

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.263/2001

In the matter between:

THE LABOUR COMMISSIONER

APPLICANT

and

TRANSDECO GTMH (PTY) LTD

1st RESPONDENT

SWAZILAND ELECTRICITY BOARD

2nd RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: ADV. MAZIYA

FOR 1st RESPONDENT

: ADV. SMITH

JUDGEMENT

20-11-03

The Applicant who is the Commissioner of Labour in the Kingdom of Swaziland brought the application for determination of an unresolved dispute in terms of Section 137 of the Employment Act No. 5 of 1980. The application was launched on behalf of the employees listed in annexure 'doc.1' to the application.

The first Respondent is Transdeco GTMH (Pty) Ltd a company based in the Republic of South Africa, whereas the Second Respondent is the Swaziland Electricity Board, a public Corporation and the sole provider of electricity in the kingdom.

It is alleged by the Applicant that the first Respondent towards the end of 1998 entered into a contract with a Mozambican company by the name of MOTRACO to erect overhead transmission lines to run from Camden in South Africa through Swaziland to Maputo in Mozambique. The project is

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herein after referred to as the "400 KV" project. The project commenced in 1999 and was completed sometime in the year 2000.

At the end of the "400 KV" project, the Swaziland Electricity Board (Second Respondent) was desirous of improving and integrating her electricity lines in Swaziland and in the year 2000 contracted the first Respondent to undertake the project within the Kingdom of Swaziland. This second project is hereinafter referred to as the "132 KV" project.

During the construction of the "400 KV" lines that commenced on or about March 1999 the first Respondent required unskilled and semi-skilled labour to perform the preparatory ground work and other assignments to be given to them from time to time.

It was first contended by the Applicant but later on became common cause that the first Respondent engaged the services of the J-TEC Management Services (hereinafter J-TEC) a locally registered Limited liability company to provide the unskilled and semi-skilled labour for the "400 KV" project only.

The issues in dispute are firstly whether these employees were the employees of J-TEC or did J-TEC merely recruit them on behalf of the first Respondent.

The second issue in dispute is whether the second Respondent (SEB) was a party to and/or was involved in the '400 KV' project so that the contract became a public contract within the meaning of the Employment Act No. 5 of 1980.

If it is found that the "400 KV" project was a public contract, then the Applicant has locus standi in judicio to bring the application in terms of Section 37 of the Employment Act. If it is found that the '400 KV' project was not a public contract, then the Applicant has no locus standi to bring this application and the same must be dismissed.

The first Respondent, denies that the unskilled workers were its employees stating that it contracted J-TEC to provide unskilled labour services for which J-TEC was duly and fully paid on a monthly basis in terms of a contract of services entered into between the first Respondent and J-TEC.

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The first Respondent denies therefore that it was the employer of all the unskilled labour recruited by J-TEC in Swaziland.

Further the first Respondent states that the second Respondent was not a party whatsoever to the '400 KV' project adding that it was a contract between itself and 'MOTRACO' Mozambican company. It is further averred on behalf of the first Respondent that Swaziland and therefore Swaziland Electricity Board was not a direct beneficiary of the '400 KV' project and therefore the second Respondent did not participate nor was it a party to the utility contract. It is admitted that the local authorities in Swaziland were consulted and they facilitated pitching of construction sites along the '400 KV' line and the second Respondent requested that a few of its technical staff be attached to the project so as to familiarize themselves with installation of high voltage steel pylons because the same were being erected in Swaziland for the first time. The first Respondent and MOTRACO obliged the SEB staff in this respect as a courtesy gesture.

Furthermore where it became necessary to relocate families and houses along the cable line, this was coordinated by the chiefs of the areas affected and compensation if any, was the responsibility of MOTRACO the ultimate beneficiary of the "400 KV" line.

If the unskilled workers had any claims of underpayments in respect of the '400 KV' project, the same should have been made by the individual employees against J-TEC jointly with the first Respondent but this being not a public contract, the Commissioner of Labour has no locus standi in judicio to bring this suit.

The Applicant on the contrary brought witnesses who testified that they saw and worked alongside employees of the Second Respondent (SEB) in the "400 KV" project and that the families that were relocated along the line were compensated by and paid by the second Respondent (SEB). It was argued on behalf of the Applicant by Advocate Maziya therefore that since public money was expended in the project, it was a public contract and the Applicant has locus standi in the matter.

What is apparent from the case of the Applicant is that there is confusion as to whether the witnesses who claim to have been compensated by SEB were relocated with respect to the '400 KV' project or with respect to the second project the '132 KV' project. The onus to establish this on a preponderance of probability rests with the Applicant. It does not tally

with common sense, that a public corporation would pay for expenses of relocation in respect of a contract it was not a party to nor was it a direct beneficiary of. It is because of this that the second Respondent (SEB) recognized the need to tap into the '400 KV' project intended for Mozambique and entered into a contract with the players to get a diversion of the power from the '400 KV' line into Swaziland hence the initiation of the '132 KV' project in the year 2000 upon completion of the '400 KV' line.

Some of the unskilled workers initially recruited for the '400 KV' project by J-TEC were hired by the first Respondent (TRANSDECO) to provide labour for the '132 KV' project.

The first Respondent concedes that the '132 KV' project was a Public contract within the meaning of the Employment Act and if the employees have any claims in respect of this particular project, the Applicant would be entitled to bring a suit on their behalf.

The Commissioner of Labour was placed in a much better position than the unskilled employees to investigate the nature of the '400 KV' project and that of the '132 KV' project.

There was numerous correspondences between the Applicant and the 1st Respondent on the claims and it was made clear to the Applicant that the unskilled workers in respect of the '400 KV' project were employees of J-TEC a registered company in Swaziland. It was also made clear that the 2nd Respondent was not whatsoever involved in the '400 KV' project. For some reason, the Commissioner of Labour appears to have ignored this information or did not believe what he was told. It is not clear what investigations he conducted to establish the real status of the '400 KV' project and that of the employees before bringing a suit at the High Court to attach monies owed to the 1st Respondent by the 2nd Respondent in respect of the "132 KV' project. No wonder the attachment was lifted by the High Court.

Section 137 of the Employment Act reads thus :

" 137(1) in the event of any question arising as to whether or not the wages to be paid or the hours or other conditions of employment to be observed in the fulfillment of any contract awarded or to be awarded to any contractor are less favourable than the established rates and

conditions as defined in Section 134 or those contained in the schedule prepared by the Labour Commissioner in accordance with Section 135, the question shall, if not otherwise disposed of, be referred by the Labour Commissioner to the Industrial Court which shall decide the matter.

137 (3) The decision of the Industrial Court shall be final"

This section falls under Part X111 of the Act entitled "LABOUR CLAUSES (PUBLIC CONTRACT)". It is for this reason that the Labour Commissioner has authority to bring an application of this nature only in respect of a public contract as opposed to a private contract.

In this respect a public contract is defined under Section 2 of the Employment Act as follows:

"public contract means a contract involving the expenditure of funds by the government or by any statutory body whether corporate or unincorporate for-

- (a) the construction, alteration, repair or demolition of public works;
- (b) the manufacture, assembly, handling or shipment of materials, supplies or equipment;
- (c) the performance or supply of services; or

(d) the supply of goods.

Counsel for the Applicant very ably argued that the Applicant has established that SEB a public corporate body had expended money in respect of '400 KV' project and therefore the Commissioner of Labour had locus standi in judicio to bring these proceedings.

The court has considered the evidence of the witnesses called by the Applicant especially that of the Labour Commissioner, Joshua Mndzebele, Joseph Masuku a worker employed in the '400 KV' project by J-TEC, Sibusiso Dlamini, an employee (employed in the '400 KV' project and later in the '132 KV' project); Ephraim Dlamini (an employee in the '400 KV' and later in the '132 KV' project); that of Balegelwa Ndzimandze an Induna at Luyengo (under Chief Mfanawenkhosi Tembelele); and that of Aaron

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Dlamini a resident of Luyengo who was relocated to a new house and compensation granted to him allegedly by the second Respondent (SEB).

All these witnesses apart from the last one Aaron Dlamini were unable to connect SEB to the '400 KV' project except to say that a few employees of SEB were seen at the site and participated in the erection of cables. They clearly did not know the circumstances under which the SEB employees came to the site. The first Respondent through Mr. Godfrey Sibiyi gave a clear and credible explanation as to the presence of SEB employees who had been allowed to participate in the construction to acquire knowledge on erection of steel, high voltage pylons.

Mr. Sibiyi distinguished the '400 KV' and '132KV' projects very succinctly. The documentation in bundle "A" shows that these were two different contracts the latter 'KV 132' being one between the first Respondent and SEB while the '400 KV' was between the first Respondent and MOTRACO of Mozambique.

Only the last witness for the Applicant Aaron Dlamini came close to establishing that SEB was involved in the compensation and construction of houses for the people that had been relocated.

His evidence however fell short of establishing on a balance of probability that the compensation he received was in respect of the '400 KV' project and the money was from Public funds. To the contrary this could not have been the case because that project was only passing across Swaziland and was fully owned by MOTRACO of Mozambique with the first Respondent (TRANSDECO) as the contractor.

For the aforesaid reasons, the Labour Commissioner lacks capacity to bring the application on behalf of the employees involved in the '400 KV' project and the same must fail.

The Labour Commissioner had all the aforesaid information prior to filing of this suit and especially after having failed to secure the attachment of monies owed to the 1st respondent by the 2nd Respondent before the High Court.

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The SEB wisely decided not to defend this suit having deemed the Application to be without any merits.

For these reasons the Applicant is to pay costs of the application including costs of counsel.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

