IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

THE COMMISSIONER OF LABOUR

Appellant

And

TRANSDECO GTMH (PTY) LTD

1st Respondent

SWAZILAND ELECTRICITY BOARD

2nd Respondent

Case No. 06/2004

Coram	ANNANDALE IP
MATSEBULA JA MAPHALALA JA	
For the Appellant Advocate	L. Maziya (Instructed byAttorney General)
For the 1st Respondent Advocate	D. Smith SC (Instructed by Robinson Bertram)
For the 2nd Respondent	No appearance

JUDGMENT

Maphalala JA

[1] This appeal is concerned solely with the interpretation and meaning of the definition of a "public contract" as defined in Section 2 of the Employment Act of 1980.

[2] The Appellant, who was the Applicant in the court below, is the Commissioner of Labour in the Kingdom of Swaziland. He brought an application before the President of the Industrial Court 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 of the Swaziland Electricity Board which is cited as the 2nd Respondent in this appeal.

[3] The President in the Court a quo found that the Appellant did not have locus standi in judicio to bring the application in terms of Section 137 of the Employment Act having found that the "400kv" project was not a public contract and dismissed the application.

[4] The Appellant being dissatisfied with the finding by the President of the Industrial Court filed the present appeal before this Court on the following grounds:

1. "1. The Honourable Judge a quo erred and grossly misdirected himself in law by holding that the Appellant does not have the locus standi in judicio to move the application on behalf of the former workers of the 1st Respondent.

2. The Court a quo applied a very wrong interpretation of Section 137 of the Employment Act of 1980 and that he appeared not to understand the said Section, its purpose and implications at all.
3. The Judge a quo did not take into account the evidence that was adduced before him by the Appellant and other witnesses which was designed to establish that the 2nd Respondent was

involved and did in fact use public funds in relation to the 400kv project.

4. The Court a quo erred and grossly misdirected itself in law in completely disregarding all the evidence of all the six witnesses who were called by the

Appellant despite that their evidence was uncontradicted by any evidence of the Respondent herein.

5. The Court a quo also erred in law in holding that all the witnesses, except the last one, were unable to connect the 2nd Respondent with the 400kv project. In fact the only conclusion from the uncontradicted evidence of the six witnesses is undoubtedly that the 2nd Respondent was actively involved and spent funds on a regular basis towards the completion of the 400kv project.

6. The Court a quo erred in law in holding that the evidence adduced by the six witnesses brought by the Appellant did not establish that the contract between the 1st Respondent and Montraco was in terms of Section 137 of the Employment Act of 1980, a public contract.

7. The Court a quo erred and grossly misdirected itself in law in holding that even the last witness called by the Appellant failed to establish on a preponderance of probabilities that the 2nd Respondent actually used public funds to compensate people who were housed along the path of the 400kv line yet the Respondent did not bring evidence to rebut that.

8. The Court a quo also misdirected itself in law in applying a very high standard of proof of evidence which is even above the high standard applicable in ordinary criminal matters.

9. The Court a quo also failed to apply the law on the facts before it and appeared to be more inclined to lean towards the Respondents even though they brought no evidence to disprove what Appellants had already proved even beyond reasonable doubt, with regard to the involvement of the 2nd Respondent in the 400kv project."

[5] From the above grounds of appeal three distinct issues emerge viz i) whether the Court a quo applied a wrong interpretation of Section 137 of the Employment Act, ii) whether the Court a quo erred in its treatment of the evidence of the witnesses brought by the Appellant; and iii) whether the Court a quo also misdirected itself in law in applying a very high standard of proof of evidence adduced a quo.

[6] The facts of the matter are that before the Court a quo there were two contracts in issue, namely the contract entered into between the 1st Respondent and Montraco, a Mozambican registered company; and the contract entered into between the 1st Respondent and the 2nd Respondent. The former contract was referred to in the

Court a quo as the "400kv contract" and the latter contract was during the proceedings in the Court a quo referred to as the "132kv contract".

[7] It was conceded by the Appellant's counsel in his opening address before the Court a quo that the 2nd Respondent was not a party to the contract between the 1st Respondent and Montraco. It was also conceded by the 1st Respondent's counsel that the second contract between the 1st and 2nd Respondents was indeed a "public contract" as defined in the Employment Act.

[8] The approach adopted by the Appellant's counsel was, however that, notwithstanding the fact that the 2nd Respondent was not a party to the "400kv contract" the 2nd Respondent had expended money etc thereon and accordingly same fell within the ambit of the definition of a "public contract".

[9] The Appellant in the Court a quo then led evidence in an effort to prove that the 2nd Respondent

indeed contributed labour, skills and money to the "400kv contract". The learned President in the Court a quo, however found that the evidence of the witnesses led fell far too short in proving this aspect of the matter. Consequently the Court found that the Appellant did not have locus standi and thus dismissed the application on that ground,

[10] In arguments before us it was submitted on behalf of the Appellant that the Commissioner of Labour was perfectly entitled to bring the application, as he did, in terms of Section 137 of the Employment Act No. 5 of 1980. The said Section provides as follows:

"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 fulfilment 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.

5

(2) In arriving at its decision on any question referred to it under subsection (1), the Industrial Court shall have regard to any established rates and conditions, or to any agreement, custom, practice or award that may be brought to its notice relating to the wages, hours or conditions of work or persons employed in a similar capacity and in a similar trade or industry to that of the person to whom the matter relates.

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

[11] It is common cause that the "contract" referred to in this section is a "public contract".

[12] Section 2 of the Employment Act of 1980 defines a "public contract" in the following terms:

"Public contract means a contract involving the expenditure of funds by Government or by any statutory body whether corporate or unincorporated, 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 service; or
d) The supply of goods".

[13] The position adopted by the Appellant in casu is that, notwithstanding the fact that the 2nd Respondent was not a party to the "400kv contract" the 2nd Respondent had expended money etc thereon and accordingly same fell within the ambit of the definition of a "public contract".

[14] The 1st Respondent on the other hand has taken the position that it is irrelevant with regard to the dispute at hand as to whether the 2nd Respondent did or did not contribute skills, labour and money to the "400kv contract" as the contributions aforesaid do not render the contract between the 1st Respondent and Montraco a "public contract" as defined in the Employment Act. In order to give effect to the definition of a "public contract" the establishment of a contract between the Government and a third party must be proved on the facts of the matter. In the absence of the existence of a contract, the interpretation of what is meant by the legislature in the definition of a "public contract" cannot even begin. For this proposition the court was referred to two South African leading cases in the law of

6

contract in Conradie vs Rossouw 1919 A.D. 279 and that of Registrar of Deeds vs Ferreira Deep Ltd 1930 A.D. 180.

[15] The issue therefore before us, simply put, is whether contributions of labour, skills and money by the 2nd Respondent to the contract between the 1st Respondent and Montraco makes the said

contract a "public contract" or whether a contract between the Government and a third party should exist to qualify as a "public contract".

[16] It would appear to me that in order to give effect to the definition of a "public contract" the establishment of a contract between the Government and a third party must be proved on the facts of the matter. There should exist a contract as aforementioned. In casu the Appellants, by their own concession, have agreed that they were not a party to the "contract" entered into between the 1st Respondent and Montraco and accordingly there can be no question of a "public contract" having come into existence.

[17] The "contract" per se did not involve the Government or any statutory body in the expenditure of funds. The reason for this is clear, namely that the Government and/or any other statutory body was not a party to the contract which would have entailed involvement by them in any manner as set out in the definition clause of the term "public contract".

[18] I further find that there is considerable force in the argument advanced by Advocate Smith for the 1st Respondent that there is a presumption that the same words in the same enactment bear the same meaning. What this presumption says is simply that since a certain consistency in the use of language can as a rule be said to prevail it is allowed to assume that a word or phrase bearing a particular meaning in a particular part or portion of an enactment, will bear the same meaning throughout the enactment.

[19] Immediately preceding the definition of "public contract" appears the definition of "public authority" and "public officer". "Public authority" is defined as meaning the Government or a local authority or the Ngwenyama in-Counsel.

"Public Officer" includes any officer of a public authority. Therefore a "Public contract" means a contract involving a public authority as represented by a "public officer". On the facts of the present case, the "400kv contract" did not involve a "public authority" and/or "public officer".

[20] It would appear to me further that the construction which the Appellant places on the definition of a "public contract" would lead to absurdities in that there will be very few private contracts and thus impeding commercial activity.

[21] In view of the above conclusion I find that it will not be necessary to consider the other issues I have mentioned earlier on in this judgment viz, ii) whether the Court a quo erred in its treatment of the evidence of the witnesses brought by the Appellant, and; iii) whether the Court a quo also misdirected itself in law in applying a very high standard of proof of evidence adduced a quo.

[22] For the afore-going reasons therefore, I propose that the appeal be dismissed as it is without merit, and it is so ordered.

[23] We make no order as to costs.

MAPHALALA JA

I AGREE

ANNANDALE JP

I AGREE

Delivered on the 1st December, 2004