

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 480/2007

In the matter between:

SWAZILAND ELECTRICITY BOARD

Applicant

and

**NATIONAL ELECTRICITY SUPPLY
MAINTENANCE AND ALLIED STAFF
ASSOCIATION**

1st Respondent

DOCTOR HLONGWANE

2nd Respondent

VUSUMUZI SIMELANE

3rd Respondent

MOSES SITHOLE

4TM Respondent

PATRICK QWABE

5TM Respondent

CORAM:

| | |
|------------------------|------------------|
| P. R. DUNSEITH | PRESIDENT |
| JOSIAH YENDE | MEMBER |
| NICHOLAS MANANA | MEMBER |

FOR APPLICANT
FOR RESPONDENT

N. J. HLOPHE
S. MNGOMEZULU

J U D G E M E N T - 15/11/2007

1. The National Electricity Supply Maintenance & Allied Staff Association ("NESMASA") embarked on a wildcat strike on the 22nd October 2007, demanding that the suspension of three managers be lifted and a forensic audit be abandoned. The Staff Association and its executive office bearers solicited the participation of the staff and the unionisable employees of the Swaziland Electricity Board ("SEB") in this strike action, which resulted in a failure of electrical supply to a substantial section of the national power grid.
2. On the morning of the 22nd October 2007, the Industrial Court granted an interim order upon the application of the SEB in terms of which NESMASA and its members were interdicted from participating in or continuing the strike action, and NESMASA and its officers were interdicted from inciting or encouraging the employees of the SEB to engage in such strike action.
3. This court order was duly served upon NESMASA and its officers, the 2nd - 5th Respondents, at 2.30 p.m. on the 22nd October 2007 by the Deputy-Sheriff.

4. The Applicant alleges that notwithstanding service of the court interdict, the Respondents carried on with their strike. It is alleged that the interruption of the national power supply by strike action instigated, organized and encouraged by NESMASA and its officers continued throughout the 23rd October 2007. According to the SEB's General Manager Operations, deliberate acts of sabotage attributable to employees of the SEB resulted in disconnection of supply to certain areas. Routine technical maintenance and repair of supply installations was abandoned for 48 hours. Numerous consumers and institutions dependant on electricity for their domestic, commercial and agricultural operations are said to have been affected by the actions of NESMASA, its officebearers, its members, and the employees who participated at the instigation of NESMASA.

1. In the late afternoon of 23rd October 2007 the SEB returned to court alleging that NESMASA and its office bearers, particularly Doctor Hlongwane, were flouting the interdict served on them on 22nd October 2007 and brazenly and publicly displaying contempt for the order of the Industrial Court.
2. The Court President issued an interlocutory rule requiring the Respondents to appear before the Court at 9.00 a.m. on 24th October 2007 to show cause why they should not be held in contempt and committed to prison forthwith.
3. The rule nisi was served upon the Respondents personally the same evening, but they failed to appear before the court the following morning. The Industrial Court then extended the rule nisi to the 2nd November 2007.
4. On the 2nd November 2007 the parties were in attendance at court. Without opposition from the Respondent, the Applicant sought and was granted an order declaring the strike illegal and confirming the interim interdict issued on the 22nd October 2007. The court was informed that the strike had been called off, but the Applicant nonetheless persisted in its application for the Respondents to be held in contempt of court and sanctioned accordingly.

1. The contempt application was duly postponed to enable the parties to file further papers. A full set of affidavits is now before the court, and having heard arguments from the representatives of the parties, the court is required to determine whether the Respondents were in wilful contempt of the interim interdict issued by this court and served on the Respondents on the 22nd October 2007.
2. Before dealing with the issue of contempt of court, we wish to make certain observations with regard to the strike action instigated by the Respondents.
3. Section 91 of the Industrial Relations Act 2000 expressly and unconditionally prohibits strike action being taken in essential services. Electricity services are designated as essential services, that is to say, services whose interruption endangers the life, personal safety or health of the population of Swaziland. For that reason, employees of the SEB are absolutely prohibited by law from engaging in strike action.
4. The strike was called off after 48 hours, but that in no way detracts from the gross illegality of the Respondent's conduct in instigating the strike in the first place, nor does it compensate the customers of SEB and the public at large for the economic loss and inconvenience sustained whilst the strike ran its course.
1. It is entirely irrelevant whether the grievance of NESMASA which prompted a wildcat strike has any merit. The Industrial Relations Act 2000 provides an expeditious procedure whereby disputes in essential services may be resolved by conciliation and fast track arbitration. The doors of the Industrial Court are always open to genuine victims of unfair labour practices. Instead of making use of these effective means to resolve their complaint, NESMASA resorted to self-help. Not only was this action illegal because it involved an essential service, it also completely bypassed the prescribed statutory procedures which are a precondition for lawful industrial action.

2. Workers organizations which instigate their members to engage in illegal wildcat strikes are a cancer in the field of labour relations. Worker organizations have laboured for decades to win respect as social partners at the workplace and in the economic development of the kingdom. A staff association that disrespects the rule of law and the socio-economic contract between employers and employees betrays the labour movement. It also destabilizes the economy and discourages investment and job creation, particularly when its illegal conduct interrupts the provision of essential services.

15. By engaging in illegal strike action, the 1st Respondent and its office bearers may be charged with a criminal offence, and they are liable on conviction to a fine of up to E10-000,00. - see sections 88 (5), 97 and 110 of the Act. The Respondents have also exposed the employees of SEB who participated in the strike at their instigation to summary termination of their services - see section 88 (6) of the Act.

16. Turning to the question of contempt of court, the Applicant alleges that:

16.1 the 2 Respondent addressed a meeting of SEB employees on 22nd October 2007 after he had been served with the court order and called on employees to leave their stations and congregate at the SEB head office on the following day;

16.2 on the morning of the 23 October 2007 the 2nd Respondent appeared on national television and again called on employees to congregate at SEB head office;

16.3 employees from all the depots gathered at the head office on 23 October 2007 where they were addressed by the 2nd Respondent. The latter did not mention that further strike action had been interdicted nor call on the members of the 1st Respondent to disperse and return to their duties.

16.4 numerous instances of deliberate interference or tampering with the electricity system occurred after the court injunction was issued.

17. The Respondents deny these allegations. The 2nd Respondent testifies that the Respondents had already learned of the court order through an office Memorandum issued by the Applicant before the order was formally served by the Deputy-Sheriff. The 2nd Respondent alleges that upon receipt of the memorandum he addressed the NESMASA membership and advised them to abandon the strike action and they complied. After service of the court order the 1st respondent resolved that its executive should seek audience with the Managing Director and/or the Board of Directors on the 23 October 2007.

18. The 2 Respondent denies that he called upon the employees to converge on SEB head office. He tenders a DVD copy of the television broadcast for the scrutiny of the court. He says that although a large number of SEB

employees gathered at the head office on 23 October 2007, these were members of the union SESMAWU who had not been interdicted by the court from so gathering. The 2nd Respondent states that the respondents were ignorant of the fact that their presence at the head office on 23 October 2007 whilst seeking an audience with the Board of Directors might be construed as contemptuous of the order of court. He denies that the Respondents persisted in the strike, and he denies that any acts of sabotage were committed by the 1st Respondents' members.

19. The 3rd, 4th and 5th Respondents have also made affidavits in defence of the Respondents. They state that the 1st Respondent has a membership of seventy five people only, but more than six hundred people took part in the "protest". They say that the majority of the people who took part in the protest are members of the union SESMAWU.
20. It is clear that there is a material dispute as to whether the Respondents persisted in their strike action after they received notice that the strike had been interdicted by order of this court.
21. The Applicant declined the Respondent's invitation to play a recording of the 2nd Respondent's television interview, from which the court infers that the Applicant's version of the interview cannot be sustained. The allegations of interference with the electrical system do not directly implicate the Respondents or their members, and there is no evidence that the Respondents conspired at sabotage with other persons.
Allegations made by the SEB Managing Director Mr. Gumbi regarding contemptuous dismissal of the court order by the Respondents are hearsay and cannot be relied upon.
22. What appears to be undisputed is that the executive committee of the 1st Respondent congregated with about six hundred SEB employees at the SEB head office throughout the 23 October 20007. The Respondents

assert that they were assembled in order to seek audience with the SEB board of Directors, an audience which was eventually granted in the evening of that day at Turns George Hotel, Manzini. It is not alleged that the 2nd-5th Respondents or the members of NESMASA attended to their duties on the 23 October 2007, nor do the Respondents allege that they made any attempt to disperse the assembly of the employees or to encourage them to return to their work stations.

23. The court must decide whether the Respondents' participation in this gathering at SEB head office constitutes wilful contempt of the order of the court.

24. Applicant's counsel submits that the contempt can be inferred from the contents of a notice issued by NESMASA and SESMAWU to all SEB employees on the 24th October 2007. The notice commences as follows:

"Current Situation

The Executives of SESMAWU and NESMASA would like to thank all members that participated in the meetings that took place at the Head Offices in the last two days. Our unity in this case has borne positive fruits with regard to our demands....."

The notice then sets out the alleged resolutions of the meeting with the Board of Directors, and concludes as follows:

"We therefore request all members of NESMASA and SESMAWU to go back to work, full force on receipt of this communique.

N.B.

A letter of assurance from the Ministry that no one shall be victimized for taking part in the two days meeting shall follow shortly. If any member is intimidated, they should report that to their respective Executives.

Regards

*George Maseko
SESMAWU President*

*Doctor Hlongwane
NESMASA SECT.*

UNITY IS POWER"

25. The notice refers to unity bearing fruit with regard to the demands of the organizations. This can only refer to the joint strike action that was instigated by the 1st Respondent to enforce compliance with its demands regarding the suspension of NESMASA members.

26. Members of SESMAWU and NESMASA are thanked for participating in the "meetings' at the Head office on 22nd and 23rd October 2007 and requested to return to work. There can be no doubt that the reference to "meetings" is a euphemism for the work stoppages that occurred when SEB employees converged on SEB head office on the days in question. By thanking its members for participating in the work stoppages on the 22 and 23 October 2007 and requesting them to return to work, NESMASA unequivocally reveals its own participation in and control over such work stoppages. By praising its unity with SESMAWU, NESMASA shows that the work stoppages were carried out in concert with SESMAWU and its members. By crowing that this unity of purpose has advanced its demands, NESMASA makes it clear that the work stoppages on both the 22nd and 23rd October were arranged with a view to inducing compliance with the NESMASA demands. In short, the notice issued to all SEB employees confirms that NESMASA and its office bearers persisted in illegal strike

action throughout 23rd October 2007 notwithstanding having been served with a court order which specifically interdicts such action.

27. The attempt by the respondents to pass off its illegal work stoppage as "seeking an audience with the Board of Directors" is sheer disingenuity. The executive committee did not have to assemble with 600 employees to request or arrange an appointment with the Board, nor did the members of NESMASA and SESMAWU have to abandon their duties for an entire day whilst a Board meeting was being convened. The work stoppage was calculated to force compliance with SESMAWU's demand to meet with the Board. This in itself constituted illegal strike action.

See **SEB v SESMAWU (IC CASE No. 419/04)**.

28. The court does not accept that the Respondents were ignorant of the fact that their continued engagement in work stoppage on 23 October 2007 contravened the terms of the court interdict. Any person of reasonable intelligence would have realized this, and the 2nd -5th Respondents are all management employees and office-bearers of the staff association. We find that they were well-aware that their actions contravened the court interdict, but they persisted nevertheless. In fact, they defied the order of the court.

29. The Applicant has proved that the court order was brought to the notice of the Respondents and that they failed to obey the order. Whilst the overall onus of proving contempt of court beyond a reasonable doubt rests on the Applicant, the evidential burden shifts to the Respondents to prove the absence of wilfulness and bad faith.

FAKIE NO v CC11 Systems 2006 (4) SA 326 (SCA).

It is not sufficient for the Respondents to claim that they never intended to show contempt for the court. They are presumed to intend the natural consequences of their actions, and the natural consequences of persisting in a strike in the face of a court interdict prohibiting strike action is to **bring** the administration of justice into contempt.

30. The court finds that the Respondents disobeyed the court order and that such disobedience was wilful and mala fide.
31. Punishment for civil contempt of court is generally imposed to enforce compliance with a court order. The Industrial Court does not exercise criminal jurisdiction to punish offenders for contempt where the coercive element is absent.

Cape Times v Union Trades Directories & Others 1956 (1) SA 105 (N) at 120-121.

32. We have given careful consideration to the question whether we should forward our judgment to the Director of Public Prosecution with

a recommendation that the Respondents be prosecuted, both for contempt of court and for instigating and engaging in illegal strike action. We have come to the conclusion that such action would not be helpful in restoring harmonious industrial relations between the parties. Nevertheless we admonish the Respondents in the strongest terms for the flagrant disrespect they have shown to the court and the rule of law generally. When a party believes that it can flout a court order with impunity, this forebodes the breakdown of law and order generally. Any further breaches of the law by NESMASA will be regarded in the most serious light.

33. No order is made on the application, save that the 1st Respondent is ordered to pay costs on the scale between attorney and client.

The members agree

PETER R DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT