of the amendment to section 44 of the Industrial Relations Act is not an issue for decision in this matter.

(iii) The costs are to follow the event in this matter and are to be payable by 2nd and 3rd Respondents to the Applicants.

Delivered in open Court on this the …… day of November 2012.

N. J. HLOPHE

JUDGE