IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 898/2014

In the matter between:

XOLILE CYNTHIA SUKATI **APPLICANT**

AND

THE PRINCIPAL SECRETARY

MINISTRY OF PUBLIC SERVICE **1ST RESPONDENT**

THE MINISTER OF PUBLIC SERVICE **2ND RESPONDENT**

THE MINISTER OF FINANCE **3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

Neutral citation: *Xolile Cynthia Sukati v. The Principal Secretary, Ministry of Public Service & Others (898/2014) [2014] SZHC 186 (7th August 2014)*

Coram **:** **M. E. SIMELANE, AJ**

Heard **:** **24th July 2014**

Delivered **:** **7th August 2014**

Summary

Declaration order – applicant seeking a Cabinet decision to be binding as of the 29th March 2012 placing her on salary grade B7 – respondent refusing to comply with Cabinet's decision – urgent application – contention that application should be dismissed as it was not urgent – matter having been dealt as an ordinary application and not as an urgent matter – the cause of action not labour related – application upheld with costs

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JUDGMENT
7th AUGUST 2014

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[1] The Applicant per an urgent application enrolled on the 7th of July 2014 sought the following orders:

> *"(1) Dispensing with the usual forms relating to procedures, forms and time limits in connection with the institution of proceedings and hearing this matter on the basis of its urgency.*
>
> *(2) An Order declaring that on 29th March 2012 Cabinet graded and or placed the Applicant on salary grade B7.*
>
> *(3) Directing that the budgetary machinery for putting the aforesaid Cabinet decision be put into effect and/or in operation with effect from the date of its issuance.*
>
> *(4) Directing the respondents to pay to the Applicant arrears of salary due to her with effect from the date of its issuance.*
>
> *(5) Ordering the respondents to pay interest at the rate of 9% on the arrears of salary in question with effect from the issuance of the aforesaid Cabinet directive to the date of the judgment in this matter.*
>
> *(6) Costs of suit. Insofar as the First respondent is concerned, such costs to be at attorney and client scale and to be paid personally from his own pocket in the event he opposes this application.*

(7) Further and/or alternative relief."

[2] Both parties filed comprehensive heads of arguments for which I am grateful.

[3] The Applicants case is found at paragraph 8 to 16 of her founding affidavit which I quote hereto:

> *8.*
> *"I first joined the Civil Service on 25 February 1993.*
>
> *9.*
> *In November 2011, I was appointed as acting Senior Personal Secretary to the Chief Justice in the Swaziland Judiciary.*
>
> *10.*
> *I wish to draw to the attention of this Honourable Court that the previous Senior Personal Secretary to the Chief Justice, one Mrs Maria Dlamini, who has since retired, was herself on a higher Grade than B6.*
>
> *11.*
> *By letter dated 7 March 2013 the Civil Service Commission approved my promotion to the Grade of B7 in the post of Senior Personal Secretary with effect from 1 November 2011. I hereby attach a photostatic copy of the instrument letter Marked "A".*
>
> *12.*
> *I aver that following a recommendation by the Judicial Service Commission, and on 29 May 2012, Cabinet approved my grading and placed me on salary scale Grade B7. I hereby attach a photostatic copy of the Cabinet directive in question marked annexure "B".*
> *13.*
>
> *Despite a clear directive by Cabinet, the Ministry of Public Service, acting mostly through the First respondent, has refused to recognise, honour and implement the Cabinet decision in question, throwing me from pillar to post in the process. I attach a letter written to the Principal Secretary in the Ministry of Public Service, marked annexure "C".*
>
> *14.*
> *It is my respectful submission that once Cabinet has taken a decision no individual can render it nugatory as the Ministry of Public Service has*

done in this matter. Only Cabinet has the power to change its decision, but even so, it has to observe procedural fairness such as the right to be heard. All of that has not happened in this matter.

15.

I categorically state that Cabinet has not changed its decision contained in annexure "A" above. Accordingly, the respondents have no justifiable defence to the prayers sought.

16.

In my respectful submission a defiance of a Cabinet decision by a Principal Secretary on a daily basis as the present matter shows calls for intervention by the court as a matter of urgency. It prejudicially affects me in my right to proper remuneration and it does so on a daily basis."

[4] The Respondents through the 1st Respondent opposed the application by first raising the following points *in limine*:

a) *Jurisdiction* - in that this is a labour matter which should have been taken to the industrial court.

b) *Urgency* – the applicant knew as from the 7th of March 2013 about her promotion but chose not to do anything up to now.

c) The High Court has got no right to *declare a fact* but may only declare *a right* hence prayer 2 is incompetent.

[5] On the merits MR. EVART MADLOPHA laid the defence of the Respondents at paragraph 11 to 16 as follows;

"AD PARAGRAPH 10

11. I admit that Mrs. Maria Dlamini was remunerated on Grade B7. However, prior to Mrs. Dlamini's appointment as senior Personal Secretary to the Chief Justice she was Senior Personal Secretary 1 on the Private and Cabinet Offices a post on ***Grade 7****. When Mrs. Dlamini transferred to the Judiciary, she left with her personal right. Senior personal Secretary in the Judiciary is and always been on* ***Grade B7****. Attached hereto are extracts from the Establishment Register for the Financial Year 2013/14 marked "A" and "B" reflecting the Grades for Senior Personal Secretary in the Private and Cabinet Office and Senior Personal Secretary in the Judiciary respectively****.(bold my emphasis)***

AD PARAGRAPH 11

12. I admit the Civil Service Commission approved the applicant's promotion by letter dated 7 March 2013. The error was initially made by the Ministry when the request for filling of vacant positions was made to Cabinet. When the error was realized, my Ministry notified the Civil Service Commission. Subsequently the Civil Service Commission corrected the error by letter dated 15 April 2013 which placed the job title for ***Senior Personal Secretary II*** *on the Grade of B6. A copy of the Civil Service Commission's amendment is attached and marked "C".* ***(bold my emphasis)***

AD PARAGRAPH 12

13. I deny that Cabinet approved the applicant's grade on B7. Cabinet does not grade posts. Cabinet approved the filling of vacant posts.

The request made to Cabinet for filling of vacant post included, as stated above, the erroneous grading of the applicant's post.

AD PARAGRAPH 13

14. *I deny that Cabinet directed that the post of Senior Personal Secretary be changed to Grade B7. Errors occur in the grading of public servants, once the error is realized it is incumbent on my Ministry to correct the mistake. I accordingly deny that I am refusing to implement a Cabinet decision.*

AD PARAGRAPH 14

15. *I deny that the Ministry of Public Service has rendered a Cabinet decision nugatory. The Cabinet directive was that vacant posts be filled. Grading was done by the Ministry of Public Service. In so grading an error was made which was subsequently corrected. The right to be heard is not implicated at all in this matter.*

AD PARAGRAPH 15

16. *I deny each and every allegation in this paragraph. The Applicant is attempting to gain an advantage to which* ***she is entitled*** *as result of a reasonable mistake."* ***(bold my emphasis).***

[6] It must be noted that the deponent says the High court post occupied by the applicant has always been on **Grade B7** but goes on to say that she has been placed on the position of Senior Personnel Secretary **II**. The letter (C.S.C Form 7(a)) does not support the deponent's contention as it simply refers to **Senior Personnel Secretary** which is in line with the Cabinet's decision.

POINTS OF LAW

[7] **JURISDICTION** – The Applicant argued that this is not a matter between herself and employer which is the CIVIL SERVICE COMMISSION hence the Industrial Court has got no jurisdiction to deal with it.

[8] Section 187(1) of the **Swaziland Constitution of 2005** which provides as follows support the Applicant's contention:

> *"Appointment, promotion, transfer, etc., of public officers.*
>
> *187. (1) Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments, and confirmation of appointments) promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission."*

[9] Section 178 of the **Constitution** provides as follows:

> *"Independence of a service commission.*
>
> *178. In the performance of its functions under this Constitution, a service commission shall be independent of and not subject to any Ministerial or political influence and this independence shall be an aspect of the exercise of any delegated powers or functions of the Civil Service Commission or any other service commission or similar body."*

[10] It is clear that the CIVIL SERVICE COMMISSION is the one tasked with the employment relationship between it and the Applicant. In the matter at hand it does not feature nor is there any prayer sought against it.

[11] The cause of Applicant's argument centres around a CABINET DECISION which comes from a body that does not employ public officers.

[12] It follows from the foregoing consideration that I dismiss this point.

[13] ***URGENCY*** – when the matter appeared before me on the 14th of July 2014 the Respondent was allowed leave to file its affidavit and the matter was postponed by consent to the 24th July 2014. The Respondent argued that I should not dismiss this matter on this point alone but should be guided by the dicta in the ***Shell Oil (Pty) Ltd t/a Sir Motors*** case in that I must eschew technical defects and not be bound by inflexible formalism in order to secure an expeditious decision of this matter and in so doing avoid unnecessary delay and costs. ***(Lwazi Sibandze v Commissioner of Police & Another (2899/10) [2014] SZHC 107).***

[14] I cannot then set aside the application on this point which accordingly fails.

[15] The argument of getting an alternative remedy does not apply in the matter as the Applicant seeks a declaratory order.

[16] ***DECLARATION OF FACT OR RIGHT*** – the Respondent contended that the Applicant is seeking an Order for a declaration of fact.

[17] I hold that prayer 2 read with the other prayers are a declaration of rights of the Applicant. To be precise prayer 3 to 5 constitute a *mandamus* application.

[18] The Applicants prayers befit an application for a declaration of rights for she is an interested party and she has a direct and substantial interest which is existing and also lies on the future and or contingent to her claim ***(Ex parte Special Tribunal under Immigration Act 32/1964 SLR (1989-81) 107 at page 110 A – B)***.

[19] The Industrial Court does not have powers to grant a declaratory order ***(Ex parte Especial Tribunal (supra).***

[20] It follows from the foregoing consideration that all the Respondent's points *in limine* are dismissed with costs.

MERITS

[21] It is common cause that the CIVIL SERVICE COMMISSION per a letter (CSC FORM 7a) dated 7th March 2013 promoted the Applicant to SENIOR PERSONNEL SECRETARY under B7 salary grade. The promotion was with effect from 1st November 2011.

[22] The letter of promotion was given to the Applicant and the Secretary to the JUDICIAL SERVICE COMMISSION, Mrs. Lorraine Hlophe confirmed that the Applicant commenced her post with the judiciary on the 2nd November 2011.

[23] The grading of the Applicants post was approved through a CABINET DECISION number **CM28785** communicated to the Ministry of Justice and Constitutional Affairs by the Principal Secretary of the Ministry of Public Service through a letter dated 12th June 2012.

[24] The letter read as follows:

> *"Subsequent to your request to fill vacant positions in your Ministry, please be informed that Cabinet through CM28785 has approved the attached vacant positions for filling.*
>
> *Please note that in cases of promotion to these approved vacancies, the resultant vacancy has also been approved for filling*. (underlining my emphasis)
>
> *Your usual co-operation is highly appreciated.*
>
> *F. T. MHLONGO*
> *For: PRINCIPAL SECRETARY"*

[25] It is clear that the Cabinet's decision covered matters of promotion too and it is common cause that the applicant holds the position of Senior Personal Secretary in the judiciary and her position was graded at salary B7.

[26] The 1st Respondent on the other hand contends that the Cabinet decision was wrong and the Applicants should have been graded at salary B6.

[27] He contends that after noting the error the CIVIL SERVICE COMMISSION per a letter dated 15th April 2013 corrected the anomaly by placing the Applicant on grade B6. The letter was however not served upon the Applicant or the officer responsible for expenditure in the Ministry of Justice unlike the earlier letter dated 7th March 2014.

[28] It was contended by the Respondent's attorney that due to the ongoing negotiations and confusion the Applicant has to date not been paid according to her promotion either at grade B6 or B7.

COURT'S ANALYSIS

[29] The 1st Respondent admits that they did not approach Cabinet to reverse decision number CM28785 hence the decision remains valid and executable.

[30] It is only Cabinet that can reverse its decision albeit not retrospectively due to the requirement of legitimate expectation coupled with the right of the Applicant to be heard.

[31] The Applicant cited the Lesotho Appeal Court case of ***Attorney General and Others v Makesi and Others (LAC 2000/2004) 38 [2001] LSHC 141*** which I find to be on all fours with the present matter.

[32] The Respondents argued as follows against the cited case:

> *"4.1 The case of **Attorney General And Others v Makesi and Others LAC (CIV) NO.3 of 2000** relied upon by the applicant is an authority distinguishable from the facts of the present matter by virtue of the fact it deals with a situation where despite the directive from Cabinet, there was no implementation of same by appellants.*
>
> *4.2 The respondents in the Makesi case wanted to be placed in a higher grade based on a directive by Cabinet, which was not implemented not a grade erroneously contained in the request by the Minister of Justice. The applicant was misled in relying on the **Makesi** case."*

[33] I disagree with learned Respondents counsel argument for even if the line Ministry had created an error legitimate expectation had been made to the Applicant about her salary grade.

[34] The power to make a decision or to declare a policy includes the power to cancel it or withhold its implementation. This right can be delegated by direct implication in extreme circumstances which is not the case in the present matter.

[35] In the **ATTORNEY GENERAL case (supra)** cabinet approved the upgrading of salaries of judicial officers of the courts. Despite the Cabinets approval the Minister of Public Service upon being requested to do so by the Minister of Justice, failed to implement that decision whereupon the concerned judicial officers brought an action to compel the implementation of the decision.

[36] Friedman JA (Gauntlett JA and Ramodibedi JA concurring) in the **Attorney General** case (supra) held as follows:

> *"This appeal must accordingly be approached on the basis that the Cabinet decision remained unchanged. I interpose here to point out that had that not been the case, i.e. had the Cabinet reversed its decision, applicants would have been entitled to contend that they had a legitimate expectation that the decision would not be altered without affording them a hearing. They were not given a hearing. Consequently, had the decision been changed, applicants would have been entitled to have the decision to reverse the earlier decision set aside and an order that it be reconsidered after having given applicants a fair hearing on an issue which clearly adversely affected their rights. See Attorney of General of* ***Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC)***
>
> *I pass on to deal with the next defence raised by respondents, namely, that this is a matter of government policy in respect of which the court's jurisdiction is excluded.*
>
> *Respondents' counsel submitted that the power to make a decision or to declare a policy includes the power to cancel it or to withhold its implementation. There can be no dispute that a policy- maker is entitled to*

change policy decisions. The importance of an unfettered power to change policy had been stressed. See; ***Hughes v Department of Health and Social Security [1985] AC 776 (HL) at 788.*** *But this does not mean that the power of the courts to intervene in appropriate circumstances has been removed. As Sedley J stated in* ***R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd. [1995] 2 ALL ER 714 (QBD) at 731 C-D****:*

> *'While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy)'*

The learned judge continued at 731D-E:

> *'…. It is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it.'*
>
> *Although these statements were made in the context of a legitimate expectation situation, they serve to illustrate the point that there are limitations on the power of a policy maker to change policies. This was emphasized by Lord Denning MR in* ***Re Liverpool Taxi Owners' Association [1972] 2 ALL ER 589 (CA) at 594 G*** *where he stated that a person or public body entrusted with powers for public purposes cannot divest themselves of those power, e.g by contract. However, Lord Denning went on to point out that:*

> *'… that principle does not mean that a [public] corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it.'*

See also Craig: ***Administrative Law, 3 ed, 672-675****.*

> *In the present case there has not been a mere expression of policy, for example that the government intended policies. This was emphasised by Lord Denning MR in order to increase the jurisdiction of certain courts and upgrade judicial salaries. A decision was taken by the Cabinet to increase the jurisdiction of certain specified courts and to upgrade in a specified manner the salaries of the judicial officers who function in those courts. But the matter does not rest there. On 20 August 1996, pursuant to the Cabinet decision, a specific request was directed by the Department of Justice to the Principal Secretary, Public Service, to give effect to the decision which was to come into operation on 1 April 1996. Save for the contention that the Cabinet decision was changed, which for the reason stated above, I have found to be devoid of substance, there is no explanation from the respondents as to why this direction was not carried out.*
>
> *In these circumstances there is no reason why the aid of the court should not be invoked in order to ensure that effect is given to the Cabinet's decision and to the direction for its implementation contained in the savingram dated 20 August 1996, provided, of course that implementation would be intra vires the person responsible therefore."*

[37] I fully align myself with this approach.

[38] It follows for the reasons set out above that the failure of 1st or 2nd Respondent to carry out the cabinet's decision is unlawful and the High Court has power to enforce compliance by means of a *mandamus* and to grant the declaratory order.

[39] From the totality of the aforegoing I hereby grant the orders in the Notice of Motion in terms of prayers 2 to 6 with costs.

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MBUSO E. SIMELANE
ACTING JUDGE

For Applicant : In person
For Respondents : T. Khumalo