

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 688/06

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF CIVIL SERVANTS APPLICANT

And

ATTORNEY GENERAL

1ST RESPONDENT

PAUL NKAMBULE

2^{MD} RESPONDENT

ACCOUNTANT GENERAL

3^{R0} RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

MR. A.M. LUKHELE: FOR APPLICANT

MR. S. KHULUSE: FOR RESPONDENTS

R U L I N G 09.02.07

[1] This matter came before the court on 12th December 2006 by way of a Notice of Application.

[2] The applicant is seeking an order in the following terms:-

- "1. Committing the respondents to prison for a period of three (3) months for contempt of court.
2. Suspending the said committal on condition that the respondents make payment to the affected members of the applicant within a period of seven (7) days of:
 - 2.1 Their 20% extended duty allowance for the period from 1st August 2004 to the present date.
 3. Costs on the Attorney-client scale.
 4. Further and/or alternative relief."

[3] The respondents did not file any Answering Affidavits. Instead a point of law was raised by their representative.

[4] The point of law raised on behalf of the respondents was that this court does not have the jurisdiction to grant an order for committal as the court order that the respondents failed to comply with was not one *ad factum praestandum* but was an order *ad pecuniam solvendam*.

When the matter appeared before the court on 12th December 2006 the parties agreed that it be postponed until 17th January 2007. This was done with the understanding that the employer, being the Swaziland Government, would in the meantime be able to pay the workers represented by the applicant.

That however did not happen, On the 17th January 2007, it transpired that the workers had still not been paid. On that day, the parties briefly addressed the question whether the court has the jurisdiction to grant the orders sought.

The point in *limine* raised was not fully argued, Mr. Khuluse suggested that the proper procedure would be to call the 3rd respondent in terms of Rule 45(h) of the High Court rules, to explain to the court why the Government has still not paid the applicant members.

Mr. Lukhele was agreeable to that proposal. He further pointed out that all that the applicant's members were interested in, was compliance with the court order. An order was thus issued by | the court calling the 3rd respondent to appear in person before the court on the 25th January 2007 to explain why the Government was failing to comply with the court order,

[9] The application therefore took a different direction altogether. It then took the form of an enquiry by the court as to why the judgement debt is still not fully satisfied.

[10] In these circumstances, the court cannot make any order in terms of prayers 1,2,2.1 and 3 of the Notice of Application, The court can only make such an order after arguments on the point of law raised.

[11] The court therefore is presently only called upon to consider the evidence of the 3rd respondent as to why Government is unable to pay the applicant's members their monthly extended duty allowance of 20% of basic salary.

[12] Mr. Lukhele told the court that they will be content with an order of the court directing the Government to comply with the court order within a certain time frame to be decided by the court.

[13] It must be emphasized again that at this point, the court is not in a position to make a finding whether or not the respondents are in contempt of court without first having answered the question whether it was proper to institute contempt of court proceedings in this matter.

[14] In court the 3rd respondent said that he is the paymaster for the Government. He told the court that he was aware of the court order against the Government. He said the court order was partly complied with in that the Government managed to pay the workers up to July 2006. He said the Government could not fully comply with the court

order because the budget did not include the money that the court ordered should be paid to the workers. He said he makes payments only if money is available in the vote of that particular Department or Ministry.

The 3rd respondent further said he did advise the 2nd respondent that there was no money. He said after he had so advised the 2nd respondent, it became his (2nd respondent) duty to pursue alternative means to comply with the court order. He said a budget has now been submitted to Parliament, which includes the money that will be used to pay the workers. He said they are presently waiting for its approval in or during April this year.

He further told the court that supplementary budgets are no longer entertained by Parliament. He also said that he was aware that the Government has taken a stand to comply with court orders.

Mr. Lukhele submitted thereafter and urged the court to find that the evidence of the 3rd respondent as to why the Government has failed to fully comply with the court order was unsatisfactory.

It was further argued on behalf of the applicant that it is incorrect that payments by Government are made only on the basis of a budget. The court was referred to sections 4 and 6 of the Finance Management and Audit Act No.8 of 1967; section 4 of the Government Liabilities Act No.2 of 1967 and to sections 198 and 199 of Constitution of Swaziland.

[19] Mr. Khuluse submitted on behalf of the respondents that in as much as there is in existence the Consolidated Fund from which the Government may get funds, access to those funds is to be authorized by an Appropriation Act approved by Parliament, He submitted that the respondents are presently awaiting approval of the budget that has already been presented to parliament.

[20] It is hard for the court to accept the explanation given by the 3rd respondent. He was just too eager to shift all the blame to the Principal Secretary, the 2nd respondent. Section 4 of the Government Liabilities Act places the burden to pay squarely on his shoulders.

[21] The title of the section states explicitly that the Government is required to comply with court orders. It is worded as follows:-

"No execution or attachment to be issued, but Government required to pay the sum awarded." (my underlining).

[22] Section 4 states that:

"No execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or respondent in any such action or proceedings referred to in section 2 or against any property of the Government;

Provided that the Accountant-General shall cause such money as may, by a judgement or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be paid out of the revenues of Swaziland." (My underlining).

[23] It is important to note that the *proviso* is framed in the imperative. It says that the Accountant-General "**shall**" cause such money to be paid out of the revenues of Swaziland.

[24] It is clear beyond any doubt therefore that Parliament did make a provision for the Government to pay any sum awarded against it. The payment is made out of the revenues of Swaziland.

[25] It is easy for the court to see why the 3rd respondent took the position that he did. He failed to appreciate the special relationship that exists between the members of the applicant and the Government. The parties are in a position of employer and employee. It is a special relationship governed by the terms of the employment contract that the parties entered into.

[26] In terms of that contract, the employee is to render his services to the employer, and the employer is to pay for the service in the form of monthly salary. The terms of the employment contract changed as a result of the court

order which was to the effect that their monthly basic salary was to be enhanced by 20% of the basic salary.

[27] Secondly, the award was made against the Government in its capacity as the employer of the applicant's members. The 3rd respondent seems to have taken the view that the Firemen are employees of the Fire and Emergency Services, and that if there was no money in that vote, everything should end there. That approach was clearly wrong.

The claim was against the Swaziland Government and the award was made against the Swaziland Government. The Government Liabilities Act provides that the Government is required to pay the sum awarded against it out of the revenues of Swaziland (See paragraph 24).

The court is also of the view that the Legislature by providing for essential service was not making inroads to the principle that "no work no pay - no pay no work." All that the Legislature intended was that grievances reported by workers engaged essential services should be speedily resolved. The Government in this case took a laid-back approach and did not communicate with the applicant.

The importance of the 3rd respondent's evidence was that he did not say that the court order could not be fully complied with because the Government had no money. He restricted himself to the budget for salaries of the Department.

There was no evidence that he could not get the money from any other sources or centers of the Ministry responsible.

The 3rd respondent also told the court that he was not aware of the Government Liabilities Act. It is very unfortunate that a person holding such a very important Government office is not *au fait* with a piece of legislation that directly impacts on his office.

[33] Before the court therefore, there was no evidence that there is no money in the other centres of the Ministry under which the applicant's members are employed. There was also no evidence that the Government of Swaziland has no money.

[34] Taking into account all the foregoing observations the court will make the following ruling in terms of prayer 4 of the applicant's application;-

1. **THAT THE 3rd RESPONDENT IS DIRECTED TO ACT IN TERMS OF SECTION 4 OF THE OF THE GOVERNMENT LIABLITIES ACT WHICH SPECIFICALLY INSTRUCTS HIM TO PAY A JUDGEMENT DEBT OUT OF THE REVENUES OF SWAZILAND.**
2. **THAT THE PAYMENT TO BE MADE WITHIN TWENTY-ONE DAYS FROM THE DATE OF THIS RULING.**
3. **THAT THE SWAZILAND GOVERNMENT TO PAY THE COSTS.**

The members agree.

NKOSINATHI NKONYANE A.J.
INDUSTRIAL COURT