

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 295/200

In the matter between:

MICHAEL BONGANI MASHWAMA

1 st APPLICANT

SMITH BHEKI GINA

2nd APPLICANT

PIUS NKAMBULE

3rd APPLICANT

and

SWAZILAND ELECTRICITY BOARD

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

P. R. DUNSEITH:

FOR APPLICANT

P. FLYNN:

FOR RESPONDENT

JUDGEMENT

27.11.2000

This Application was brought under a certificate of urgency seeking for an order in the following terms:

(a) Waiving the usual requirements of the rules of court regarding form, police and service of applications and hearing the matter as one of urgency.

(b) Directing and ordering the Respondent to suspend the Disciplinary Proceedings against (he Applicants until such time as the Commission of Enquiry into the Swaziland Electricity Board has completed its investigations and published its Report.

© In the event of a rule nisi granted in terms of prayer (b) above or the matter being postponed, then an interim order in terms of prayer (b) be granted pending the final determination of this application.

(d) Further and / or alternative relief.

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The Application is founded on the Affidavit of the 1st Applicant Michael Bongani Mashwama and supporting affidavits of the 2nd and 3rd Applicants.

The Respondent's preliminary objections to the Application were dismissed and the matter was heard on the merits.

The following issues are not in dispute.

1. That the Applicants have been charged with disciplinary misconduct based on allegations contained in the Report of the Internal Board of Enquiry.

2. That a Commission of Enquiry was on the 1 st September, 2000 established by the Hon. Minister for Natural Resources and Energy to investigate and enquire into the operations of the Swaziland Electricity Board with a view to identify any irregularities in :

(a) management of the Board's operations and adherence to established systems, procedures and regulations and hierarchy.

(b) management of the Board's assets such as transport.

© restructuring of operations and job allocation procedures,

(d) management of daily operations of the Board vis avis the Board of Directors, management and staff;

(e) administration procurement and tendering processes in the smooth performance of all contracts entered by the Board.

Further, the commission was to investigate and report on :

(a) any anomalies of the system and procedures employed by the Board in carrying out the Commission's functions;

(b) procedures carried out in the recent Swaziland Electricity Board Internal Enquiry;

© performance of the various sections or departments of the Board including the financial management and accounting procedures thereof.

The Applicants in the Founding Affidavit have questioned the factual basis of the conclusions reached and in particular as concerns serious allegations made against them therein.

The manner in which the report was compiled has been challenged and the way in which the Board of Enquiry conducted the Enquiry has been seriously questioned by the Applicants. They allege that they are being made scapegoats for serious omissions and defects in the general management and overall administration of the Respondent with a singular objective of absolving senior management of responsibility.

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The Applicants were suspended on the 24th July, 2000 and their letter of suspension state that the Board of Enquiry into procurement procedures affecting the Telecommunications department contains serious allegations, involving inter alia, gross negligence, dereliction of duty, dishonesty and the threatening and intimidation of other employees.

The Applicants were then served with a notice to appear before a disciplinary hearing on the 30th October, 2000.

The notice amongst other things stated that the Board of Inquiry has submitted its report for the attention of the Managing Director and substantial evidence therein confirm serious allegations made against the Applicants.

The Applicants on the 19th October, 2000 recorded serious objection to the disciplinary hearing scheduled for 30th October, 2000 before the Commission of Enquiry completes its work and make its

findings.

The Commission of Enquiry aforesaid is set up in terms of Section 12 of the Electricity Act No. 10 of 1963.

The section gives the Minister general powers which inter alia include giving directions of a general nature to the exercise and performance by the Board of its functions as appear to the Minister to be requisite in the public interest.

It is in pursuance of such powers that the Minister has deemed it in the public interest to set up a Commission of Enquiry to probe up the Board.

Whereas, it is the function of the Board to appoint, employ, discipline and dismiss its employees in terms of Section 9. It is clear as in this case that the purview of the Commission of Inquiry intersects with that of the intended disciplinary inquiry against the Applicants. It would be imprudent to proceed with the disciplinary hearing before the commission has completed its work.

The Board may after considering the findings of the commission reach a different decision and abandon the intended disciplinary hearing.

The Applicants would be seriously prejudiced in the event the disciplinary panel found them guilty of the various offences only to be exonerated later by the commission, They would suffer irreparable harm, were that eventuality to happen.

The Applicants have established a clear right to the relief sought. The balance of convenience is in favour of stopping the disciplinary hearing pending the outcome of the commission.

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As we stated in the case of Swaziland Engineering Metal Automobile and Allied Workers Union and Tracar Division of SWAKI INVESTMENT CORPORATION Industrial Court Case No. 211/99 pg 4:

"It is the prerogative of the management to run their business the way they know how, with due regard to the accepted modern labour practices and at all times observing the relevant laws that govern industrial relations....."

We must reiterate however, that the court will not hesitate to intervene where serious prejudice is likely to be suffered by the employees when it is apparent that the employer is bent on abusing its prerogative without due regard to principles of fair play and reasonableness.

Indeed, this court has jurisdiction to interfere in such situations.

Accordingly the Application is allowed with no order as to costs.

Members Agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT