

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 257/15

In the matter between:-

BONGIWE DUBE & 22 OTHERS

Applicants

AND

SOS HIGH SCHOOL

1st Respondent

**THE CHAIRMAN OF THE TEACHING
SERVICE COMMISSION**

2nd Respondent

**THE PRINCIPAL SECRETARY IN THE
MINISTRY OF EDUCATION AND TRAINING**

3rd Respondent

THE ATTORNEY – GENERAL

4th Respondent

Neutral citation: *Dube Bongiwe and 22Others vs SOS High School*
(275/2015) [2019] SZIC 04 (06 February, 2019)

Coram: N.NKONYANE, J
(Sitting with G. Ndzinisa and S. Mvubu Nominated
Members of the Court)

Heard submissions: 12/12/18

Judgement delivered: 06/02/18

SUMMARY---Labour Law---Writ of execution---Execution against Government property---Provisions of The Government Liability Act of 1967--- Failure to cite the correct party in legal proceedings.

Held---Section 4 of The Government Liabilities Act, 1967 prohibits the execution or attachment of any property of the Government.

Held further---A writ of execution cannot be sued out against the property of a person against whom there is no judgement.

JUDGEMENT

1. The Applicants have approached the Court by way of Notice of Application and are seeking an order in the following terms;

“1. *Quantifying First Respondent’s Judgement debt in respect of stipend arrears from January 2014 to May 2018 in terms of this Honourable Court order of the 8th July 2015, confirmed by the Judgment of the Industrial Court of Appeal under Case Number 02/2018 delivered on the 3rd May 2018, fixing same to **Nine Hundred and Seventy Four Thousand Six Hundred and Eight Emalangenani (E 974, 608.00).***”

2. *Granting costs against any Respondents which may choose to oppose this application, jointly and/ or severally if applicable.*
 3. *Such further and alternate relief as this Honourable Court deems meet.”*
2. The Respondents did not file an answering affidavit to the Applicants’ supporting affidavit. The Respondents’ attorney told the Court that they intend to argue legal points and they will seek leave to file answering affidavits if the legal points are dismissed by the Court.
 3. There was no objection from the Applicants’ representative in the matter proceeding to arguments on the basis of the legal points raised. The Court therefore allowed the parties to proceed to arguments as both parties had filed heads of argument.
 4. This application has a long history. The factual background is as follows; the Applicants are employees of the 1st Respondent. The 1st Respondent is a school situate at Sidwashini in Mbabane. Prior to January 2006, it was part of a donor funded organization known as Hermann Gmeiner SOS Children’s Village Association of Swaziland. The Applicants are employed as teachers and support staff. Over and

above their normal monthly salaries from the Government of ESwatini, they were paid a monthly allowance by the organization as performance incentive.

5. It is common cause that the foundation or organization experienced financial hardships as a result of a decline in donor funds which led to the organization handing over the school to Government in January 2006.
6. The taking over of the school by the Government resulted in the teachers losing the benefit of the allowance as the Government does not pay an allowance to teachers over and above the normal monthly salaries. The teachers were not privy to the memorandum of agreement signed between the Government of ESwatini and the organization. There is no evidence that they were consulted during the negotiations between the two parties. In terms of article 2.5 of the agreement, the 1st Respondent ceased to pay the additional monthly allowance to the teachers and support staff.
7. The school's parents' association undertook to shoulder the payment of the benefits from its funds. This arrangement continued until January 2014 when it became apparent that the arrangement could not be sustained.

8. As expected, the Applicants did not take the matter lying down. They reported it to the Labour Commissioner as per the provisions of Section 26 of **Employment Act No.5 of 1980** as amended. The Labour Commissioner ruled in favour of the Applicants.
9. It seems that the 1st Respondent did not comply with the Labour Commissioner's ruling as the matter was eventually reported to the Conciliation, Mediation and Commission ("CMAC"). At CMAC the 1st Respondent did not appear and the CMAC Commissioner presiding over the matter heard the evidence of the party in attendance and made an award in favour of the Applicants.
10. The 1st Respondent again failed to comply with the CMAC award. The Applicants filed an application to Court to have the award registered to facilitate its execution in order to realize the judgement debt. There were many other Court processes that followed thereafter and the matter was at some point heard by the Industrial Court of Appeal.
11. The Applicants have now sued out a writ of execution. The Registrar of the Court has declined to sign the document on the basis that the parties

are not in Agreement on the exact amount to be realized hence the matter is now before the Court again.

12. On behalf of the Respondents it was argued that the warrant of execution cannot be enforced against the 1st Respondent as it is a Government entity and has no *locus standi in judicio*. It was argued that the 1st Respondent, being a Government School, has no separate existence from the Government and therefore cannot be sued in its own name as a separate legal entity. It was further argued that in terms of **The Government Liabilities Act, 1967** execution or attachment of Government property is prohibited.

13. Indeed, Section 4 of **The Government Liabilities Act No.2 of 1967** provides that;

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

14. The question that arises therefore is; is SOS High School (the 1st Respondent) a Government entity. In terms of the memorandum of agreement signed by the parties in January 2006, the Government merely

took over the operations of both the Primary and High Schools. Article 1.1 provides that Government will;

“1.1 take over from SOS Swaziland the operations and management of the Primary and High Schools in accordance with Government policies and regulations.”

Article 2.1 provides that SOS Swaziland will;

2.1 retain the ownership of the buildings and the land and guarantee full access to the school buildings.

Article 2.2 provides that SOS Swaziland will;

“2.2 donate to the schools the equipment and machinery already being used by the schools as listed in annexure”.

15. What is clear from the agreement is that;

15.1 Government took over the running of the schools.

15.2 the ownership of the land and the buildings was retained by SOS Children’s Village Association of Swaziland.

- 15.3 the equipment and machinery in use by the schools at the time of the signing of the agreement were donated to the schools which are under the administration of the Government and are therefore the properties of the Government.
16. It is clear therefore that the furniture and equipment belong to the Government. Faced with the realization that the school's furniture and equipment cannot be attached because these belong to the Government, the Applicants' representative told the Court that they will not attach the Government property but they have a list of items that will be attached and it is annexed to the writ.
17. The Applicants' representative's argument however does not take the Applicants' case any further. The Court says this because the land, buildings and the orphanage belong to SOS Children's Village Association of Swaziland. The Applicants signed the memorandum of agreement to be paid the allowance with SOS Children's Village Association of Swaziland. SOS Children's Village Association of Swaziland was never cited in the proceedings. It will be unfair, therefore, for SOS Children's Village Association of Swaziland to be met

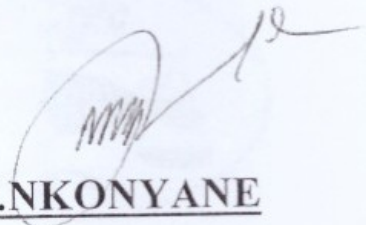
with a writ of execution when they were not part of the legal proceedings.

18. In the circumstances of this case, the Court will uphold the Respondents' attorney's argument that the present application is not supported by the law because execution or attachment of Government property is prohibited in term of Section 4 of **The Government Liabilities Act, 1967**. Further, the warrant of execution cannot be effected against the properties of SOS Children's Village Association of Swaziland because this organization was never cited and is therefore not part of the Court proceedings. Before the Court there is no judgement against SOS Children's Village Association of Swaziland. A writ of execution cannot be sued out against the property of a person against whom there is no judgement. (See: **Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa, 4th edition, page 757**).

19. Taking into account all the foregoing observations, the interests of justice, fairness and equity, the Court will make the following order;

- a) The legal points raised are upheld and the application is dismissed.
- b) There is no order as to costs.

20. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants: Mr. A. Fakudze
(Labour Law Consultant)

For Respondents: Mr. K. Nxumalo
(Attorney General's Chambers)