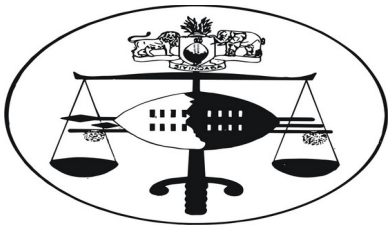

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 342/12

In the matter between:

THE MINISTER FOR LABOUR AND **1st Applicant**

THE ATTORNEY GENERAL **2nd Applicant**

And

THE LABOUR ADVISORY BOARD **1st Respondent**

TRADE UNION CONGRESS OF SWAZILAND **2nd Respondent**

Neutral citation: *The Minister for Labour & The Attorney General v The Labour Advisory Board and Trade Union Congress of Swaziland (342 [2012]* SZIC 2 (FEBRUARY 26 2013**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & A. Nkambule Nominated Members of the Court)

Heard : **18 December 2012**

Judgment delivered: **26 February 2013**

Summary:
Application instituted by the applicants for a declaratory order that the 2nd Respondent is not a workers' federation in terms of the Act.

Held—There is a lacuna in the law as there is no provision for the registration of federations in the Act.
Held—The Act gives the words "organization" and "federation" special or technical meanings. These words cannot therefore be given a general meaning by the court.
Held—It is the duty of the court to interpret and not to re-enact a provision of the law.

JUDGMENT
26.02.13

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[1] This is an application on Notice of Motion brought by the Applicants against the Respondents.

[2] The 1st Applicant is the Minister of Labour and Social Security and is moving the present application in his official capacity. The 2nd Applicant is the Attorney-General acting in his nominal capacity.

[3] The 1st Respondent is the Labour Advisory Board cited in its official capacity as such in terms of the Industrial Relations Act 2000 as amended. The 2nd

Respondent is the Trade Union Congress of Swaziland ("TUCOSWA") established as a workers' federation under its own constitution.

[4] The Applicants are seeking an order in the following terms;

"1. Reviewing and setting aside the decision of 1st Respondent made on 5th September 2012.

1.1 Receiving a notice at the instance of 2nd Respondent in terms of Section 40(2) of the Industrial Relations Act 2000, as amended ("the Act")

1.2 Holding that the matter of the recognition/non-recognition of 2nd Respondent is a "socio-economic interest of workers" in terms of s.40(1) of the Act;

2. Declaring that 2nd Respondent is not a workers' federation in terms of the Act.

3. Costs of suit.

4. Further or alternative relief."

[5] The application is opposed by the 2nd Respondent. No papers were filed on behalf of the 1st Respondent.

[6] In its Answering Affidavit the 2nd Respondent raised a point in *limine*, namely that; the relief sought by the Applicants was incompetent given the provisions of **Section 32 (4) of the Industrial Relations Act No.1 of 2000** as amended. Section 32 (4) provides that the Commissioner of Labour shall apply to court when she intends to de-register a federation. The 2nd Applicant countered by arguing that this section can only refer to de-registration of a duly registered federation, and that the 2nd Respondent was never duly registered under the Act, and that therefore there was no obligation on the Applicants to apply to court to de-register an entity that was not properly registered in the first place.

[7] It then became clear, and it was agreed in court, that the point *in limine* raised by the 2nd Respondent, and the prayers sought by the Applicants can both be resolved by the court answering the question whether or not the 2nd Respondent is a workers' federation in terms of the Industrial Relations Act.

[8] The Applicants' argument before the court was that there is no provision for the registration of federations in the current Industrial Relations Act. The

Applicants' position therefore was that Government was not morally or legally bound to recognize or deal with a body that was not registered in terms of the Industrial Relations Act.

[9] The question for the court to decide therefore is whether the 2nd Respondent is a federation in terms of the **Industrial Relations Act of 2000** as amended. If it is not, *cadit quaestio,* and the application succeeds.

[10] The court would like to register its appreciation to both Counsels for their comprehensive heads of argument.

[11] There was no dispute between the parties regarding the nature of the problem for the court to resolve, namely that; in the current legislation, whilst there is a specific provision for the registration of organizations under Section 27, there is no specific provision for the registration of federations. There is only a provision for regulation of federations under section 32. That section also provides under sub-section 4 for the de-registration of a federation that has not complied with the provisions of that section.

[12] **FORMATION OF TUCOSWA:-**

The question before court is not whether the 2nd Respondent was properly formed or not. There is a presumption that it was properly formed in terms of its

own constitution. Its constitution is not an issue before the court. The Act is clear on this issue and it provides under section 32 (1) that;

"Organizations and employers may form, participate in, be affiliated to or join a federation which has as its principal objects the functions of advice, consultation, collective bargaining, defence and promotion of the collective interest of members or any other issue that may be of interest to its members including matters of public policy and public administration."

The legislative intent therefore is very clear that a federation may be formed by organizations and employers. The Act however requires that a federation be registered, hence the argument on behalf of the Applicants that since the 2nd Respondent is not registered in terms of the **Industrial Relations Act of 2000** as amended (The Act), it has no right to mobilize the workers with a view to engage in a protest action. The argument by the Applicants' representative was based on section 2 of the Act, which defines a federation as ***"a body registered in terms of this Act".*** It should follow, therefore, that if TUCOSWA is not registered in terms of this Act, it is not a federation in the eyes of the law.

[13] **WHAT IS A FEDERATION:-**

In terms of the interpretation section of the **Industrial Relations Act of 2000,** a Federation is defined as follows:-

"Federation means a body registered in terms of this Act which is wholly comprised of employers and/or a combination of employers' associations, trade unions or staff associations as the case may be."

It is therefore not in doubt that it is a legal requirement that a federation should be registered in terms of Industrial Relations Act of 2000.

[14] **WHAT IS AN ORGANIZATION :-**

In terms of the Act :

"Organization means a trade union, staff association or employers' association in good standing as the context may require."

It is clear from the definition that the word organization does not mean the same thing as federation. The Legislature in its wisdom made a deliberate shift from

the repealed Industrial Relations Act of 1980. In terms of the 1980 Act, the definition section provided that;

"federation means an organization which is wholly comprised of a combination of employers associations, industry unions or staff associations as the case may be."

It becomes clear therefore that other federations that were registered prior to the current legislation, like the Swaziland Federation Trade Unions (SFTU), were properly registered under the provision for registration of organizations under the 1980 Act because under that legislation the word organization also referred to federation.

[15] In the 1996 Act, federation was defined as follows;

"federation" means a body which is wholly comprised of employers and a combination of employers association, industry unions or industry staff associations as the case may be."

Although there was no specific requirement for registration in the definition section, the requirement for registration was specified under section 24 which provided that;

"Subject to section 31, within three months after its formation, an organization or federation shall prepare and adopt a written constitution which shall be submitted to the Commissioner of Labour for registration immediately after its adoption"

There is no similar provision in the current Act. Instead, the current Act only provides for the registration of a written constitution of an organization under section 26.

[16] **WAS TUCOSWA REGISTERED IN TERMS OF THIS ACT (THE INDUSTRIAL RELATIONS ACT OF 2000)**

It was argued by Mr. Maseko on behalf of the 2nd Respondent that TUCOSWA was registered in terms of the Act when one takes into account the provisions of **Section 27, 28 and 29 of the Act.** He reasoned that these provisions of the Act fall under Part IV of the Act which deals with employees, staff and employer organizations, federations and international organizations, and that therefore the word organization must be given a generic meaning so as to include a federation. **Sections 27 and 28** deal with the registration of organizations. **Section 29** deals with constitutions of organizations. In this Act as it presently appears there is no provision for the registration of federations. In its answering affidavit, the 2nd Respondent stated in paragraph 5 that;

"Ad paragraph 3.3

Contents of this paragraph are denied as if specifically traversed. The TUCOSWA contends that it was properly registered under Part1V of the Act in terms of section 27 of the Act. This appears more fully from annexure "TUCOSWA 5" in Case No. 310/2012."

As already pointed out in paragraph 15 above, section 27 is a provision that deals with the registration of organizations. The word organization cannot be given a generic meaning or interpretation by the court because the Legislature has already given a specific meaning to it under section 2 of the Act.

[17] Mr. Maseko further argued that the court must not give the word organization a narrow interpretation. He argued that such a narrow interpretation would be inconsistent with the spirit, object and purport of Section 4 and other critical provisions of the Act, and also inconsistent with the International Labour Organization standards.

[18] The court is alive to the fact that Swaziland is a signatory to various international instruments guaranteeing freedom of association and collective bargaining. The court is also alive to the requirement that it must take into account other International Conventions in order to arrive at a suitable judgement. Swaziland

is a member of the community of civilized states, it would therefore not be proper for the courts to interpret the country's legislation in a manner that conflicts with the international conventions which Swaziland has undertaken to be bound by.

CF: Attorney-General v. Unity Dow (2001) AHRLR

(BWCA 1992)

[19] In the present case, the court is unable to give a generic meaning to the word "organization" so as to include federation. To do so would be to violate the principles of interpretation of statutes. The reason for this is not hard to find. The word has been given a specific definition by the Legislature under section 2. In a statute where such a definition clause occurs, the words and phrases it contains acquire, for the purposes of that particular statute, a technical meaning. It therefore follows that such words and phrases are as a rule not to be understood in their ordinary sense, but in accordance with the meaning ascribed to them by the definition clause. (See: **Lourens M du Plessis ; "<u>The Interpretation of Statutes</u>" (1986) page 112.)**

[19] The intention of the Legislature is clear from the Act. Employees in Swaziland have the right to freely join a trade union, staff association or to form a federation. By providing in the definition section that *"federation means a body*

registered in terms of this Act" the Legislature made its intentions clear, federations may be formed by organizations and employers, but they must be registered in terms of the Act.

[20] The freedom to freely join any collective bargaining body, does not mean that the requirements for the regulation of that entity should be disregarded. For example, one cannot successfully argue that his right to earn a living is violated when he is prevented from selling goods to the public in town. Before one can sell the goods to the public in town, one needs to have permission from the Town Council or City Council. Similarly, although TUCOSWA exists in terms of its own Constitution, the Act requires that such a body must be registered in terms of the Act. In this regard, the court is guided by the decision of the Court of Appeal of Botswana, cited by the 1st Applicant's representative under paragraph 7 of the Heads of Argument, in the case of **Molepolole College SRC v. Attorney-General [1995] 3 LRC 447,** a case in which the College had refused to register and formerly recognize the SRC, the court held as follows, per **Amissah JP;**

> **"I find merit in the argument that the protection of freedom of association in s.13 of the Constitution does not permit persons to disregard provisions in laws regulating associations …. It seems to me that were it not so, no**

> **association of persons, whether companies, partnerships societies, charitable or not, trade unions etc, would be subject to regulation by law. All such associations could claim protection under s.13 of the Constitution for non-compliance with any such laws or regulations."**

Similarly, in the present case there is no doubt that the right of workers to freely join or not to join any trade union or federation is guaranteed under the Constitution of the Kingdom of Swaziland. This right is however subject to the provisions of the Industrial Relations Act of 2000 which provides that a federation must be registered.

[21] It was not the 2nd Respondent's case before the court that registration under the Act is not required.

[22] Registration under the Act in terms of **Section 28** creates a status which would otherwise not exist. For example, it indemnifies union officials and representatives against personal liability for damages caused by acts performed in good faith on behalf of the organization.

See also: **John Grogan: "Workplace Law" : 10th Edition pp 312 – 3.**

[23] As already pointed out in this judgement, it became clear to the parties before the court that there was a lacuna in the law. Mr. Maseko argued that to close this lacuna the court must give a generic meaning to the word "organization" so as to include federation. Again, as already pointed out, the court is unable to do that as the word was given a specific meaning by the Legislature under **Section 2,** the interpretation section. The duty of the court is to interpret and not to re-enact the enactment.

[24] The court was also urged to adopt the definition given by the International Labour Organization's Freedom of Association and Protection of the Right to Organize, Convention (No.87). In that Convention it is provided that;

"ARTICLE 10

In this Convention the term "organization" means any organization of workers or of employers for furthering and defending the interests of workers or of employers"

It is indeed the duty of every court in the modern world to interpret legislation in line with the provisions of the relevant international conventions. In the present case it has not been shown that the Act as it is presently framed is in violation of the workers' right to organize. All that is required in terms of the Act is that a

federation must be registered. It has not been shown that the requirement for registration is too onerous a requirement as to effectively deny trade unions in Swaziland the right to freely form a federation.

[25] The learned author, Lourens M du Plessis (op cit) at page 112 goes on to state that;

> **"In Canca v Mount Frere Municipality the general rule with respect to definition clauses is said to be that the statutory definition usually prevails, unless it appears that the legislature had intended otherwise. In deciding whether the legislature had indeed so intended the court should ask itself whether the application of the statutory definition may not result in such an injustice, incongruity or absurdity that the legislature could not have intended the undesirable result."**

In the present case there is no doubt that the statutory definition would lead to incongruity and absurdity in the sense that it provides that a federation is a **"body registered in terms of this Act"** but the Act has no provision for the registration of a federation.

[26] The golden rule is that each case must be judged according to its peculiar facts and circumstances. The present case is not one where the meaning of some word

or phrase is not clear and the court is called upon to give a meaning to it. The present matter is one where it is clear that there is something missing or a lacuna in the law. The question that arises is how should the lacuna be filled? Is it by interpretation by the court or by the Legislature amending the Act by adding the missing words and/or sections? In answering these questions the court was guided by the decision of the Supreme Court in the case of The Attorney-General v Mary-Joyce Doo Aphane, case no. 12/2010 where the court pointed out in paragraph 39 that;

"The making of laws is essentially the function of the legislature. This means that, in as much as what is known as judge-made law may be constitutionally permissible, judge-made law must be carefully confined to its proper limits, and courts should be astute not to intrude into the legislative sphere which is the preserve of the law-giver."

In the present case, as already pointed out, it is not a matter where the court is called upon to give meaning to an unclear wording of the Act. It is a case where there is a lacuna in the law. The nature of the problem is not one that may be simply cured by the court reading in some words and severing others from the Act. In the Canadian case of Schachter v Canada [1992] 2 S.C.R 676 referred to by the Supreme Court, supra, Lamer CJ held, inter alia, that;

"Courts should certainly go as far as required to protect rights, but no further…."

In the present case, where both parties agreed that there is lacuna in the law, the court is of the view that the best organ to resolve the present problem is the Legislature and not the court.

[27] In the present case, appearing for the Applicants was the Attorney-General himself. The Attorney-General is part of the law making process in Parliament. He is also fully aware of the sensitive nature and urgency of the issues involved. He even suggested that the status *quo ante* should remain and the Legislature be given the opportunity to attend to the lacuna. This proposition commends itself to the court as being a sound one in conformity with common sense. Mr. Maseko did not agree with this suggestion and argued that the legislative process was tedious and that the matter could drag on for a long time whilst the workers' rights under the Act and the Constitution remain frozen.

[28] Further, another important feature in this matter is that there is already a Bill to amend the Act so as to provide for the registration of federations. As a court whose duty is to interpret and not formulate legislation, we do not see why Parliament, whose duty is to enact legislation, should not be allowed to amend

the Act so as to make a provision for the registration of federations as a matter of urgency.

[29] The rights of the workers remain intact as they can, in the meantime, exercise their rights to collective bargaining through their trade unions.

[28] The view of the court in this matter therefore is that since there is already a legislative initiative to amend the Act, the process must be allowed to take its normal course. The Kingdom of Swaziland is a constitutional state where the separation of powers is a cornerstone of the constitutional order. **(See : Prime Minister of Swaziland and Six Others v MPD Marketing and Supplies (PTY) Ltd, Appeal Case No.18/2007; The Attorney-General v Mary-Joyce Doo Aphane Civil Appeal Case No. 12/2010).**

[29] The court can only urge the Attorney-General to prevail upon the august house to give the matter the urgency that it deserves in light of the country's obligations under the various international conventions to which this country is a signatory

[30] The court having found that in the present legislative scheme there is no provision for the registration of federations, it follows that the 2nd Respondent is not a federation in terms of the Act. Following on this, the other prayers should

also succeed with the result that the application succeeds in its entirety. Applicants have asked for costs of suit. The court is not of the view that the 2nd Respondent acted frivolously in opposing the application. It would therefore be unfair to mulct the 2nd Respondent with an order for costs.

[31] Taking into account all the submissions made in court and also all the circumstances of the case, the court will make the following order:

a) **The application succeeds in its entirety.**
b) **The parties are directed to agree on a modus operandi pending the registration of the 2nd Respondent in terms of the Act after it is amended.**
c) **There is no order as to costs**.

[32] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS: **MR. J. M. DLAMINI**
(ATTORNEY GENERAL'S CHAMBERS)

FOR 2ND RESPONDENT: **MR. T.R. MASEKO**
(T.R. MASEKO ATTORNEYS)