

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 62/2005

In the matter between:

**SWAZILAND NATIONAL ASSOCIATION
OF CIVIL SERVANTS**

APPLICANT

and

SWAZILAND GOVERNMENT

RESPONDENT

CORAM:

NDERI NDUMA JOSIAH YENDE NICHOLAS MANANA

PRESIDENT

MEMBER

MEMBER

FOR APPLICANT: P. R. DUNSEITH

FOR RESPONDENT: ADV. L. MAZIYA

J U D G E M E N T - 15/06/05

These are civil contempt proceedings arising from alleged failure of the 1st, 2nd and 3rd Respondents to comply with an order of this court issued on the 28th February 2005.

The order reads as follows:

1. *The retrenchment letters and exercise purporting to terminate the services of the so called temporary employees as at the 31st March 2005 is set aside.*
2. *The Respondent is interdicted and restrained from retrenching the so-called temporary employees who have qualified to be converted into the permanent and pensionable cadre in*

line with the authority in the case of Vusumuzi Shongwe and the Principal Secretary, Ministry of Works and Transport and 2 others, without first confirming such employees in the permanent and pensionable establishment.

3. *The Respondent is directed in conformity with the Recognition Agreement between it and the Applicant and in conformity with the Laws of the land with regard to the principles governing the redundancy and retrenchment of the so called temporary employees to engage the Applicant in bona fide consultations.*

4. *There will be no order as to costs.*

In the Founding Affidavit of Quintcn Dlamini, the following allegations that have a bearing to the application have been made:

The judgement was delivered in open court in the presence of legal representative of the Respondents. On the 18th March 2005, the 1st Respondent noted an appeal, a copy of which was attached.

No application for stay of execution of the order was made in terms of Section 19 (4) of the Industrial Relations Act No. 1 of 2000.

The Respondents are therefore under a legal duty to conform with the order of the court. On the 1st April 2005, the employees the subject of the order attended work at their various stations. They were turned away and told that they had been retrenched and they no longer had any jobs. Confirmatory Affidavits of eight (8) such employees were filed to buttress the issue.

Mr. Quinton Dlamini held a meeting on the issue with the 3rd Respondent Mr. E. Madlopha, who informed him and the executive of the Applicant that as far as he was concerned the employees had been retrenched; there was no work for them; there was no money to pay them; and they were no longer employees of the 1st Respondent. He said that the Applicant should negotiate the issue with the 2nd Respondent, Cyril Kunene.

Mr. Quinton avers that at the time Mr. Madlopha made these assertions he was fully aware of the contents of the court order but willfully and in flagrant contempt chose to flout it and/or subvert it to the prejudice of the daily paid employees.

For these reasons, the 2nd and 3rd Respondents should be committed to jail for contempt of the court and should remain so committed until they comply with the order of the court.

RESPONDENT'S CASE

The 2nd Respondent Cyril Kunene made a comprehensive response to the averments by Quinton Dlamini in his Answering Affidavit as follows:

Ad paragraph 10

The allegations hereof are denied and Applicant is put to strict proof thereof. I am advised that none of the said employees were turned away and that todate they are in government premises. However it is true that the officers are not assigned any duties and the reason is that since the 31st March 2005, there is no work to be assigned to them. In this regard I refer to the Confirmatory Affidavit of Shodi Zulu annexed hereto.

During arguments by both counsel it became common cause that indeed the affected employees report to work daily, they are not assigned any duties though they remain at the Respondent's premises till knock off time; they have continued to receive their monthly remuneration.

Mr. Cyril Kunene has further in the Answering Affidavit outlined the plan of action the Respondents have put in place to comply with the court order dated 28th February 2005.

The said plan is contained in a document annexed to the application and marked 'CJM 1'.

The salient points of the plan are as follows;

1. *Between the 13th and 15th April 2005, the Ministry of Public Works and Transport applied for posts for the affected employees.*
2. *Between the 18th April and the 30th April 2005, said ministry to apply for funding of the plan to the Ministry of Finance. This is to involve the Cabinet and Parliament.*
3. *The Ministry to continue to pay salaries of the affected employees from internal sources.*

4. *Between the 2nd May and 6th May 2005, discussions to be held with the Civil Service Board regarding permanent employment of the artisans.*
5. *The Civil Service Board to employ and convert the artisans to permanent establishment between the 9th May 2005 and 13th May 2005.*
6. *Ministry of Public Works and Transport to employ and convert the Labourers and others to permanent terms between the 13th and the 20th May 2005.*
7. *Engagement of the Swaziland National Association of Civil Servants (SNACS) to discuss termination process of all the affected employees between the 23rd and the 27th May 2005.*
8. *Upon agreement with SNACS, letters of termination to be issued.*
9. *Engagement of the Swaziland National Provident Fund (SNPF) on the issue of contribution to pension and SNPF.*
10. *The last day of service for all the affected employees to be the 30th June 2005.*

This plan of action was placed in the knowledge of the Applicant and was even advertised in the local print media.

It is apparent that the [Applicant](#) has big reservations against the intaidcu plan of action by the Respondents. These reservations constitute the thrust of the application before court.

The arguments by the Applicant as contained in the heads are to this effect:

The 3rd Respondent consciously refused to recognize the legal position of the so called temporary employees notwithstanding that this has been spelled out for him in the case of Vusumuzi Shongwe. That as a matter of law and fact, all the employees affected are permanent employees and therefore enjoy equal status as all their counterparts hitherto not targeted for retrenchment.

That the entire retrenchment exercise was set aside and same had to commence afresh in terms of the laws of the land by treating all the employees across the board on equal footing for the purposes of any intended retrenchment in the future; that this had to be preceded by a fresh issuance of notices in terms of Section 40 and due consultations and disclosures to follow with and to all stake holders.

That the Respondents in flagrant defiance of the meaning, ratio and intent of the judgement of the court states that it is creating positions which it will immediately thereafter declare redundant on the 30th June 2005.

It was submitted that this was a cynical exercise and an insult to the court the effect of which was to subvert the court order.

Moreover, the Respondents persist in their illegal discrimination against the so called 'temporary' workers since it is only their positions which will be declared redundant. If there is insufficient funding, then a redundancy exercise across the board must be conducted, applying the principle "*last in first out*". A situation where new recruits force veteran - workers out of their jobs cannot be tolerated, the submissions concluded.

The court cannot agree more with the interpretation placed on its order by the Applicant. The effect of the same was to place all the employees at the Ministry of Works and Transport on an equal footing upon the regularization of the so called 'temporary employees' into permanent and pensionable cadre.

That this has been done belatedly was not the fault of the employees affected and therefore they should not be discriminated nor put at any disadvantage resulting from their late entry into the permanent cadre.

The fact of the matter is that each one of them is to be deemed to have become permanent and pensionable from the date they were entitled to the right of inclusion to the cadre in terms of the law as stated in the case of Vusumuzi Shongwe.

The consequence of this in practical terms is that in the event the Respondent persisted in any future retrenchment exercise, the principle of "*last in first out*" shall be applied taking into account, the date they should have been included in the establishment register for permanent cadre but not from the date of the belated inclusion thereof.

Having said that, the court does not share the view of the Applicant that the plan of action by the Respondents was put in place in bad faith and in deliberate defiance of the meaning, the ratio, and intent of the court order.

To the contrary, the court holds the view that the Respondents did not fully appreciate the practical effect of the order of the court dated 28th February 2005.

The court therefore will not impute any cynism, nor intent to subvert its order by the Respondents in *casu*.

The court stated the general principle in civil contempt proceedings recently in the matter of Swaziland Nurses Association and the Board of Trustees of Swaziland Nazarene Health Institutions and 2 Others - Industrial Court Case No. 117/2005 as follows:

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

For the proposition we quoted the cases of; Clement v Clement 1961 (3) SA 861 Noel Mancester f Edmsl BPK v Thereon en Andreere 1974 (3) SA 688:

Freankel Max Peollak Vindenue Inc. v Menell Jack hvman Rosenberg & Co. Inc and others 1966 (3) SA 355 (A) at 367 H:

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

The court is satisfied that though the plan of action already put in place by the Respondents appear to be at cross purpose with the order of the court dated the 28th February 2005, there was no willful, nor malafide intent on the part of the 1st, 2nd and 3rd Respondents to defy the court order and/or place the court's dignity into contempt.

Rather, I dare say, there was a clear lack of appreciation of the full, proper and practical implication of the order of the court by the Respondents.

The plan of action, as it related to the retrenchment exercise must be conducted in terms of the clarification contained in this judgement.

We are indebted to Mr. P. R. Dunseith for the Applicant and to Mr. L. Maziya for the Respondents for their very able submissions. We want to place it on record that both counsel sought for the clarification of the order dated the 28th February 2005, and I have gladly complied with their request.

The application fails. No order as to costs. The members agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT