

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CTV. CASE No. 289/97

IN THE MATTER BETWEEN :

PRISCELLA SHABANGU

APPLICANT

And

THE PRINCIPAL SECRETARY IN THE

MINISTRY OF HOME AFFAIRS.

1ST RESPONDENT

CIVIL SERVICE BOARD

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

CORAM:

DUNN J.

FOR THE APPLICANT:

MR A. LUKHJELE

FOR THE RESPONDENTS:

MR. NXUMALO

JUDGMENT

20TH FEBRUARY 1998.

In this application , the applicant seeks an order reviewing and setting aside a decision of the 1st and 2nd respondents, transferring the applicant from the Ministry of Home Affairs to the Deputy Prime Minister's Office.

The application is opposed by the respondents.

The applicant is employed by the Swaziland Government as an Assistant Secretary. She is on pensionable terms and is the head of the Refugee Section

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of the Ministry. She is based in Mbabane.

The applicant states that on the 14th June 1995, she received a letter, dated 13th June 1995 , from the secretary of the 2nd respondent. The letter was in the following terms :

I am directed by the Civil Service Board to inform you as I hereby do that a decision has been taken that you be transferred from the Ministry of Home Affairs to the Deputy Prime Minister's Office (Shiselweni Region) as Assistant Secretary 1 , Grade 11 with immediate effect.

The applicant states that the Civil Service Board did not inform her of its intention to transfer her to Nhlanguano before the decision to transfer her was taken . She states that the failure to inform her of such an intention, denied her the opportunity of making representations to the Board regarding the transfer. In particular, she states that the decision of the Board failed to take her personal circumstances ; her training and experience in the work she was doing and the fact that the post she was being transferred to was lower than her present post , into account.

The applicant sets out that she responded to the letter from the 2nd respondent by addressing a letter dated 15th June 1995, to the 2nd respondent. In the letter, which is annexed to the papers, the applicant dealt with all the factors on which she states she would have wished to have been heard , prior to the Board's decision being made. She states that during September 1995 she was called to a meeting that was attended by the former Prime Minister, Prince Mbilini, and the then Minister for Home Affairs. She states that the former Prime Minister advised her at that meeting that the decision to transfer her had been withdrawn and that she would receive a letter confirming that fact from the 2nd respondent. She states that she continued in her post at the Ministry of Home Affairs.

On the 14th of November 1996 the applicant states that the Principal Secretary in the Ministry of Home Affairs verbally informed her that he was transferring her to the Deputy Prime Minister's Office. This was followed by a minute from the Principal Secretary dated 22nd November 1996 . The minute reads as follows:

Pursuant to CSB/BF 1900 of 13th June 1996 and CO/LAB & PS/10 dated 20th September 1996 from the Secretary to Cabinet regarding your transfer from this Ministry, I have effected your transfer today. Payment of your salary from December 1996 onwards will be through the Deputy Prime Minister's Office , Head 6.

The answering affidavit on behalf of the respondents is deposed to by the secretary of the 2nd respondent. There is a supporting affidavit by the 1st respondent.

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The 1st respondent denies having taken the decision to transfer the applicant. He states that all he did was to " take administrative action pursuant to a transfer that had earlier on been made. " He points out that there was an error in his minute of the 22nd November in that the date of the memorandum CSB/BF 1900 should have been the 13th June 1995 and not the 13th June 1996.

It appears from the affidavit of the secretary to the 2nd respondent , that the letter which the applicant addressed to the 2nd respondent on the 15th of June 1995 was treated as an appeal by the 2nd respondent . It further appears, that the applicant made what was described as a " re-appeal" following a memorandum which was addressed to her on the 10th July 1995 informing her that "the decision conveyed to you under our even referenced letter dated 13th June, 1995 cannot be reversed." The secretary of the 2nd respondent has attached copies of further correspondence which he states dealt with the applicant's appeal to the 2nd respondent , culminating in a letter dated 26th July 1995 formally advising the applicant that her appeal had been dismissed by the 2nd respondent.

The secretary of the 2nd respondent states that "matters of transfer of civil servants are dealt with by the Civil Service Board which is an independent Board." There is no reference in the replying affidavits to the powers of the 2nd respondent to effect transfers of civil servants . Mr. Nxumalo, for the respondents, did not refer to any such powers in his argument . The 2nd respondent is a creature of statute. The relevant statute is the Civil Service Order, 1973. The 2nd respondent was established in terms of section 3 of that Order. The functions of the 2nd respondent are set out as follows under section 4.

The functions of the Civil Service Board shall subject to this King's Order- in - Council be those set out in Regulation 22 of the High Commissioner's Notice :

Provided that any reference in such Regulations to the " Resident Commissioner " shall be deemed to be a reference to the Prime Minister or any Assistant Minister to whom the Prime Minister may delegate any of the functions and duties thereby imposed on him.

The High Commissioner's Notice means " the Public Service Commission (General) Regulations published in the Laws of Swaziland under Commissioners Notice No. 34 of 1963. "

The functions of the Civil Service Board are set out as follows, under.

Regulation 22 -

1. The Board shall advise on any question relating to the appointment (including promotion or transfer) or termination of appointment or to the dismissal or other disciplinary control of officers or any officer.
2. The board shall advise on the following other matters-
 - (a) The localisation of the service, which the Board shall keep under review and report on the progress thereof to the Minister when required and at the least annually.
 - (b) Recruitment procedure.
 - (c) The selection of candidates for scholarships or training courses related to the service.
 - (d) Examinations held to select candidates for appointment to or promotion within the service .
 - (e) Confirmation in permanent and pensionable offices.
 - (f) Promotion and efficiency bars, and the withholding and restoration of increments.
 - (g) Maintenance of a system of annual confidential reports.
 - (h) Appeals relating to appointments (including promotions or transfers), disciplinary control, and termination of appointments, and dismissals.
 - (i) The extension of an officer's pensionable service beyond the normal age of retirement.

I have perused the Regulations in detail and have not been able to find any Regulation empowering the 2nd respondent to order the transfer of civil servants. Regulation 22 is silent as to the authority or body to which the 2nd respondent is to tender advice on the question of transfers. The Regulation certainly does not empower the 2nd respondent to direct the transfer of a civil servant . The power to advise on appeals, conferred on the 2nd respondent under Regulation 22(2)(h) does not confer any power to order a transfer. The decision of the 2nd respondent which was communicated to the applicant in the letter of the 13th June 1995 was thus clearly outwith the jurisdiction of the 2nd respondent and must be set aside.

The question of what is stated to have been an appeal by the applicant to the 2nd respondent falls away, in the light of the absence of any Regulation authorising the 2nd respondent to issue the order of transfer in the first place.

I must point out that there appears to be an urgent need for an examination of the Civil Service Order, 1973 and the Regulations thereunder and in particular the question of the transfer of civil servants . Numerous cases come before the courts on this issue and invariably , the applicants succeed. The authority of the 2nd respondent and the procedure to be followed when a transfer is to be effected need to be clearly spelt out in the Regulations .

Reliance has at times been placed on the provisions of the Government General Orders for transfers. The status of the General Orders has , however, never been clearly defined. The General Orders cannot , in any event , confer greater powers on the 2nd respondent than those conferred by the Civil Service Order 1973.

The application is granted with costs .

B. DUNN.

JUDGE.