

IN THE HIGH COURT OF SWAZILAND

PATRICK MGCUMO BHEMBE

Applicant

V

ATTORNEY GENERAL & 2 OTHERS Respondents

Civ. Case No. 1465/99

CORAM : S.W. SAPIRE, CJ

For Applicant : Mr Kuny. Instructed

by Mr. Dunseith

FOR 1st and 3rd Respondents ; Mr. Flynn instructed

by Millin and Currie.

JUDGEMENT

(02/07/99)

The applicant has come to court on application in order to have the appointment of the 3rd respondent as Chief Executive Officer of the Swaziland National Provident Fund set aside. The founding affidavit recites that the applicant has been up to now the Acting Chief Executive Officer of the Fund.

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Advertisements were made inviting persons to apply for the position of substantive Chief Executive Officer and the applicant was one of the persons who responded to the advert. Investigations were undertaken and experts in the field were consulted as a result of which the Board recommended the applicant, which is the 2nd respondent in this matter for the office.

Although the Swaziland National Provident Fund was established in 1974 in terms of an Order-In-Council, the appointment of the Chief Executive Officer is governed by the provisions of the Public Enterprise Control and Monitoring Act of 1989. Relevant is Section 8 which provides that except in the case of the University of Swaziland, the Governing body of each category "A" Public Enterprise shall nominate the Chief Executive Officer who shall be appointed or who may be dismissed by the Minister responsible after consultation with the standing committee.

The plain meaning of the words is that it is for the Board of the 2nd respondent to nominate the Chief Executive Officer and the person so nominated may be appointed by the Minister.

In this case after the nomination by the 2nd respondent of the applicant for the position the 3rd respondent approached the Minister and complained that he had been unfairly treated and overlooked. I am not required to find whether there is substance in any complaint of this nature. This application is not concerned with that issue at all. This application is concerned solely with the issue of whether the appointment was technically correct or not

The fact of the matter is that the Minister, after unconcluded and inconclusive correspondence with the 2nd respondent and in order to resolve the impasse he himself appointed the 3rd respondent as Chief Executive Officer without that person having been nominated by the Board.

The Minister then took the matter to the standing committee and having made the appointment asked for confirmation or ratification. In that he was again misdirected or uninformed on the provisions of the terms of the governing statutory provisions. The appointment must be made in consultation with the

standing committee. Ratification made after the appointment is not envisaged or permitted.

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But the fundamental problem with the appointment is that the Board did not nominate the person who has been appointed. Counsel who appeared for the 1st and 3rd respondents did not seriously contest this.

The 2nd respondent has without argument agreed to be bound by whatever decision may be made on this application.

It was argued that the Minister under the powers given to him under the Act was also entitled to act in the way he has done. Under the act the Minister is given power to take decisions on policy matters. The appointment of a Chief Executive Officer is not a policy matter. Moreover as we have seen the way in which the Chief Executive Officer is to be appointed is set down in no uncertain terms in the act itself.

For these reasons, as the appointment is obviously in conflict with the terms of the statute and must be set aside. I accordingly order that the appointment of the 3rd respondent as the Chief Executive Officer of the Swaziland National Provident Fund be set aside and that the cost for this application be paid by the 1st and 3rd respondents.

S.W. SAPIRE CJ

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