



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1232/2008

In the matter between:

**ALFRED TSABEDZE
AND OTHERS**

APPLICANTS

AND

**SWAZILAND GOVERNMENT
ACCOUNTANT GENERAL
ATTORNEY GENERAL**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *Alfred Tsabedze And Others v. Swaziland Government & Others (1232/2008) [2013] SZHC52 (2013)*

Coram:

M.C.B. MAPHALALA, J

For applicants

Advocate L. Maziya instructed by
T.L. Dlamini & Associates

For Respondents

Senior Crown Counsel V. Kunene

Summary

Constitutional Law – payment of gratuity and arrear salary to members of Bucopho and Tindvuna Tetinkhundla in accordance with their terms and conditions of engagement – At the expiry of the life of Parliament they were paid 25% of gross earnings in terms of Finance Circular of 2006 unilaterally issued by respondents – Their terms of engagement entitled them to 50% of gross earnings at the end of the life of Parliament – Court finds that applicants were not prejudiced since the 2006 Finance Circular entitled them to enjoy increased salaries, allowances and gratuity compared to the terms of engagement – application dismissed.

**JUDGMENT
6TH MARCH 2013**

- [1] Sometime in 2008, the applicants instituted legal proceedings in respect of the following orders; firstly, reviewing and setting aside Finance Circular No. 1 of 2006; secondly, directing the respondents to pay to the applicants 50% of their gross earnings for the past five years as *ex gratia* payment upon applicants leaving office; thirdly, directing the respondents to pay the applicants their salary and sitting allowance backpay in terms of Finance Circular No. 3 of 2004 with effect from the 1st April 2004 including the months of April and May 2006. They further sought an order for costs of suit.
- [2] The applicants comprise both members of Bucopho and Tindvuna Tetinkhundla from Tinkhundla centres throughout the country; they were elected in terms of the Constitution from the various chiefdoms as their representatives to the Tinkhundla Centres. They were sworn into office in November 2003; pursuant to assuming office, the respondents furnished them with their terms and conditions of engagement.
- [3] Annexure “A” has been attached to the application as evidence of their terms and conditions of engagement. Article 11 thereof provides the following:

“11. Bucopho beNkhundla Members:

To get 50% of gross earnings for the past five (5) years as

ex-gratia payment.

111. Tindvuna TetiNkhundla

**To get 50% of gross earnings for the past five (5) years as
ex- gratia payment.”**

- [4] The applicants argued that the respondents subsequently issued Finance Circular No. 1 of 2006 and sought to reduce unilaterally the *ex-gratia* payment from 50% to 25%. The circular is dated 30Th May 2006 and it sought to increase the salaries and sitting allowances of the applicants; however, it reduced their gratuity from 50% to 25%. The circular was with effect from 1st April 2006 and was signed by the Principal Secretary in the Ministry of Finance.
- [5] The Applicants further argued that they were not consulted before the respondents unilaterally altered their terms and conditions; they argued that their Constitutional right to administrative justice was infringed by the 2006 circular on the ground that it introduced terms and conditions that were less favourable than those which they had previously enjoyed.
- [6] It is common cause that on the 23rd June 2006, the respondents paid to the applicants their sitting allowances and salary arrears following the salary adjustments in terms of Finance Circular No. 3 of 2004. The applicants further argued that in terms of the 2006 Finance Circular, they were to receive, like all other beneficiaries of the circular payment,

of their salaries and sitting allowances backpay calculated from the 1st April 2004. They further argued that they were only paid for the months of April and May 2006; and that the respondents are in arrears with the said payments for the remaining twenty four months calculated from April 2004 to March 2006.

[7] They also argued that on the 5th May 2006, they raised the two issues pertaining to the unilateral variation of their terms and conditions and the arrear salary and sitting allowances back-pay with the Minister of Regional Development and Youth Affairs; however, no response was received. On the 8th May 2007, they filed a letter of demand with the Attorney-General instituting proceedings.

[8] On the 10th June 2008 Justice Monageng granted them an order reviewing and setting aside Finance Circular No. 1 of 2006 as well as an order directing the respondents to pay to the applicants 50% of their gross earnings for the past five years as *ex-gratia* payment upon applicants leaving office. The court further granted the applicants costs of suit.

[9] It is not in dispute that the respondents did not file opposing papers to the application; however, it is common cause that both counsel

representing the parties were present in court when the matter was heard and judgment given in favour of the applicants.

[10] On the 2nd November 2009 the applicants instituted contempt proceedings against the respondents compelling them to comply with the Court Order issued by Justice Monageng. They sought the following orders: firstly, compelling the respondents to pay the applicants their gratuity according to the Court Order issued by the High Court on the 6th June 2008. Secondly, declaring the non-compliance with the said Court Order as a wilful contempt of the authority of the court. Thirdly, that an order do hereby issue committing the second respondent, a certain Khabonina Mabuza, into gaol for a period of sixty days from the date of the order of the court referred to in paragraph (a) above. Fourthly, directing the first and second respondents to pay applicants who are former members of Bucopho Benkhundla the outstanding amount of E7 250.00 (seven thousand two hundred and fifty emalangen) per person. Fifthly, directing the first and second respondents to pay applicants who are former members of Tindvuna TetiNkhundla the outstanding amount of E14 500.00 (fourteen thousand five hundred emalangen) per person. They further sought an order for costs at attorney and own client scale including costs of counsel.

[11] The applicants averred that the Court Order was served upon the respondents; and, in addition, an attorney from the Attorney General's chambers was present in court when the court issued the Order on the 10th June 2008. They further alleged that pursuant to the said Order, the respondents paid them 25% gratuity in accordance with the 2006 Finance Circular; and, that in doing so, they acted in contempt of court. In addition, they argued that they underpaid applicants who are members of Bucopho an amount of E7 250.00 (seven thousand two hundred and fifty emalangeni) and further underpaid applicants who are members of Tindvuna Tetinkhundla an amount of E14 500.00 (fourteen thousand five hundred emalangeni) per person.

[12] The applicants argued that subsequent to the payment by the respondents, their erstwhile attorneys wrote a letter to the third respondent dated 6th March 2009 alerting him of the non-compliance with the Court Order. In his response in a letter dated 6th March 2009, the third respondent stated the following:

“....Our instructions pertaining to the above captioned matter are that the Ministry of Tinkhundla denies liability of your client's claim. Your clients were paid in accordance with annexure “A” hereof less the applicable tax. This means that they were paid 25% of their gross earnings for the period of their service. These monies were greater than the 50 % as was ordered by the court.... This means that your clients were overpaid and therefore owe the government.”

[13] The applicants contend that the contents of the third respondent's letter shows not only that they are aware of the Court Order but that they are deliberately acting in contempt; hence, the prayer for an order at a punitive scale including costs of counsel. I may add that the third respondent's letter overlooks the fact that a Court Order was issued; and, surprisingly the letter states that they deny liability for the claim. It is common cause that the Order was issued on the 10th June 2008 and the contempt proceedings were lodged on the 2nd November 2009, more than a year later; however, the respondents did not appeal the judgment or apply for rescission of the judgment.

[14] In their answering affidavit, the respondents concede that the Court Order was granted for payment of gratuity to the applicants in accordance with their terms and conditions. However, they argued that since the Court Order had set aside the 2006 Finance Circular, that means all the monies paid to the applicants in terms of the said circular were an overpayment to the applicants; hence, the government should be reimbursed since the applicants were unjustly enriched. They further argued that the applicant's gratuity was calculated in such a way that they would not be in a worse position.

[15] It is not in dispute that the 2006 Finance Circular increased the salaries and allowances of the applicants; however, it reduced the gratuity to

25% of their gross earnings. It is common cause that from the date of commencement of the circular until it was declared invalid on the 10th June 2008, the applicants enjoyed increased salaries and allowances. It is also not in dispute that at the end of their term of office, the applicants were paid 25% of their gross earnings in terms of the 2006 Finance Circular.

- [16] Applicants who were members of Bucopho were each paid gratuity of E20 750.00 (twenty thousand seven hundred and fifty emalangeni) and applicants who were members of Tindvuna Tetinkhundla were paid E34 750.00 (thirty four thousand seven hundred and fifty emalangeni) by the Government. Since the Court Order sets aside the 2006 Finance Circular, this means that the said circular was invalid from its inception; hence, the increased salaries and allowances enjoyed by the applicants were unlawfully paid and constitute overpayment since they benefited from an invalid finance circular. I agree with the sentiments expressed by the respondents in paragraph 4.4 of their answering affidavit, where they state the following:

“4.4 If the gratuity was calculated at 50% for example Bucopho would have been entitled to E28 000.00 (twenty eight thousand emalangeni) and Government would deduct E27 000.00 (twenty seven thousand emalangeni) as overpayments of salaries courtesy of the circular and Bucopho would therefore take home a total of E1 000.00 (one thousand emalangeni) instead of the amount of

E20 750.00 (twenty thousand seven hundred and fifty emalangeni) they were paid by government. On the other hand Tindvuna Tetinkhundla would have been entitled to E56 000.00 (fifty six thousand emalangeni) less E27 000.00 (twenty seven thousand emalangeni) overpayment of salaries and would take home a total of E29 000.00 (twenty thousand emalangeni) instead of the amount of E34 750.00 (thirty four thousand seven hundred and fifty emalangeni) they were paid by government.”

[17] A calculation of 50% of gross earnings based on the Court Order less a deduction of overpayment would create an overpayment due to the Government. I agree with Counsel for the respondents that the 2006 Finance Circular was effective until it was set aside by the Court in which event it ceased to exist, and, it became invalid with retrospective effect. The benefits accruing from the circular were unlawful, and if so advised, the respondent could claim back the monies received by the applicants as increment. See Cora Hoexter, Africa at page 485.

[19] The applicants were not prejudiced by the 2006 Finance Circular but they benefited both in terms of the increased salary, allowances and gratuity. The gratuity in terms of the 2006 Finance Circular benefited the applicants on the ground that the gratuity they received was higher than what they would have received in terms of their contract of engagement. As stated in the preceding paragraphs, the applicants were in fact overpaid, and, the application should be dismissed.

[20] The issue which remains relates to costs of suit. It is common cause that the court granted judgment in favour of the applicants on the 10th June 2008. The respondents did not lodge an appeal against the said judgment or apply for rescission in terms of the Common Law or Rule 42. They waited until the 2 November 2009 when the applicants lodged contempt proceedings. It was incumbent upon the respondents, after the court had granted the judgment to act swiftly and challenge the judgment and/or comply with it. Incidentally the respondents were aware of the judgment but they elected to act in contempt thereof for more than a year until the application to compel them was lodged. To that extent they should pay costs at a punitive scale. The applicants would not have instituted contempt proceedings if they did not ignore the judgment; clearly, the applicants were put out of pocket.

[21] The respondents by their failure to appeal the judgment or apply for rescission or implement the judgment for more than a year acted recklessly and vexatiously in the circumstances and their conduct was deplorable towards the court; their conduct was contemptuous and it further undermined the dignity of the court. This is a clear case in which the respondents should bear costs at attorney and client scale including costs of counsel as duly certified in terms of Rule 68 (2). See the Law of Costs, A.C. Cilliers, Butterworths, Durban 177 at pages 66-70.

[22] Accordingly, the following orders are made:

- (a) The application is dismissed.
- (b) The respondents are ordered to pay costs of suit at attorney and client scale including costs of counsel as duly certified in terms of Rule 68 (2).

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT