IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 117/05

In the matter between:

SWAZILAND NURSES ASSOCIATION **APPLICANT**

And

BOARD OF TRUSTEES OF THE SWAZILAND **1ST RESPONDENT**

NAZARENE HEALTH INSTITUTIONS **2ND RESPONDENT**

CLEOPAS DLAMINI LEONARD DLAMINI **3RD RESPONDENT**

CORAM:

NDERINDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : P. R. DUNSEITH

FOR RESPONDENT : S. DLAMINI

J U D G E M E N T - 02/06/05

These are civil contempt proceedings arising from the failure of the 1st, 2na and 3rd Respondents to comply with an order issued by this court on the 16th December 2004. The details of the circumstances which have given rise to this situation are set out hereunder:

THE ISSUES

On the 1st April 2005 the Applicant launched motion proceedings against the 1st, 2nd and 3rd Respondents in which it sought, *inter alia,* the following relief:

(a) Committing the 2nd and 3rd Respondents to prison for contempt of court for such period as this Honourable Court may determine;

(b) Directing the Respondents to pay a fine to the Applicant as a penalty for contempt of court in such amount as this Honourable court may determine.

(c) Costs on the attorney-client scale;

(d) Further and/or alternative relief.

The application is grounded on the Affidavit of Goodness Dlamini the Chairperson of the Swaziland Nazarene Health Institutions (SNHI) which is alleged to be a branch of the Swaziland Nurses Association, the Applicant.

The 1st Respondent is the Board of Trustees of the Swaziland Nazarene Health Institutions, the proprietor and governing body of the Raleigh Fitkin Memorial Hospital, Manzini. The members of the Applicant, the subject of the application, work as nurses and health workers at the said hospital.

The 2nd Respondent is one Mr. Cleopas Dlamini, sued in his capacity as the chairman of the 1st Respondent. The 3rd Respondent on the other hand is one Mr. Leonard Dlamini sued in his capacity as Acting Chief Personnel Officer of the 1st Respondent at the RFM Hospital, Manzini.

The Respondents filed an Answering Affidavit on the 29th April 2005 deposed to by one Mr. Cleopas Dlamini, the 2nd Respondent herein.
Therein he raised points in limine couched in the following terms:

5.1 *The 1st Respondent has never recognized the Swaziland Nurses Association in terms of Section 42 of the Industrial Relations Act No. 1 of 2000 as an employee representative.*

5.2 *The court order dated the February 2005 is in favour of the RFM Nurses Unit Committee and support staff and not the Applicant herein.*

5.3 7**?7e** *1st Respondent is only aware of an informal body known as the RFM Nurses Unit Committee and support staff with which it was engaged in negotiations on behalf of its employees.*

5.4 *In the premises the Swaziland Health Institutions (SNHI) branch of the Swaziland Nurses Association does not have legal capacity/persona to move the application.*

The Applicant responded to the Answering Affidavit and the points *in limine* in a Replying Affidavit deposed to by Goodness Dlamini and filed on the 4th May 2005.

Goodness Dlamini reiterates her assertions in the Founding Affidavit that indeed the RFM Nurses Unit Committee is the local branch of the Applicant.

That the Applicant union has the *locus standi in judico* to move the application on behalf of the Branch Committee. She attached to the Replying Affidavit a copy of the resolution authorizing the institution of the proceedings.

A confirmatory Affidavit by one Masitsela Mhlanga, the President of the Applicant was filed wherein he confirmed that M/s Goodness Dlamini was the duly elected and appointed chairperson of the SNHI Branch of the Applicant and that the RFM Nurses Unit Committee is a sub-branch of the Manzini branch of the Swaziland Nurses Association.
It was common cause that the Applicant is a duly registered trade union and the sole representative of the nurses in the Kingdom of Swaziland.

The 1st Respondent had not signed a recognition agreement with the Applicant but had provided a check-off to all its nursing employees for payment of subscriptions to the Applicant.

In all previous disputes brought to this court either by the Applicant or by the 1st Respondent, it appears that it was generally accepted that the Applicant was the trade union representing the interests of the nurses employed by the 1st Respondent.

Indeed, one such is the Industrial Court Case No.413 of 2004 between the present Applicant and the 1st Respondent which case culminated in an order granted by the court on the 16th December 2004, which the Applicant seeks to enforce by the contempt proceedings. No objection was raised at all to the *locus standi of* the Applicant in those proceedings.

The Respondent in a Johnny-come-lately fashion now seeks to impeach the legal standing of the Applicant after the horse has bolted as it were. The point in *limine* is not good, cannot be sustained and same is dismissed. The court is indebted to the arguments by counsel for the parties in the points in *limine.*

AD MERITS

On the 16th December 2004, the Applicant represented by Attorney Peter Dunseith obtained an *exparte* order directing and ordering the 1st Respondent to pay the salaries/wages of its employees promptly on due date namely, 23rd day of each and every month.

The order was obtained upon submissions by Mr. Dunseith that M/s Lindiwe Khumalo the appointed attorney of the 1st Respondent had given consent to the granting of the order.

It is common cause that the RFM Hospital is the sole referral hospital for the Manzini Region.

That it does not charge patients attended to therein commercial rates in terms of an arrangement entered into between the 1st Respondent and the Government of the Kingdom of Swaziland.

In return, and in recognition of the essential service provided to the members of the public by the RFM hospital, the Government undertook to provide annual subventions to cater for the salaries of all the employees and other budgetary needs of the hospital.

It is now common cause that such subventions have often come late and when they do, have fallen short of the budgetary estimates of the RFM hospital. One of the immediate consequences of these delays and shortfalls in the subvention provided has been regular and at times inordinate delays in paying the salaries of the nurses and other medical staff at the RFM.

It was one such delay that had necessitated the bringing of an urgent application in Case No. 413/04 resulting in the order of the 16th December 2004.

Particularly problematic has been the Respondent's inability to provide timeously for the annual salary increments to its employees. Whenever the Government of Swaziland conducts a salary review of the Civil Servants, the practice has been to award the employees of the Respondent a similar and equal salary review. This is then followed by a request for a further subvention to cater for the increased salaries.

On the 12th November 2004 the RFM nurses Unit Committee and support staff and RFM Hospital entered into an agreement that was reduced into writing in settlement of a wage negotiations dispute. It was expressly agreed therein in writing that the back pay as per Government Circular No. 3 of 2004 will be paid in full by not later than the 31st January 2005.

This agreement was made an order of the court on the 9th February 2005. the 3rd Respondent represented the 1st Respondent in the negotiations and in court when the agreement was made an order of the court.

The Applicant agreed as an indulgence to the deadline for payment of the back pay being extended from 31st January 2005 to 30 days from the date of the order namely until 23rd March 2005.

On the 15th March 2005 the 3rd Respondent informed the Applicant at a meeting that the 1st Respondent was unable to comply with the court order due to the delay in obtaining the Government subvention timeously.

As at the time the application was brought, the back pay had not been paid.

On the 23rd March 2005, the 3rd Respondent also notified the Applicant and the 2nd Respondent that the March 2005 salaries will be delayed due to the 1st Respondent's "mechanism of sourcing funds". A copy of the notice is annexed to the Application and marked "B".
As of the 1st April 2005 when this application was launched, the said salaries had not been paid. However during the hearing of this matter, the court was informed that March salaries had been paid in mid April.

The Applicant submits that the Respondents are in willful and flagrant contempt of the court orders dated the 16th December 2004 and the one dated the 9th February 2005.

That the Respondents should be found guilty of such contempt and be committed to gaol for a period to be determined by the court and/or until they comply with the court order to punch the contempt.

It is conceded by the Applicant that the reason for the failure to pay salaries and back-pay on due date is because Government is failing to comply with its obligations under the Management Agreement wherein it undertook to finance the 1st Respondent.

The Applicant argues that the 2nd Respondent being the Chairman of the 1st Respondent and the representative of the Government in the Board of the 1st Respondent, should be committed for contempt of court in order to ensure compliance in future with the 1st Respondent's obligations to its employees and the Government's obligations to the 1st Respondent.

In respect of the 3rd Respondent, it was submitted that he was at the time, the court orders were granted the most senior employee at the RFM hospital. That he committed the 1st Respondent and undertook to ensure compliance with the court orders. His failure to ensure such compliance also amounts to willful disregard of the court orders and he should be found guilty of contempt of court.
In the Answering Affidavit and during submissions before court the Respondents deny any flagrant and/or willful disregard of the court order. They have pleaded helplessness in that efforts to get Government to provide subvention have in the past been rewarded belatedly, if at all. Monthly salaries in particular are dependent on an overdraft facility with their bankers, which facility must be secured by the Government. This also has often caused delays in paying the salaries on the 23rd May of every month in terms of the consent order made by the court on the 16th December 2004.

In conclusion the 2nd and 3rd Respondents plead innocent of alleged contempt and seek dismissal of the application with costs.

THE LAW

It is a general principle of common law that an order for imprisonment for contempt of court will not be made by a court for the willful failure to comply with an order *adpecuniam solvendam* it will only do so if the order not complied with is an order *ad factum praestandum.*

It is also true that committals for willful disobedience of orders to make money payments at stipulated times have been confined almost exclusively to maintenance cases.

The principle upon which the courts have approached this question is set out in Slade v Slade 4 E.D.C in which the court decided that a husband could be committed for contempt by reason of his failure to pay maintenance for a judicially separated wife.

SHIPPAR J; stated at page 248-9:

" *Where a money payment is ordered by the court (after due enquiry as to the party's ability) to be made at a particular time or place or in a particular manner, so that something is to be done over and above the mere payment of the money, willful disobedience of such an order affords ground for an application for committal for contempt of court. What gives the court power to deal with this case as one for a committal order is the fact that the Respondent after the investigation as to his circumstances is ordered to pay to his wife at a certain place and by a certain date. It is on that account, and because there was a judgment not merely for money payment in general terms but for alimony to be paid in prescribed manner, that the court is enabled to deal with the Respondent's refusal as a contempt.*"

In the case of Swanepol v Bovey 1926 T.P.D 457 it was stated:

"*The cases have laid down that proceedings for committal for contempt in the case of an order for payment of money are limited to the case where the court has ordered a Respondent, to do a certain thing and has indicated the manner in which it should be done.*"

The case of Bocain v Bocain 1921 S.W.A 17, deals with contribution towards costs but not maintenance.

Banks SJ. in Singers Estate v Kotse 1960 *(2)* SLR C.P.D. states that:

"*It seems to me that whereas in the present case, the order not only fixes the lump sum but also the manner in which the money should be paid, there is no reason why the court should not apply the same rule as it does to the payment of monthly amounts of maintenance, nor in my opinion does it make any difference that in the present case the order of the 13? June 1936 was made by consent*".

in the case of Ferreira v Bezuidenhout (19701 *(1)* O.P.D. De Villier J states that the cases of Singers Estate v Kotse, supra and Stellenbosch Farmer Winery fEdmsl BPK v Goldberg, wherein it was held that "*orders similar to the one in issue in the present case are orders ad*

factum praestandum because they are to be performed in a particular manner and at a particular place. He said

"*In my respectful view these cases are wrongly decided. An order to pay maintenance in a matrimonial suit is entirely distinguishable from an order to discharge a commercial debt or an order to pay costs. The reasons why an order for periodical payments for maintenance is regarded as an order ad factum praestandum is stated by Schreiner J as he then was in Carnick v Williams 1937 W.L.D. 76 at p. 83 as follows:*

"*it seems to me that the reason for holding maintenance orders..... to be orders ad factum praestandum is that they are not really money judgments at all. In their essential nature they are orders that the defendant do something, namely maintain his wife or the children. This duty might be performed in various ways including the provision of housing, clothing and food in kind or the transfer of property, but in practice the court indicates how the defendant is to fulfill the duty by the payment of a periodical sum of money.....This direction by the court does not convert the judgement from one ordering the doing of an act by the defendant into one awarding a sum of money to the plaintiff*".

In the Swanepol v Bovey, supra at p. 458 it was stated:

" *The ordinary object of such an order is to give.....the right of execution. But the ordinary consequences (sic) of the non-fulfillment of an order of court to pay a sum of money is certainly not liability to be committed for contempt of court.*
That has been laid down repeatedly. There is an apparent exception in matrimonial suits.
.....I know of no case and no case has been quoted from the Bar, where the court had entertained an application for contempt of court where the order.....is not a matrimonial one. In this case it is pure money debt which has been made an order of court. I attach no importance to the fact that the money is payable in a certain manner - in instalments; that element cannot give the court the right to commit for contempt of court."

Mr, Dunseith for the Applicant submitted that the order of the Industrial Court dated the 16th December 2004 entered into by consent directed the 1st Respondent to pay its employees' salaries/wages promptly on due date, namely the 23rd day of each and every month.

He argued that though the judgement was for payment of money namely, salaries and wages, it also directed the manner and date in which the payment was to be made.

According to Mr. Dunseith therefore, the order was one *ad factum praestandum* and not *adpecuniam solvendam.*

He likened it to an order for maintenance discussed above and urged the court to enforce compliance thereof by an order for imprisonment for contempt of court.

In this regard I take instruction from the reasoning of Devilliers J in the case of Ferreira v Bezuidenhout. supra and state that the order of the 16th December 2004 was one for payment of money on a monthly basis and on a specific date, and was unlike an order for maintenance which is an order to comply with a duty to maintain. It is not an order *ad factum praestandum* merely because it is an order to pay in a particular manner or on a particular date, and at a particular place.
Mr. Dunseith in the alternative submitted that although it was the 1 Respondent (Board of Trustees of the Swaziland Nazarene Health Institution) which was the employer of the members of the Applicant and was in default; the real culprit was the Government of Swaziland represented in the Board of Trustees by the 2nd Respondent Cleopas S. Dlamini.

For this reason, so the argument went, these proceedings for contempt, were very much similar to those against Government officials who willfully or by negligence and dilatory failed to comply with the orders of the court.

Mr. Dunseith submitted that it was necessary to commit the 2nd Respondent for contempt of court to uphold the dignity of the court.

Similarly, the 3rd Respondent being the most senior official of the 1st Respondent, and with specific responsibility to ensure payment of the salaries timeously should also be visited with the similar fate.

It has been held by the courts in a long line of decisions in Swaziland and in South Africa that contempt of court is the willful and malafide refusal to comply with an order issued by the court.

See Clement v Clement 1961 *(3)* SA 861 *CD:*

Noel Lancaster Sands f Edmsl BPK v Theron en Andrere 1974 *(3)* SA. 688:

Freankel Max Peollak Vindenue Inc v Menell Jack Hyman Rosenberg & Co. Inc. and Others 1966 (3) SA 355 (A) at 367H;

Ben Zwane v The Prime Minister of the Kingdom of Swaziland and Anor 2001 flQ. (Unrept).

It is clear that the 2nd and 3rd Respondents are in a predicament. The 1st Respondent is not permitted to charge market rates for the health services it provides to the members of the public. For that reason, it is unable to generate enough revenue to pay its staff.

The Government of Swaziland has by agreement in recognition of the essential service rendered to the public undertaken to provide annual subventions to discharge its commitments including payment of salaries to the staff.

Unfortunately as stated earlier efforts by the 2nd and 3rd Respondents to obtain the subvention timeously are frustrated by bureaucracy and other impediments common to Government operations.

Mr. Cleopas S. Dlamini stated in the Answering Affidavit that "*I wish to submit that the failure to pay the salaries and back-pay to Respondents employees is the result of the non availability of funds. Respondent has through 2nd and 3rd Respondents sourced for funds from Government and awaits the subvention.*"

Similarly Leonard Siphiwa Dlamini states that "*I wish to state that the Respondent through myself and the 2nd Respondent are not in willful default of the court orders and further that if the 1st Respondent was in a financial position it would have paid to its employees the salaries on the 23rd day of every month and the back pay due to its employees whom I am part of ".*

It is clear to the court that the 2nd and the 3rd Respondents are not in willful and malafide contempt of the court order of the 16th December 2004, that was entered into by consent.

It is to put it more mildly very embarrassing that an employer in the most essential service finds itself unable to pay its health workers timeously or at all in some instances.

The problem is compounded by the requirements of Section 94 (2) of the Industrial Relations Act of 2000 as follows:

"*strikes and lockouts shall be prohibited in respect of any service that has been designated as a minimum maintenance service in terms of sub-section (1).*"

The employees the subject of this application fall in the said designation.

It is therefore imperative that their contractual rights are respected and adhered to timeously without fail. Such failure may result in automatic release of the employees affected from their contractual obligations and all the concomitant consequences would follow from such release.

Whereas, the Government Proceedings Act, preclude any judgement creditor from attaching Government property, the 1st Respondent is not immune from attachment of its property.

For that reason, unlike litigants who obtain judgements against the Government, the Applicants herein are at liberty to execute judgments obtained in their favour against the 1st Respondent.

In the matter of East London Local Transitional Council v Mec for Health EC 2001 (3) SA 1133.
Ebrahim J, cited the decision of the full bench of the Transki High Court in the case of Mjeni v Minister of Health and Welfare, Eastern Cape Case No. 824/96 with approval as follows:

"*The common distinction between orders ad pecuniam solvendam and those ad fuctum praestandum regarding contempt of court proceedings would not in my view make sense in cases where the state is the judgement debtor in the light of the provisions of S 3 of Act 20 of 1957. (This is similar to the Government Proceedings Act of Swaziland).*

It would simply mean that the judgement creditor cannot enforce the judgement in the event of failure to pay whereas his counter parts would be able to do so against judgement debtors who are private persons. Effectively, it would mean those who sue the state run the risk of obtaining hollow and unenforceable judgements. The state could just ignore such judgements with complete impunity.

As the rationale behind that common law rule is that the successful party has other options to enforce an order ad pecuniam solvendam, I am of the opinion that its application cannot be extended to matters where the state is the judgement debtor because no such option is available to the successful party. To hold otherwise would lead to consequences too ghastly to contemplate. In effect the courts would be condoning and encouraging deliberate disobedience of their orders or even conduct which holds such orders in utter contempt."

It is the courts conclusion that the Applicant herein unlike a judgement creditor against Government, has alternative remedy to contempt of court proceedings where judgements sounding in money are concerned.

For this, and other reasons stated herein, the application fails.

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT- INDUSTRIAL COURT