IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 264/2022

In the matter between:

NATIONAL PUBLIC SERVICE AND ALLIED WORKERS UNION (NAPSAWU)	Applicant
And	
PRINCIPAL SECRETARY MINISTRY OF HOUSING AND URBAN DEVELOPMENT	1st Respondent
THE PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE COMMISSION	2nd Respondent
THE EXECUTIVE SECRETARY CIVIL SERVICE COMMISSION	3rd Respondent
ATTORNEY- GENERAL N.O	4th Respondent

In re:

PRINCIPAL SECRETARY MINISTRY OF HOUSING AND URBAN DEVELOPMENT	1st Applicant
THE PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE	2nd Applicant
THE EXECUTIVE SECRETARY CIVIL SERVICE COMMISSION	3rd Applicant
ATTORNEY- GENERAL N.O	4th Applicant

Neutral citation: National Public Service and Allied Workers Union v Principal Secretary Ministry of Housing and Urban Development and three Others In re: Principal Secretary Ministry of Housing and Urban Development and three Others v National Public Service and Allied Workers Union (264/22) [2023] SZIC 106 (13 October 2023)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr.M.P. Dlamini and Mr. E.L.B. Dlamini, Nominated Members of the Court)

Date Heard: 29th August, 2023

Date Delivered: 13th October, 2023

SUMMARY – The Applicant has brought an application to this Honourable Court seeking the granting of a contempt order against the Respondents for failure to comply with an order issued by the Court- Respondents are opposed to application – Respondent aver that they have complied with the Court order- raise point of law - abuse of Court process.

Held-1. The Applicant's representatives together with the Respondent's representatives are to meet and hold consultations on the issues as brought before Court.

2. The consultations are to take place within seven (7) days of issue by this Court of this order.

3. Thereafter the attorneys of record are to jointly file a report with this Court of the process and its outcome within 14 days after completion of the consultations.

JUDGMENT

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[1] The Applicant is National Public Service and Allied Workers Union, a union duly established in terms of **The Industrial Relations Act 2000 (as amended)**to represent on behalf of Fire and Emergency Services employees who are fully paid-up members of the Applicant. The Union has limited capacity to sue and be sued in its own name. The union has its official place of business premised in Manzini at Trelawney Park.

[2] The 1st Respondent is the principal Secretary Ministry of Housing and Urban Development, cited herein in his official capacity as such. It has its principal place of business situated at the Ministry of Labour and Social Security housed at the inter- ministerial building in Mbabane.

[3] The 2nd Respondent is the Principal Secretary of the Ministry of Public Service, cited herein in his official capacity. The Ministry is cited herein on the basis that it is the Ministry responsible for the terms and conditions of all civil servants including unionized members of Applicant. This is the Ministry that will have to implement any recommendation or the intended unilateral salary stoppage in August, 2021. It has its business premises situated in Mbabane.

[4] The 3rd Respondent is the Executive Secretary of the Civil Service Commission, cited herein in his official capacity as the recipient and the officer responsible for actioning any documents on behalf of the CSC. The Commission's official place of business is situated at the Inter-Ministerial building in Mbabane.

[5] The 4th Respondent is The Attorney General N.O cited in these proceedings in its nominal capacity as the party against whom any legal proceedings against the Government of Eswatini is to be instituted by service on same. The Attorney General's official place of business is situated at the Ministry of Justice Building in Mbabane.

[6] The present application is brought by normal motion proceedings wherein the Applicant, avers that the Respondents jointly and severally are in contempt of the orders of Court issued on the 9th November, 2022. The Applicant has now approached the Court seeking an order in the following terms:

6.1 The Respondents jointly and severally are in contempt of the orders of Court issued on 9th November, 2022.

6.2 Calling upon the Respondents jointly and severally to show cause within seven (7) days from date of the grant of prayer 1 above, why they should not be committed to goal for a period of thirty (30) days.

6.3 Calling upon the Respondents personally to show cause why they should not be ordered to pay costs at punitive scale from their own pocket for these proceedings.

6.4 Further and/ or alternative relief.

[7] The present Application has a history before this Honourable Court, having first come before this Court for the interpretation of an arbitration award. The matter was referred back to CMAC for interpretation and on the 9th November, 2022 the Arbitration award dated the 5th August, 2022 and the Interpretation of the award dated the 2nd November 2022 were made orders of Court. The matter again finds its way before this Court, now as contempt proceeding for the failure of the Respondent to comply with arbitration award and interpretation award. On the 28th June, 2023 the application came before Court and the parties agreed to several postponements during the course of hearing this application. It was finally agreed between the parties upon all pleadings having been filed and heads prepared that the matter be argued on the 29th August, 2023 on which date the matter was argued and judgment reserved.

BRIEF BACKGROUND

APPLICANT'S CASE

[8] The Respondents raised the point of law of abuse of Court process by the Applicant. the parties agreed during the hearing of the matter that it be heard holistically both on the point of law and the merits. The Applicant was first

to adduce its argument, it denied that there is any abuse of Court process. It was its averment that there is instead a willful disregard of a lawful Court process by the Respondents, hence the reason for it to approach the Court.

[9] It was its argument that the issues which arise from this application is not a debate about whether the two hundred and eight hours (208) have been worked or not, the issue is that the award and the interpretation thereof is not being complied with by the Respondents. When its members submit their claim forms, the forms are unlawfully and unfairly rejected. The Respondents simply reject the claims without establishing whether the Applicant's members have worked the hours as reflected in the award. Thus, the gist of the matter before Court is not interpretation, but the willful act by the Respondents of refusing to accept the Applicant's member overtime claims. Thus, the Respondent point *in limine* ought to be dismissed.

[10] On the merits it was the Applicants argument that after the 9th November, 2022 the Court having endorsed both the award and interpretation, same were served on the Attorney General and the Principal Secretaries, through the services of a Deputy Sheriff. However, despite having been served with the Court Order, the Respondents acting jointly with the Station Officers, refuse to approve and action the overtime claims. It was the Applicants submission that both award and interpretation are not being complied with by the Respondents.

[11] It was further its argument that after failing to comply with the Court Order, several correspondences were issued to the Respondent to caution them on

their actions, and that their continuous refusal to accept or sign the overtime claim forms, was contemptuous and their continuous refusal would result in the institution of contempt proceedings. Copies of the correspondence addressed to the Respondents in support of their argument was annexed to the application. It was the Applicant's submission that this is evidence that the Respondents were alive to what was going on regarding the payment of overtime for the Applicant's members.

[12] It was the Applicants submission that the Respondents and the Station Officers have no justified reason in law for the continued refusal to receive and to approve its members claim forms for overtime, because they are calculated in terms of the computations of formulas stipulated in the arbitration award and interpretation. It was its averment that the Respondent's conduct is impermissible in law, and there is flagrant willful refusal and or disregard of the binding Court order, on the Respondents part.

[13] It was its further averment that the award and the order issued by the Court on the 9th November, 2022 remains in force, and there is absolutely no reason in law for the refusal to accept the Applicant's claim forms. Further its members have a right in law to be paid overtime in terms of the General Orders A250 (ii) as clearly stated in the award and its interpretation. Therefore, there is no reason for refusing to accept the forms submitted by its members.

[14] It was its submission further that the conduct of the Respondents is contemptuous as the Respondents refuse to comply with the order of Court. The act by the Respondent warrants that they be found to be in contempt of Court. Further that in the present case the Respondents have displayed a high level of willful refusal to comply with the order of Court, and the Respondents must be held to be in contempt. The Applicant referred the Court to **HERBESTEIN AND VAN WINSEN** and the cases of **CONSOLIDATED FISH DISTRIBUTORS (PTY) LTD V FIVE & OTHERS 1968 2 (SA) 517 (C)** and **HOLTZ V DOUGLAS AND ASSOCIATES (OFS) CC ANDERE 1991 (2) SA 797, UMGCWEMBE WABOBABE PTY V SWAZILAND SUGAR ASSOCIATION AND ANOTHER (3688/08) SZHC** and **NOMCEBO NKAMBULE AND OTHERS V MACHALANGENI DEVELOPMENT AND ANOTHER HC CASE NO 1713/13.**

[15] In closing it was its averment that the award as issued by CMAC directed both parties to attend to the calculations, therefore none of the parties are absolved from the order, therefore the assertion by the Respondent that the award was not issued in the Applicant's favour is incorrect. Further that the current matter deals with an order *ad factum praestandum*, an order to do, as the award directed that the parties attend to the calculation of the overtime claims, therefore enforcement can only be done by referring the Respondents to goal, for failing to comply with the order of Court.

[16] It was its submission therefore that it is willing to negotiate/meet with the Respondents on the matter however the Respondents failed in good faith to communicate its position to amicably resolve the matter, but has only

pleaded so before Court and failed to forward correspondence to the Applicants in an attempt to resolve this matter. It averred that its aim is not to send the Respondents to goal, but its intention for the application is to ensure compliance of the Court order by the Respondents. Therefore, its members are still willing to sit down with the Respondents to forge a way, and find a resolution for the proper compliance with the Court Order, and payment of their overtime claims. It was its prayer therefore that the parties be given an opportunity to meet and consult on the matter, as **The Industrial Relations Act 2000 (as amended)**, gives jurisdiction to the Court to intervene where it foresees a misjustice. The parties would then file a report with the Court, if the Respondent fails to meet with them then an order be granted in terms of the application and the Respondents be directed to pay costs.

RESPONDENT'S CASE

[17] In rebuttal it was the Respondent submission that even though the Applicant have the right to access the Courts, the right must not be abused by it. It was its argument that the Applicant's members are seeking contempt in a matter that does not support the order they have prayed for. It was the Respondents averment that the Arbitrator interpreted his award in a lucid manner that overtime for fireman will accrue after working 208 hours per month, whereafter the overtime ought to be calculated using the General Order. It was its averment further that the Applicants members are calculating overtime using the wrong formulae and not having worked 208 hours as per the collective agreement, attached and marked 'B'.

[18] It was their averment further that the award was granted in their favour, and as a result thereof the Applicant cannot come before the Court seeking contempt on an award and order that is not in its favour, and as a consequence the Respondents are not in contempt. It was its argument that the Applicant and its members are merely abusing the Court process and their conduct should be frowned upon, and the application dismissed with costs.

[19] On the merits it was the Respondent's submission that the contempt proceeding before Court are contempt proceeding sounding in money and same cannot be enforced through committal. In support of its argument the Respondents referred the Court to the case of, **DR AUGUSTINE EZEOGU AND OTHERS V SWAZI GOVERNMENT AND FOUR OTHERS IN RE SWAZILAND GOVERNMENT V DR AUGUSTINE EZEOGU AND OTHERS I/C CASE NO 474/06**, where the Judge cited **HERBESTEIN AND VAN WINSEN "THE CIVIL PRACTISE OF THE SUPREME COURT OF SOUTH AFRICA (4TH EDITION) 1997**, wherein it reads as follows:

"Orders of Court are generally speaking, divided into two categories: orders ad precuniam solvendam (sc order to pay a sum of money) and orders ad factum praestandum (sc orders to do, or abstain from doing, a particular act, or to deliver a thing). Not every order of court can be enforced by committal for contempt. The order must be one ad factum praestandum before the court will enforce it in that manner...".

[20] It was the Respondent's argument that the Court cannot therefore send the Principal Secretary to goal, more especially since the award issued by CMAC was not in favour of the Applicant and is an order sounding in money. It was its argument that on that basis the application should be dismissed with cost.

[21] In response to the Applicants argument that the Respondents are failing to pay its overtime claims, it referred the Court to the affidavit of Mr. Luke Lushaba who denied the Applicant's assertions that it was not receiving, the Applicant's members claims. It was the Respondent averment that Mr. Lushaba in the affidavit states and confirms that the Chief Fire Officers, are willing to accept overtime claims where the fireman have worked in the excess of the 208 hours per month. It was his averment that they have not turned away any claims which are in compliance with this provision. It was his further submission that the Applicant's members were using the wrong formulae when calculating their claims contrary to the General Orders.

[22] It was the Respondent's submission that on the issue of non-payment of overtime as raised by the Applicant's members Mr. Simon Gama, Mr. Sibusiso Nhlanhla Dlamini and Mr. Vincent Mduduzi Tsabedze, their statements are untrustworthy and incorrect. It was its submission that the Applicants has failed to annex those members claim forms to verify that indeed they were not accepted. It was the Respondents averment that upon investigation of the statements made by the Applicant's members, and the overtime claim form filed, it discovered that the Applicant's members had not worked the excess of 208 hours for the month.

[23] It was the Respondent's further submission that it is willing to meet with the Applicant's lawyer, with its members, and hold discussions on the matter with the Human Resources Officers, to amicably resolve the issues before Court. In closing it was its submission that it has not refused to accept the Applicant's members overtime claims. It was its argument that to date all overtime claims are being accepted, and are currently being paid.

[24] In conclusion it was the Respondent's submission that the Applicant has failed in its Replying Affidavit, to rebut the evidence as stated by itself. In support of its argument, it referred the Court to **LAWSA 1997 VOLUME 3 PART I** where Joubert WA held that,

"In dealing with the Applicants allegations of fact, the Respondent should bear in mind that the affidavit is not a pleading and that a statement of lack of knowledge coupled with a challenge to the Applicant to prove part of his case does not amount to a denial of the averments of the Applicant. It follows that failure to deal at all with an allegation by the Applicant amounts to an admission of such allegation. It is normally not sufficient for the Respondent to content himself with a bare and unsubstantiated denial."

In further support of this argument the Respondent referred the Court to the case of, Chief **MDVUBA MAGAGULA V CHIEF MADZANGA NDWANDWE APPEAL COURT CASE NO. 34/2000.**

[25] Therefore it has set out a reasonable explanation about the overtime payment of the Applicant's members. Further that the matter could have been settled out of Court, as it is willing to pay the Applicant's members the overtime

claims, as they are an essential service provider and an important part of government. It was its prayer therefore that the Applicant's application be dismissed with costs, as the matter is prematurely before Court as the matter can be harmoniously resolved by the parties meeting to consult and determine the matter.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[26] It is a well-known basic principle in civil proceedings that contempt proceedings are permissible and appropriate as an enforcement mechanism only where the order sought to be enforced is one *ad factum praestandum* (an order for a person to do, or refrain from doing a certain thing) and not *ad pecuniam solvendam* (for payment of money).

[27] Once the Court has determined that the order sought is *ad factum praestandum*, the Court must further ascertain that the said order was issued and not complied with before committal of a person accused of contempt. The Court will go a step further and establish whether the said order was served on that person or that he or she was aware of such an order but failed or neglected to abide by or comply with the said order, and that the failure to comply was intentional.

[28] It is a crime to unlawfully and intentionally disobey a Court order, as it goes to the integrity of the Court. In the case of, **FAKIE NO V CCI SYSTEMS (PTY)LTD 2006 (4) SA 326 (A)**, the Court outlined the test for when disobedience constitute contempt and it held:

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). Thus, for a contempt order to be granted, it must be shown that the refusal to obey is both unlawful and mala fide. When the unreasonable non-compliance provided is bona fide, it does not constitute contempt, according to the broader definition of the crime, of which non compliance with civil orders is a manifestation. The offence is committed not by mere disregard of the Court order, but by the deliberate and intentional violation of the Courts dignity, repute authority that this evinces. Honest belief that non compliance is justified or proper is incompatible with that intent."

[29] The onus of proving absence of willful and bad faith in failing to comply with the Court order lies with the Respondents. In the absence of any reasonable explanation or excuse the Respondents must be regarded as intending the natural consequences of its failure to obey the Court order viz to bringing the administration of justice into contempt. It is evident from the the evidence as adduced by the Respondents that they are not in intentional willful disregard of the Courts Order. In fact, it is their evidence that they are aware of the Court order and to the best knowledge of the 1st Respondent the said order is being complied with. Further the 1st Respondent submits that if same is happening and the Applicant's members

overtime claims are not being processed, he will ensure by all means possible that the Court order is complied with.

[30] It is evident from the pleading that the Applicant contends that the Respondents are not complying with the Court order, whilst the Respondents on the other hand contend that they have complied with the Court order. Even though one party allege noncompliance, and the other compliance, both parties have failed to provide the Court with evidence in the form of overtime claims proving either of the allegations as brought by both of them. The Applicant has not provided us with overtime claims wherein its members have worked overtime in terms of the General Order and were not paid, in the same vein the Respondents have not provided the Court with claim forms that have been submitted by the Applicant's members and have been paid.

[31] What is further evident is that both parties, realize that the matter can be amicably settled through consultations between its representatives, and are willing to consult on the issue. **Section 4 of the Industrial Relations Act 2000 (as amended)**, provides as the following;

"The purpose and objective of this Act is to- (a) promote harmonious industrial relations; (b) promote fairness and equity in labour relations; (c) promote freedom of association and expression in labour relations; (d) provide mechanisms and procedures for speedy resolution of conflicts in labour relations; (e) protect the right to collective bargaining; (f) provide a healthy and legally sound environment for the creation of smart

partnerships between the government, labour and capital; (g) promote and create employment and investment; (h) stimulate economic growth, development and competitiveness; (i) stimulate a self-regulatory system of industrial and labour relations and self-governance; (j) ensure adherence to international labour standards; and (k) provide a friendly environment for both small and big business development.

[32] Whilst Section 8(4) of the same act enjoins the Court that in deciding matters, the Court may make any other order it deems reasonable which will promote the purpose of objects of the Act. It is evident from the above sections that the Courts are enjoined to promote harmonious industrial relations, as well as mechanisms and processes for speedy resolution of matter, prompting fairness and equity.

[33] It is apparent that the parties are still willing to go to the negotiation table and consult on the issue that is presently before Court, and the Court is also desirous that the matter be resolved amicably in the interest of promoting harmonious industrial relations. The Court therefore is reluctant to issue out any order that may prejudice the relationship between the parties, without first affording the parties an opportunity to resolve the matter before Court amicably outside of the Court forum. As a consequence, thereof the Court accordingly makes the following order:

33.1 The Applicant's representatives together with the Respondent's representatives are to meet and hold consultations on the issues as brought before Court.

33.2 The consultations are to take place within seven (7) days of issue by this Court of this order.

33.3 Thereafter the attorneys of record are to jointly file a report with this Court of the process and its outcome within 14 days after completion of the consultations.

33.4 The Court makes no order as to costs.

The Members Agree.

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. M. Ndlangamandla (MLK Ndlangamandla Attorneys)

For Respondent: Mr. M. Simelane (The Attorney General's Chambers)