IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 560/07

In the matter between:

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

And

SWAZILAND ELECTRICITY BOARD — **RESPONDENT**

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: S MNGOMEZULU

FOR RESPONDENT: S. DLAMIN1

JUDGEMENT -11 /01/2008

1. The respondent suspended three of the applicant's members from their employment on full pay on the 2nd August 2007. The suspension was pending completion of investigations into certain allegations that the members had made unlawful threats against the respondents' Chief Executive Officer and they had plotted to discredit his reputation by planting dagga in his car.

2. Paragraph 3.3 (a) of the Respondent's Disciplinary Code and Procedure

("the Code") which forms part of the Collective Agreement between the applicant and the respondent, provides:

> **"If it appears prejudicial to the interest of the employer to allow an employee to continue in his post, the employer after consultation with the Staff Association may suspend the employee from duty, to a maximum of three (3) months, pending an enquiry. Upon expiry of the three months, the Board may extend the suspension for a further reasonable period or recall the suspended staff member..."**

3. Paragraph 3.3. (b) of the Code provides further:

4. The initial suspension period expired on the 2 November 2007. On 12 November 2007 the suspended employees were notified by their respective heads of department that their suspension is extended for a further 3 months with effect from 2 November 2007.

5. The applicant has applied to the Industrial Court on a certificate of urgency, seeking an order in the following terms:

> *1. That the Rules of the above Honourable Court be forthwith dispensed with and that the matter be enrolled and heard as one of urgency.*

2. That the Applicant be hereby condoned for none-compliance with the Rules of the above Honourable Court.

2.1. That Respondent's letters dated the 12th November 2007 be hereby declared null and void ab initio there being no Board resolution sanctioning an extension of the suspension of the Applicant's members namely Dumisa Shongwe, Makhosonkhe Shongwe and Walter Nxumalo.

2.2. That the Respondent's letter dated the 12th day of November 2007 be hereby declared null and void ab initio because such letters cannot purport to extend a *suspension that has already expired through effluxion of time on the 1st November 2007.*

2.3 That the extended suspension of Dumisa Shongwe, Mkhosonkhe Shongwe and Walter Nxumalo by the Respondent to be declared null and void and authorizing the aforesaid Managers to forthwith report to work at respondent's Headquarters.

3. That the Respondent pays the costs of this application.

4. Granting the Applicant any further and / or alternative relief.

6. The grounds for the application as set out in the founding affidavit may be summarized as follows:-

6.1. Only the Board of Directors may extend the period of suspension, yet the

extension was effected without the authority of the Board;

6.2. Alternatively, the extension of the period of suspension for a further three (3) months is unreasonable and unjustified in the circumstances.

6.3. The period of suspension cannot be extended once it has expired through effluxion of time.

7. The Respondent has opposed the application and raised the following points of law in *limine.*

> *7.1 the applicant has no locus standi to bring the application because there is no allegation in the founding affidavit of Doctor Hlongwane, Secretary General of the applicant, that he is authorized by the applicant to bring these proceedings;*
>
> *7.2. The applicant has no locus standi in that it has no direct and substantial interest in the subject matter and the outcome of the application;*
>
> *7.3. The applicant has failed to establish sufficient grounds for the matter to be enrolled as one of urgency.*
>
> *7.4. The applicant has failed to prima facie establish the requirements for a final interdict, namely a clear right; that it has no*

other remedy; and that it will suffer irreparable harm in the event the relief sought is not granted.

8. Authority to institute the application

The deponent to the founding affidavit has alleged that he is duly authorized to depose to the affidavit "for and on behalf of the 1st respondent." Mr. Mngomezulu for the Applicant submits that the reference to "1st Respondent" was a typist's error and it was intended to refer to the Applicant. As proof thereof he handed up his original manuscript draft affidavit which indeed refers to Applicant, not 1st Respondent. The court is satisfied that this is a patent typist's error, and that the Applicant should not be unsuited on the basis of such an error.

9. Direct and substantial interest in the relief sought

9.1. The application has been brought by the Staff Association in its own name and on its own behalf.

9.2. Like all other applicants in the Industrial Court, the Staff Association has to show that it has a direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the litigation **- NUM Free State Consolidated Gold Mines (Operations) Ltd. 1989 (1) SA 409 (0).** A mere financial, moral, abstract or academic interest is insufficiently direct to

confer locus standi - **Jacobs & Another v Waks & Another 1992 (1) SA 521 (A) at 533J-534E.**

9.3. Trade Unions and Staff Associations are entitled to litigate for the benefit of their membership as a whole, particularly where the dispute involves an alleged breach of a collective agreement entered into by the Union or Staff Association as collective representative of employees within its bargaining unit, or an alleged breach of the law pertaining to collective bargaining.

- Steel & Engineering Industries Federation & others v National Union of Metalworkers of SA (1) 1993 (4) SA 190(T) at 194 C-D and 193 C-H.

9.4. A Union or Staff Association does not however have locus standi to institute proceedings in its own name to protect or further the interests of individual members, where such interests are not directly and substantially shared by the organization itself or its bargaining unit as a whole.

9.5. In the present matter, the applicant has no direct or substantial interest in the extension of the suspension of its members. This is a matter which affects the members in their individual capacity as employees of the respondent. Where the applicant does have a direct interest is in the enforcement of the provision of the collective agreement and the Code.

9.6. The Applicant argues that the extension of a period of suspension can only be at the instance of the Board of Directors, and that the Respondent

has breached the express provisions of the collective agreement by purporting to extend the suspensions of its members without the authority of the Board of Directors. It also argues that the terms of paragraph 3.3 of the Code preclude the extension of the suspension period after the period has elapsed.

9.7. In our view the Applicant does have locus standi to ensure that the respondent complies strictly with the terms of the collective agreement and the Code, and to advance the arguments aforementioned with a view to setting aside an extension of suspension which does not comply with the collective agreement and the Code.

9.8. However we find that the Applicant has no locus standi to argue for the setting aside of the extension on the ground that the extension is unreasonable and unjustified in the circumstances. The Staff Association has no direct or substantial interest in the subject matter or outcome of such dispute.

10. Urgency

After considering the arguments advanced by counsel for the parties, the court is of the view that an alleged breach of the collective agreement giving rise to an unlawful extension of the suspension period constitutes reasonable cause for hearing the matter as one of urgency, and that if the matter were to follow its normal course in terms of the rules of court the extended period of

suspension would in all likelihood have expired, rendering the application abortive and academic.

11. Clear Right

11.1. The Applicant argues that when paragraph 3.3 of the Code states that the period of suspension may be extended by "the Board," this refers to the Board of Directors. In the absence of any evidence that the extension was effected with the authority of the Board of Directors, it must be regarded as ultra vires and null and void.

11.2. Mr. *Sibandze for the Respondent referred the court to the definition of the word "Board" in paragraph 2.8 of the Collective Agreement, which reads as follows:*

> *""Board" shall mean the Swaziland Electricity Board as represented by its Board of Directors, Management, and includes any person authorized by the Board to exercise the authority of the Board."*

Furthermore, the citation of the parties to the Code stipulates that "Board" refers to the Swaziland Electricity Board.

11.3. In the light of these express definitions, the reference in paragraph 3.3 of the code to "the Board" refers to the Swaziland Electricity Board, not the

Board of Directors.

11.4. Disciplinary matters normally fall within the general authority of management and do not require the direct intervention of the Board of Directors. In the case of the Respondent, section 10(b) of the Electricity Act 10/1963 expressly provides that the Chief Executive Officer is charged with the control of the staff of the respondent, subject to the direction of the Board of Directors.

11.5. In the view of the Court, the extension of the period of suspension was properly effected by members of senior management representing the respondent, and the express resolution or authority of the Board of Directors for the extension was not required.

11.6. Section 3.3 of the Code provides that the Board may extend a suspension "upon expiry" of the initial period of suspension. This implies that the extension is to be effected after expiry of the initial period. (This does not necessarily preclude an extension in anticipation of expiry of the initial suspension period, but we express no firm view on this aspect).

11.7. The extension must be effected within a reasonable time after the expiry of the initial suspension, or the respondent will be taken to have waived its right to extend. In the present matter, the suspension was extended when the employees returned to work on 12 November 2007. This is not a case

where they resumed work only to be re- suspended after some time. In the circumstances, the delay of five working days before the extension was effected is not so unreasonable that the respondent can be taken to have waived its right to extend.

12. The two grounds relied upon by the applicant, and in respect of which it has *locus standi* have no merit in law. The applicant has not shown that it has a clear right to the relief sought. A *prima facie* case is not disclosed in the founding affidavit. In the premises, the application must fail.

13. With regard to the question of costs, section 13 (i) of the Industrial Relations Act 2000 enjoins the court to take into account the requirements of the law and fairness in deciding whether to make an award of costs. The general rule that costs follow the event will yield where considerations of fairness require it. Where the parties have an ongoing relationship, a costs order - especially where the dispute has been a bona fide one - may damage the relationship and thereby detrimentally affect industrial harmony and cooperation. The Industrial Court should be accessible to litigants who bona fide believe that they (or the workers they represent) are victims of an unfair labour practice or the breach of a collective agreement. The risk of an adverse award of costs may have the effect of discouraging a party from approaching the court and lead to unresolved resentment and even self-help. (See the remarks of

Goidstone JA in NUM v East Rand Gold & Uranium Co. Ltd (1991) 12 ILJ 1221 (A) 1241 - 1243 in this regard). Having carefully considered the question of costs, the court concludes that this is not a proper matter where costs should follow the event.

14. The application is dismissed. There is no order as to costs. The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT