

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3/2000

In the matter between:

SIPHO SHABANGU

APPLICANT

and

S. AND S. BOTTLE STORE

RESPONDENT

CORAM:

| | | |
|-----------------|---|-----------|
| NDERI NDUMA | : | PRESIDENT |
| JOSIAH YENDE | : | MEMBER |
| NICHOLAS MANANA | : | MEMBER |

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|----------------|---|---------------|
| FOR APPLICANT | : | B. MAPHALALA |
| FOR RESPONDENT | : | NO APPEARANCE |

J U D G E M E N T – 05/06/03

This is an application for determination of unresolved dispute pursuant to Section 41 (3) of the Employment Act No. 5 of 1980.

The Respondent a duly registered company in Swaziland in terms of the Companies Act was duly served with the application on the 22nd February 2002. The Respondent did not enter appearance nor did a representative of the company attend the trial. The matter proceeded ex parte consequently.

The Applicant told the court that he was employed as a barman on the 10th August 1996 and was in continuous employment of the Respondent until the 9th August 1999 when he was dismissed on allegation that he had caused shortage of stock at the bar.

The Respondent initially demoted the Applicant to the position of cook which position he declined to take since he had no skill or experience of cooking. He was to be paid E400.00 (Four Hundred Emalangeni) per month instead of the salary of E500.00 (Five Hundred Emalangeni) he earned then as a bar man.

He was then verbally summarily dismissed upon declining to take up the lesser post.

He reported the dispute to the Labour Commissioner. Efforts to resolve the same through conciliation failed hence the matter came before court.

The Applicant claims leave pay in the sum of E280.00, one month's salary in lieu of notice in the sum of E560.00, Additional Notice in the sum of E160.00 and severance allowance in the sum of E400.00

Furthermore the Applicant claims compensation for the dismissal which he termed unlawful and unfair.

In support of the claim for compensation, the Applicant told the court that he was single and was unemployed for a period of three (3) years since he was dismissed. He had however gotten employed in the year 2002.

He had three dependant children and parents to support and the loss of employment seriously undermined such support. He suffered loss and damage as a result of the conduct of the Respondent.

In terms of Section 42 (2) (a) the Respondent bears the onus of establishing that it dismissed the Applicant for a reason provided by Section 36 of the Employment Act.

Furthermore, in terms of Section 42 (2) (b) the Respondent has a further onus of proving on a balance of probabilities that it was fair and reasonable in the circumstances of the case to dismiss the Applicant.

By failing to file any papers and attend the hearing, the Respondent has by its default failed to discharge such onus placed on it by the Act.

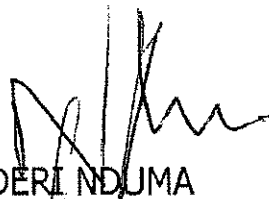
The Applicant's application has accordingly succeeded and the Respondent is liable to pay the terminal benefits as outlined in the particulars of claim, paragraph 7.

Considering the personal circumstances of the Applicant, the loss he has suffered as a result of the unfair dismissal, taking into account the period of service he had given the Respondent and the failure of the Respondent to defend its transgressions before court, the court awards ten (10) months salary as compensation for the unfair dismissal in the sum of E5,600.00.

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|---------------------------------|-----------|
| Total Award accordingly will be | E5,600.00 |
| | E 280.00 |
| | E 560.00 |
| | E 160.00 |
| | E 400.00 |
| | <hr/> |
| | E7,000.00 |
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The Respondent is to pay costs of the Application.

The Members Agree.



NDERI NDUMA
JUDGE PRESIDENT – INDUSTRIAL COURT

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO 215/99

In the matter between:

LUNGILE SIHLONGONYANE
SIFISO FAKUDZE

1ST APPLICANT
2ND APPLICANT

And

SWAZILAND DEVELOPMENT &
SAVINGS BANK

RESPONDENT

CORAM:

| | | |
|-----------------|---|-----------|
| NDERI NDUMA | : | PRESIDENT |
| JOSIAH YENDE | : | MEMBER |
| NICHOLAS MANANA | : | MEMBER |

| | | |
|----------------|---|----------------|
| FOR APPLICANT | : | P. R. DUNSEITH |
| FOR RESPONDENT | : | P. FLYNN |

J U D G E M E N T - 01/04/03

This is an application for determination of an unresolved dispute in respect of which a certificate of unresolved dispute was issued by the Commissioner of Labour in terms of Section 65 (1) of the Industrial Relations Act No. 1 of 1996 on the 26th August 1998.

The dispute as set out in the particulars of claim is that in June 1996, the two Applicants were recruited internally to perform the job of system administrator/operator, the 1st Applicant situate at Matsapha branch whereas the 2nd Applicant was at Matata branch.

The two Applicants allege that the appointments to the systems administrator/operator was on an acting capacity and the position was on Grade 5.

The 1st Applicant acted on the aforesaid position up to August 1997 but the Respondent failed to pay her the acting allowance in terms of Article 6.2 of the applicable collective agreement between the Respondent and Swaziland Union of Financial Institutions and Allied Workers, which article is a term and condition of the contract of employment between each of the Applicants and the Respondent.

The 1st Applicant further claims that the Respondent failed to confer her with the appropriate Grade 5 upon expiry of 6 months on an acting capacity from June 1996 in terms of the same Article 6.2 but instead she was transferred to a different branch and demoted to be a counter clerk.

Similarly, the 2nd Applicant alleges that he performed the duties of the system administrator/operator until August 1997. The Respondent paid him an acting allowance calculated erroneously on the basis of Grade 4a instead of Grade 5.

Furthermore the Respondent failed to confer the appropriate Grade 5 upon him after the expiry of 6 months from June in terms of clause 6.2 of the collective agreement.

The 1st Applicant therefore claims an order directing the Respondent to pay her acting allowance being the difference between notch 1 and notch 2 of Grade 5 for a period of 6 months. Confer Grade 5 upon her with effect from 1st January 1997 and calculate and pay to her all arrear salaries, allowances and emoluments arising from the two claims above and to adjust the pension contributions accordingly.

The 2nd Applicant seeks an order directing the Respondent to pay him acting allowance calculated as the difference between notch 1 and notch 2 of Grade 5 for a period of 6 months less the acting allowance previously paid to him, to confer Grade 5 upon him with effect from 1st January 1997 and to calculate and pay to him all arrear salaries,

allowances and emoluments from the two claims above and adjust the pension contributions accordingly.

In its Reply to the particulars of claim, the Respondent states that in June 1996 the two Applicants applied for training positions as systems operators and were placed as such by the Respondent and denies that the Applicants were placed as acting systems administrator/operator on grade 5.

The Respondent further states that the 1st Applicant held the position up to August 1997 and was not acting in substitute for another employee in that position, nor was she qualified or entitled to be placed on grade 5.

As concerns the 2nd Applicant, the Respondent admits that he performed the duties of systems administrator/operator until August 1997 but denies that it calculated acting allowance erroneously on the basis of grade 4a instead of Grade 5.

The Respondent further states that the 2nd Applicant was not entitled nor qualified to be placed on Grade 5.

The allegation that the 1st and 2nd Applicants were demoted to their previous grades and positions is also denied.

The issue for determination is whether the Applicants were appointed as trainees or were appointed on acting capacity. And if they were appointed to act, what grade was the posts they acted on.

Both parties have relied on oral and documentary evidence, the Applicants wanting to demonstrate that indeed they acted on a Grade 5 position whereas the Respondent's position is that they were appointed as trainees to act on Grade 4a positions which were subsequently abolished as a result of centralization of the bank's computer operations.

Whereas it is not in dispute that the Applicants served as systems administrators from June 1996 until August 1997, there is disagreement as to whether there were different categories of

systems administrators on different grades and if so, on what category were the two applicants placed.

When the Applicants were appointed, they were given job descriptions in respect of the positions which they would be acting. These were submitted as exhibit "A1" and "B1". the job descriptions also give the job specification to include an (a) o-level with credits in mathematics and English (b), banking/accounting basic course (c), Fastnet Retail Banking System Account Parametres Training; Introduction to Sco; Basic Sco, Xenix System Administration Supporting Sco, Xenix (d), introduction to Unix Communical or and UNCP Cobol Programming, Snow report writer and (e) Two Years experience in a similar job.

The job description was approved by the managing director on the 19th February 1993 for the position systems administrator/operator. It does not indicate that there were different categories of systems administrator/operator, neither does it, on its face show the Grade for the position.

It is common cause that the Applicants did not posses the stated qualifications and experience required to be appointed to the substantive posts. The Respondent however appointed them to serve in that capacity for approximately (fourteen) 14 months. The Respondent though, concedes that the job description given to the Applicants coincides with that found in exhibit "R2" on page 2, position number 2 of systems administrator on grade 5. The Respondent however emphasizes that it was never the bank's intention to elevate the two Applicants to Grade 5 category because they did not qualify for that position and could not perform all the functions demanded of an occupant of Grade 5 position.

The Respondent added further that the branches where the two Applicants worked did not have a Grade 5 systems administrator/operator position but had Grade 4a category which was the entry level to which position the Applicants were duly posted, on acting basis while they continued to train.

As seen from document "B5-6" the two Applicants and another were nominated to attend a course in introduction to systems administration course-fastnet from the 9th – 13th September 1996. this covered the basics required of a beginner in a system administrator/operator career. The 1st Applicant in the annual appraisal conducted on the 10th March 1991 was rated favorably in the performance of her duties. On the 28th July 1997 she applied to be confirmed to the position of systems administrator via letter B9. On the 8th August she received a regret letter which stated that her application did not meet the required standard. The standard attached to the letter are different to those in the job description. The Respondent pointed out that the schedule B-11 was erroneously attached to the letter of regret.

Similar predicament faced the 2nd Applicant who however received acting allowance in respect of Grade 4a position because his substantive post was on Grade 4.

It is Respondent's case that the two Applicants were not acting for other employees who held substantive positions at Grade 5. It could thus not be argued in the Respondent's view that the two were entitled to acting allowances on Grade 5 or to be confirmed to Grade 5 positions after acting for six (6) months in terms of the collective agreement.

The onus was on the Applicants to prove that they were appointed to act on Grade 5 positions.

To the contrary exhibit "R19" shows that as of the 18th October 1993, the positions of system administrator/operators at the Simunye branch held by Easter Masuku, Matata branch held by Martin Mabilisa, and Matsapha branch held by Sipho Mdluli were all on Grade 4. The internal memo ("R19") from the Manager Data Processing Unit to the Personnel and Training Department requested that the three officers be elevated to Grade 4a as they had successfully completed their probation.

Exhibit "R2" indicates that Easter Masuku of Simunye branch was elevated to Grade 4a with effect from 1st November 1993.

Whereas "R22" shows Martin Mabilisa of Matata branch was elevated to Grade 4a with effect from the same date and in terms of "R18" Sipho Mdluli of Matsapha branch was elevated to Grade 4a. Two years down the line and in terms of exhibit "R20" Sipho Mdluli was promoted to the position of system administrator on Grade 5 notch 2. whereas with effect from the same date and in terms of exhibit "R25" Martin Mabilisa was promoted to the position of systems administrator on grade 5 notch 1.

In June 1996 the 1st Applicant was asked to perform the job of systems administrator/operator at Matsapha branch whereas the 2nd Applicant was to perform the same job at Matata branch. Both were bank clerks substantively the 1st Applicant being on grade 4a whereas the 2nd Applicant was on grade 4.

No letter of posting was given to them indicating the grade of their new position. There is no documentation indicating whether the posting was on an acting capacity as alleged by the Applicants or they were simply recruited on probationary basis as trainees with a view to confirm them to those positions if they met the grade as alleged by the Respondent.

The court has had to rely on oral evidence from both sides which to a large extent is mutually destructive.

It is common cause however that at the Matata branch where the 2nd Applicant was posted as a system administrator/operator his predecessor was Martin Mabilisa who as indicated earlier was employed as a system administrator/operator on Grade 4 until 18th October 1993 when he was elevated to Grade 4a and on the 15th October 1995 he was again elevated to Grade 5 Notch 1. His title did not change but only the grade. He was then transferred to Nhlanguano branch while still on grade 5. It then became necessary to fill his position in June 1996 hence the recruitment of the 2nd Applicant.

The Respondent produced exhibit "R9" and "R10" which shows that Martin Mabilisa successfully completed a course in Basic Sco Unix System V/386 Administration and on the 9th May 1995 he had successfully completed Sco Unix System V138 Administration

successfully completed Sco Unix System V138 Administration Course. The Respondent told the court that his passing the two courses led to the grade promotions he received in 1993 and 1995.

As concerns the 1st Applicant she was posted to Matsapha in June 1996 as a System Administrator. As indicated earlier, she was prior to that a counter clerk on Grade 4a at the same branch.

The reason for the new posting was because her predecessor Easter Masuku had resigned. As earlier said Easter Masuku started as a System administrator/operator at the Simunye branch on grade 4. she was elevated to grade 4a on the 1st November 1993 and the court had no evidence of any further elevation up to the time she resigned from her post. The 1st Applicant told the court that she thought she would act in her new capacity for a short while before a replacement was found but this did not happen.

Though the 1st Applicant was able to show in her testimony that she was placed on an acting capacity, she failed to show that she was acting in place of an officer who was on grade 5 nor was she able to prove on a balance of probabilities that she had the necessary qualifications to be immediately elevated to a systems administrator grade 5. The Respondent clearly demonstrated that there existed different categories of System Administrator ranging from Grade 4, 4a, 5 and 6. At the time the 1st Applicant was recruited, the entry point was Grade 4 a which grade she was already on in her substantive post of a counter clerk. She did not while she acted on this position pass the necessary courses to qualify to be upgraded to Grade 5 or Grade 6.

This being so, her application must fail in its entirety.

The case of the 2nd Applicant as seen from the facts is a bit different in that he was at the time of posting to the position of system administrator/operator at Matata branch, a bank clerk on grade 4. it is conceded by the Respondent that the new position at entry point in June 1996 was Grade 4a and the 2nd Applicant was duly paid acting allowance to cover the difference in salary between his substantive post and the post he acted on.

Further, it has been shown that the 2nd Applicant assumed the new post after Martin Mabilisa who was already on Grade 5 had left the position for a transfer to Nhlanguano branch.

Although this is the case, through documentary and oral evidence alluded to herebefore, it has been shown that Martin Mabilisa rose in the same position of systems administrator/operator from Grade 4, 4a to Grade 5.

The 2nd Applicant has not demonstrated that he had passed the necessary courses to be appointed on Grade 5 nor has he shown on a balance of probabilities that he was appointed to act on Grade 5.

The Respondent clearly demonstrated the stringent qualifications required for one to be upgraded through the different grades of a system administrator/operator.

To the contrary, the 2nd Applicant was acting on grade 4a position and was paid an acting allowance for the post. Since the 2nd Applicant acted on this grade for more than six (6) months he was in terms of Article 6.2 entitled to be confirmed to Grade 4a after the expiry of the six months but not to Grade 5 as claimed in the particulars of claim. Indeed exhibit "A9" shows that the 2nd Applicant was called upon on the 30th July 1997 to do an aptitude test at the Training School as further requirement to determine the possibility of confirmation to systems administrator/operator cadre.

On the 20th August 1997, both the 1st and 2nd Applicants received confidential correspondence informing them that they were appointed as system operators Grade 4a on job-training but did not meet the requirement to be confirmed to system administrator Grade 5. The salary of 2nd Applicant was then adjusted to Grade 4a whereas that of the 1st Applicant remained unaffected.

It was after Hannock Vilakati an employee who was recruited along with the two Applicants and was based at Siteki was upgraded to Grade 5 Notch 1 on the 12th February 1997, that the two Applicants became aggrieved and they too demanded to be given equal treatment.

The Respondent adduced evidence to the effect that though Hannock Vilakati had not satisfied the academic qualifications required of a Grade 5 system administrator operator, he had worked in that capacity much longer than the two Applicants while he relieved the system administrator/operator at his branch. His elevation was recommended by his branch manager who was desperate to retain him at the Siteki branch. At the time, Hannock Vilakati had been approached by other employers.

The court does accept the evidence by the Respondent that Hannock Vilakati had the practical skills to perform all the requirements of a grade 5 operator whereas, the two Applicants had not. No one was in a better position than the Respondent to make this assessment and its version of the events and the reasons thereof are reasonably probably true.

In conclusion, the 1st and 2nd Applicants have failed to prove that they had been appointed to act as systems administrators on grade 5. to the contrary, the court accepts that the appointments were made on grade 4a.

Their application is dismissed with no order as to costs.

The Members Agree.



NDERI NDUMA
JUDGE PRESIDENT – INDUSTRIAL COURT