

HIGH COURT OF SWAZILAND

SANDILE MDZINISO

Plaintiff

V

ATTORNEY GENERAL

Defendant

Civ. Trial No. 34/99

CORAM

SAPIRE, CJ

FOR PLAINTIFF

MR. SHILUBANE

FOR DEFENDANT

MR, FLYNN

JUDGMENT

(23/07/99)

The Applicant, presently an Under Secretary in the Ministry of Health and Social Welfare is, on motion claiming, in essence, payment of E1 37 453.45 with interest and costs. The amount is said to comprise E128 753,42 in respect of a "Transport re-imbursive allowance" for the period March 1994 to December 1998, and E68 700,00 in respect of "entertainment allowance" during the same period, the aggregate of which is the said amount of E 137 453.45.

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The claim is, unnecessarily, combined with a prayer in the notice of motion, declaring that a memorandum from the Principal Secretary Ministry of Public Service and Information addressed to a number of government officials "is null and void and of no legal force or effect", There is no basis in law for making such an order, either at the instance of the applicant or at all. The memorandum is merely an internal administrative communication between government officials. It, like the memorandum of 8th December 1998 in which it withdrawn, cannot in itself, give rise to, or do away with rights and obligations between the parties. It is on the memorandum of 8th December that the applicant basis his claim. I will proceed therefore to examine the applicants substantive claim.

The applicant recounts in the founding affidavit that on 1st October 1985 he was appointed Commissioner of Police. This post entitled him to the use of a Government vehicle and an entertainment allowance of E150 00 per month. He apparently served as Commissioner until 28th February 1994, when to use his own words, his appointment was "Varied" to Ambassador with "all (his) personal rights to Grade 18." The letter which the applicant attaches in support of this allegation reads as follows

"Dear Sir

I am directed by the Civil Service Board to inform you as I hereby do that approval for the variation of your appointment from the post of Commissioner of Police, Grade 18 to that of Ambassador/High Commissioner (Canada) Grade 16 with Personal Right to Grade 18 has been granted with effect from date of assumption of duty."

The founding affidavit is silent as to whether the applicant was in fact appointed High Commissioner, and when, if at all Applicant assumed duty. The respondent has in a replying affidavit, attested by Hugh Magagula Principal Secretary of Public Service and Information, pointed out that appointments in the civil service fall into two categories. The King makes political appointments

such as High Commissioner while the Civil Service Board makes "Ordinary" appointments. In this connection there is a statement that applicant was appointed High Commissioner and that the appointment was revoked, in each instance by the King.. To this the Applicant has answered

" I deny that I was appointed as Ambassador as there is no legal instrument appointing me as ambassador and thereafter removing me from the said position"

(Paragraph 2.2.2 Replying Affidavit)

It would seem that Applicant was never appointed Ambassador or High Commissioner and he could therefor never have assumed duty. As the transfer of his rights was dependant on his taking up the post, the letter of the 28\* February (SM2) is of no assistance in determining whether the Applicant is entitled to the payments he is claiming. On the papers as they stand nothing indicates any reason why the Applicant should now since occupying his present position be entitled to the benefit of a re-imbursive transport allowance. This he enjoyed when commissioner of police, and which he may have enjoyed had he been appointed High Commissioner and assumed duty as such.

In paragraph 5 of the Founding Affidavit, after mentioning the variation of his appointment, he laconically states

"Thereafter I was appointed to my present position as under secretary in he Ministry of Health and Social Welfare"

The applicant makes no reference to the terms of such appointment or the salary and other benefits attaching thereto.

The real seed of the applicant's claim is to be found in a circular of the 11th August 1992. The heading is that of the Ministry of Labour and Public Service, Department of Establishment and Training. It is signed by the Acting

Principal Secretary, one E J Vilikati. After the date and reference a heading appears indicating that it is confidential and of limited circulation. It proclaims itself to be "ESTABLISHMENT CIRCULAR No 18 of 1982" Its content is "TRANSPORT RE-IMBURSIVE ALLOWANCE FOR PRINCIPAL SECRETARIES AND HEADS OF DEPARTMENTS ON SALARY GRADES 26 AND ABOVE." The last paragraph of the circular had application to the applicant, and reads as follows:

"The uniformed officers in the Police Department, the Defence Force and the Prisons Department who fall within this category and who opt to continue to use Government transport shall not be paid the car allowance"

I may be safe in assuming that the provision applied to the applicant who was Commissioner of Police at the time, but there is nothing in the papers to indicate whether or not he opted to continue to use government transport. In paragraph 4 of the founding affidavit, he merely says that he was entitled as Commissioner to the use of a government vehicle, but makes no mention of whether he gave up that use when the circular announced a new policy. How and on what authority, this change in policy was effected is not disclosed.

Some four years after applicant had ceased to be Commissioner of Police, a memorandum dated 8th December 1998 was issued under the hand of H D Magagula, Principal Secretary, Ministry of Public Service and Information. It was addressed to the Secretary to the Cabinet and the Principal Secretaries of a number of ministries, including that in which the Applicant is employed. Dealing with the commuted car allowances and entertainment allowances. The addressees were informed:

"It has been decided that all former Principal Secretaries and Commissioner of Police whose transport re-imbursive and entertainment allowances were stopped following the variation of their appointments, should be re-instated with effect from the date they ceased to receive them and any amount that

remained unpaid to date be re-imbursed without further delay"

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The applicant was stated to be one of the officers affected. Who made this decision and the authority so to do are undisclosed.

The issue of this memorandum in itself did not create any contractual obligations. The communique announces that after considerable deliberation a decision had been taken. The applicant was not party to the deliberations or to the decision. The process was entirely unilateral which is the antithesis of the formation of a contract. What has to be asked is whether there was any underlying obligation on the Government to make the payments referred to. In other words apart from the announcement in the memorandum how did the obligation to make payment of the allowances arise. If the applicant indeed has a claim it is for him to show some contractual or statutory duty on the government to make payment of the amounts.

Just over two weeks later the same Principal Secretary announced in a further memorandum that the matter had been reconsidered and that the letter of the 8th December was withdrawn. This like the previous action was unilateral. The pronouncements of the Principal Secretary as to the Applicant's entitlement to the allowances are not decisive, nor are they evidence of the terms of applicant's contract with the government.

As the Applicant has not established a contractual or legislative basis for his claim it must fail. The opinions and sentiments expressed in the documents attached to the Applicant's replying affidavit marked SM 11 and SM 12 take the Applicant's case, (which should have been made in the founding affidavit) no further. Even if regard were to be had thereto they are not admissions as claimed by the applicant but merely memoranda between government employees. It is disturbing that SM 11, which is a communication by an employee of the Attorney General with the client, (and as such privileged) should ever have come to Applicants knowledge, let alone to his possession.

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The papers do not disclose that the applicant is entitled to the relief he claims.

The application is accordingly dismissed with costs.

SAPIRE, CJ