IN THE HIGH COURT OF SWAZILAND

Civ. T.954/91

In the matter of

LINDIWE ZULU — Applicant

and

SWAZILAND ELECTRICITY BOARD — 1st Respondent
THE CHAIRMAN SWAZILAND ELECTRICITY BOARD — 2nd Respondent

CORAM : Hull, C.J.
FOR THE APPLICANT : Mr. L. Mamba
FOR THE RESPONDENT : Mr. G. Oscroft

J U D G M E N T
(22/03/93)

Hull, C.J.

On 19th July, 1990, Mr. Samuel Dlamini (who was a meter reader for the Swaziland Electricity Board) went to read the meter to the applicant's, Mrs. Zulu's, flat. This was apparently housed with other electricity meters in a box outside her flat.

He found that the lock on the box had been broken and that her meter had been tampered with so that it was not recording the supply of electricity to her flat.

He then disconnected the supply to the flat and went to see her. As he arrived, two men were leaving the flat.

Mr. Dlamini told the applicant what he had found. He took her to see the meter. She denied having tampered with it and told him that she would not know how to do so. He

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informed her that the supply would not be reconnected until she had been to see the area manager.

Mrs. Zulu then went to the Board's offices. She spoke to Mr. Nimrod Zwane, who was the area manager. She repeated her denial that she had tampered with the meter and it appears that she went with him to inspect it again. In any event, the upshot of the meeting was that she was told that she would have to pay the estimated cost of the electricity supplied while the meter was being by-passed, as well as E500 in respect of the tampering.

She subsequently paid E166.40 for the estimated cost of the supply and, eventually, the sum of E500.

She has now applied to this court, by way of a notice of motion for review. She at first sought orders setting aside the decision of the Board, as set out in a letter of 8th August, 1990, to charge her the total sum of E666.40, and requiring it to refund that amount to her. In the notice of motion she described this as a penalty. At the hearing, she accepted that the sum of E155.40 was a proper charge for the estimated cost of the electricity supplied, while maintaining her claim that the Board had wrongly imposed an additional penalty of E500 on her.

In her founding affidavit, Mrs. Zulu described this amount of E500 as a "charge or fine". The Board's contention, as set out in its answering affidavit, is that it is an estimate for the costs of making good the interference with the meter.

The letter of 8th August 1990 from the Board's accountant (revenue) to her, after referring in terms to the estimated consumption for the period when the meter was not working, and explaining the basis of the estimate, then goes on to

state "The SEB charge for tampering is E500 and that brings the total charge to E666.40". In her affidavit in reply, Mrs. Zulu did not refer again to a "fine". She exhibited a further letter from the Board, dated 21st November 1990, which again describes the sum of E500 as the Board's "charge for tampering". That letter, incidentally, goes on immediately to state that this "is charged to anybody found tampering with the meter".

On the face of the papers they appeared to me to raise an issue of fact - namely whether the Board had, in terms, described the amount of E500 to her as a fine. However, it is now clear that this is not in dispute. What Mrs. Zulu is contending is simply that the charge of E500 is in substance a penalty that the Board has no power to impose on her.

She is saying that, on a proper interpretation of the Electricity Act 1963, the Board does not have that power. She is also saying that even if it did have that power, it acted in contravention of the rules of natural justice in that it failed to give her a proper hearing before deciding to do so.

The Board is a statutory body established by the Act. Accordingly it has such powers as are confirmed on it expressly or impliedly by the Act.

Section 18 imposes on it, in the circumstances set out in that section, a duty to supply electricity. By virtue of subsection (5) it may refuse to supply if reasonably satisfied that a consumer has not paid all sums (except those that are the subject of bona fide disputes).

Section 24 provides that the value of supply shall be determined by means of meters, to be provided by the Board.

subject to the payment by the consumer of such reasonable charges as the Board may fix. It provides for the sealing and protection of meters by the Board. It also provides that the register of a meter, in the absence of fraud, shall be prima facie evidence of the value of supply.

Section 29 deals specifically with the discontinuance of supply. So far as the present case is concerned, section 29(1)(a)(vii) and section 29(2) are relevant.

Section 29(1)(a)(vii) says in effect that the Board may discontinue the supply of electricity to a consumer who interferes or attempts to interfere with (inter alia) the Board's apparatus. The effect of subsection (2) is that where the Board has discontinued supply under section 29, it may refuse to reconnect it until its expenses of disconnection and reconnection, as well as any "prescribed" fees, have been paid.

By virtue of section 40(1) it is a criminal offence, punishable by a fine not exceeding E500 or 12 months imprisonment or both, to tamper with electrical plant. That expression is defined in section 2. It includes equipment or apparatus or appliances used for the purposes of generation, transmission, or distribution of electricity. Both parties here have argued this matter on the basis that it includes a meter. Under subsection (2) it is a criminal office to wilfully break a meter lock. The penalty for that is a fine not exceeding E100 or imprisonment for 6 months or both.

The chief executive officer of the Board, Mr. Harry Nkambule, in one of the answering affidavits to the application, deposed that some years ago he prepared an estimate of the costs of re-wiring a meter that had been tampered with. He also deposed that this was in the nature

of a fee. The area manager for his part deposed that this amount was laid down by standing orders to cover the cost of fixing a meter that has been interfered with.

Although Mr. Mamba argued that the sum of E500 was not coincidental - in other words that it happened to correspond with the maximum fine for criminal interference - I see no reason at all to doubt the evidence of the Board's deponents that this was a standardised estimate which, under standing orders (which I take to mean simply the operating instructions to staff), was to be charged when a meter had been tampered with.

The point here, however, is whether the Board could properly charge it to Mrs. Zulu under section 29. It is clear, from the Board's affidavits and from the arguments made here on its behalf, that it did in this case take the view simply that on the basis that the meter was tampered with, and that the meter did measure the supply to Mrs. Zulu's flat, it was entitled, under section 29, to disconnect her supply and to charge her for fixing the meter, and to withhold further supply until she did so. It is also clear that the Board took the view that prima facie, she was responsible for the tampering unless she proved otherwise. Mr. Oscroft argued that on the correct construction of the Act, the onus of proof lay on her to prove otherwise.

With respect, I do not regard that view as tenable. The Board cannot exercise its powers in point under section 29 unless it is established that the consumer has interfered with the apparatus. In this case it did not establish that. It clearly assumed that it was so, and sought to leave it to her to prove otherwise. Mr. Dlamini, in his affidavit, did state that on a subsequent occasion when he met Mrs. Zulu, she told him that one of the men who had been leaving her

when he first arrived had been found to have tampered with a meter elsewhere but it was never suggested here that that remark showed that she was in collusion with him.

There may be good reasons of policy why an Act of this nature, dealing with supply by a public utility, might put the onus on a consumer, at least for civil purposes, to disprove that he or she is guilty of tampering, but the section as it is now worded does not in my view place the onus on a consumer to do so.

In effect, inasmuch as the Board has purported to act under section 29, I consider that in substance it has, in excess of its powers thereunder, imposed a penalty on Mrs. Zulu.

I therefore make an order setting aside the charge of E500 imposed by the Board and directing it to refund that sum to Mrs. Zulu. It must also pay her costs in these proceedings.

Just before I finish, what I wish to do is to say that does seem to me that it is open to the Board, on the conducting of a proper hearing, to charge a consumer on the basis of section 29, but it also seems to me that it is open to the Board under section 24 of the Act to charge a consumer for repairing a piece of equipment otherwise than on the basis of a deliberate tampering by him or her under section 29, and of course it is always open to the Board to conduct a prosecution against a person whom they believe to have criminally interfered with its property.

David Hull
CHIEF JUSTICE