IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 216/2000

In the matter between:

VUSUMUZI SHONGWE	APPLICANT
And	
THE PRINCIPAL SECRETARY –	MINISTRY
OF WORKS AND TRANSPORT	1st RESPONDENT
THE CHAIRMAN - CIVIL SERVICE BOARD	2nd RESPONDENT
THE ATTORNEY GENERAL	3rd RESPONDENT

CORAM:

NDERINDUMA	: PRESIDENT
JOSIAH YENDE	: MEMBER
NICHOLAS MANANA	: MEMBER
FOR APPLICANT	: L. SIMELANE
FOR RESPONDENTS	: S. MASEKO

JUDGEMENT- 27/10/04

The dispute between the parties was reported to the Commissioner of Labour in terms of Section 57 (1) of the now repealed Industrial Relations Act No.1 of 1996. On or about the 24th May 2000 attempts by the Commissioner of Labour

to resolve the dispute through conciliation failed and a certificate of unresolved dispute was issued in terms of Section 65 (1).

The application serving before court was consequently filed. The Respondent, responded to the statement of claim and the Applicant replicated.

Upon close of the pleadings, a pre-trial conference was held on the 22nd August 2001 wherein all admissions made in the Respondent's Reply were confirmed. Issues denied remained in dispute.

Representatives for the parties subsequently made representation to the court with a view to compiling an agreed statement of fact and dispense with viva voce evidence. Leave was granted to that effect and thus this matter will be determined on the basis of the facts agreed upon

The facts of the case are follows:

The applicant Vusumuzi Cornelius Shongwe was employed by The Swaziland Government under the Ministry of Public Works and Communication as a labourer on the 4th March 1975. He was classified as a temporary employee. He worked with electricians. In 1982 the applicant went for a Grade Test at Swaziland College of Technology. He passed the test and qualified as an electric wireman Grade 111. on the 21st July 1988 he was appointed by the Civil Service Board as an electrician 111 under the

Ministry of Public Works and Transport. He was classified as a temporary employee. The applicant worked for The Swaziland Government as a temporary employee until the 31st December 2002.

During the applicant's term of employment, he was installing electricity in new government buildings. He was also doing electric maintenance in governments

buildings. The applicant was never idle during his term of employment There was always work that was being carried out by the applicant

The applicant was never confirmed as a permanent government employee. He did not enjoy the benefits of permanent employees. He wrote numerous letters requesting confirmation as a permanent employee. No one bothered to reply his letters. Surprisingly, his colleagues that had the same qualifications were confirmed. The applicant's salary was below that of permanent employees. He was entitled to an annual leave of twelve days while permanent employees were entitled to a months leave. He was not paid housing allowance. He never stayed in a government house. Further, he did not contribute to the Public Pension Fund.

The applicant retired from working for government on the 31st December 2002. He was 60 years old when he retired. The Swaziland Government paid the applicant an ex-gratia payment in the total sum of E68, 036.21,

The applicant is now claiming that he should have been treated as a permanent government employee. He is claiming all the benefits that are enjoyed by permanent government employees. The applicants contention is that it was wrongful and unfair to treat him as a temporary employee after having worked for government for twenty eight years.

The respondents are opposing the application of the applicant. The respondents aver that applicant was not entitled to be confirmed because he was employed for a project. It was not possible to create permanent posts for projects because the work that was being carried out was temporary.

The respondents further argue that there were no available permanent posts. Permanent posts were only created in 1999. The respondent's contention is that at the time posts were created applicant did not qualify for appointment because he was 57 years old. The respondents aver that applicant was not entitled to be classified as a permanent employee. In the premises the respondent prays that the application be dismissed with costs.'

The point of departure in this matter would be to determine whether it was lawful for government to classify the Applicant as a temporary employee (as is the case with many other employees) having worked continuously as an electrician 111 for the Ministry of Works from the 21st July 1988 until the 31st December 2002, a period of approximately fourteen years (14) and prior to that appointment had served the same government under the same Ministry as a labourer from 4th March 1975 to the 21st July 1988, a period of about thirteen (13) years.

Cumulatively, the Applicant had served government for about twenty eight (28) years and was, until he retired at the age of 60 years categorized as temporary employee and was never confirmed as a permanent government employee.

It is important to first note that the consequences of the said classification was that, the Applicant did not contribute to the Public Pensions Fund for the entire period of his employ. He was only entitled to twelve days leave a year, far less than that which applied to his permanent counterparts. He was not entitled to government housing as was his counterparts and received a lesser salary.

Permanent posts to accommodate long serving temporary employees were created in 1999, Whereas most of his colleagues were taken up to the permanent cadre, this was not possible in the case of the Applicant because at the time, he was 57 years old and remained with only three years to retirement.

In terms of the regulations governing the conversion, to qualify, one had to have at least ten (10) years remaining to the retirement date. For the said reason the Applicant did not qualify for the conversion.

When he retired, the Applicant was paid an ex-gratia gratuity in terms of the Pensions Regulations in the sum of Emalangeni Sixty Eight Thousand and Thirty Six and Twenty One Cents (E68,036.21). His contention, which is correct is that, had he been converted to the permanent cadre, his terminal benefits would have been much higher than aforesaid.

Employment of the civil servants is by the Civil Service Board and the same is regulated by the Civil Service Order, 1973 (hereinafter "the Order) and the Civil Service Board (General) Regulations 1963. (now incorporated to the 1973 Act (hereinafter 'the regulations').

In this respect Section 3 (1) of the Order established the Board and gives it power to appoint, promote, transfer, terminate, dismiss and discipline public officers. Regulation 24 (1) on the other hand stipulates the principles and procedure to be followed by the Board in discharging its duties of appointments, promotions and transfers.

Regulation 2 states that "appointment' means –

(a) the conferment of an office upon the person not already in the service on probation or contract or temporary engagement;
(b) the conferment of an office on permanent and pensionable terms, on probation or otherwise, upon a person already in the service serving on contract, temporary engagement, or in an un-established capacity;
(c) the conferment upon a person of the same or other office on contract or temporary engagement on the expiration of the specified period of that

person's present contract or temporary engagement by way of renewal or extension thereof for a further specified period;

(d) the conferment of an acting allowance upon an officer in respect of the discharge of the duties of an office other than the office to which he is substantively appointed.

The Order and the Regulations do not define temporary engagements except that Regulation 32 provides for the manner In which temporary engagements are to be terminated. The officer is to be given a month's notice or one month's salary in lieu, unless the letter of appointment of that engagement provides otherwise.

The rationale of the 1999 conversion regulations to restrict employment on permanent and pensionable basis to those temporary employees who had ten years (10) or more remaining prior to retirement was derived from the provisions of The Public Service Pensions Funds Regulations, 1993.

Regulation 7 (1) in particular provides that:

"subject to these Regulations, no member shall qualify for any benefit under this part unless he has ten (10) or more years of service to his credit".

The court was told that the Applicant was disqualified from the conversion to permanent and pensionable status in 1999 because he was at the time fifty seven (57) years and thus in terms of Regulation 8 (1) of the Pensions Regulation that provides for compulsory retirement at the age of sixty (60) years, he had only three (3) years to retirement, (see paragraph 5 of the Respondent's Reply).

The Applicant however was employed by the government in a temporary position in 1975. Regulation 2 (1) of the Pension's Fund Regulations promulgated in 1993, provides as follows;
"Every public officer serving in a pensionable office on the commencement of these regulations shall become a member:

provided that the period a member has served in a pensionable office prior to the commencement of these regulations shall be included in me computation of his pensionable service;

provided further that if an officer held a non-pensionable office prior to the commencement date of these Regulations and was then appointed to a pensionable office, his pensionable service shall include the period he served in the non-pensionable office excluding any period for which he received a gratuity payment in lieu of a pension." (emphasis mine)

Clearly, the Pensions Fund Regulations were not a bar to the appointment of the Applicant to the pensionable status in 1999, having commenced government service in 1975. Failure to convert him, as the Respondent did to his younger colleagues was in itself unconscionable and a travesty of justice. The court was given no other reason why the Applicant was excluded from the conversion exercise.

The other issue for determination is whether it was lawful in terms of the Employment Laws of Swaziland to employ the Applicant for a period of twenty eight (28) years continuously as a temporary and non-pensionable employee.

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It is common cause that indeed the Applicant had unbroken service to government from 1975 to the year 2002 when he reached the retirement age of 60 years and left the service of the Respondents in terms of the Pensions Act and the Regulations referred to hereinbefore.

The Employment Act of Swaziland was promulgated on the 26th September 1980. Its main objective as discerned from the preamble was as follows:

"An Act to consolidate the law in relation to employment and to introduce new provisions designed to improve the status of employees in Swaziland."

The date of commencement was the 1st November 1981.

Section 5 of the Employment Act No, 5 of 1980 (hereinafter the 'Act) reads as follows:

"Act binds Government –

5. Subject to Section 6, the provisions of this Act shall apply to employment with, by or under the Government, other than to employment in the Royal Swaziland Police Force, the Umbutfo Swaziland Defence Force and the Swaziland Prison Service."

Section 6 on the other hand provides for the Minister to exempt certain categories of employers and employees from the operation of this Act as follows:

" Minister may exempt –

6 (1) The Minister may, by order published in the Gazette exempt any person or public authority or class of persons or public authorities from the

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operation of all or any of the provisions of this Act or any regulation order or directive made thereunder.

(2) No exemption shall be made by the Minister under this section which is incompatible with any International Labour Convention for the time being in force for Swaziland,"

Pursuant to Section 6 aforesaid, the Minister 'for the time being responsible for labour' promulgated The Employment Act (Exception) Order 1981, 1987, 1988 and 1989.

For purposes of this matter serving before court, we will specifically refer to the 1987, 1988 and 1989 exemption orders.

Section 2 of the 1987 reads as follows:

"2 the following persons and their employers are hereby exempted from the application of the following parts of the Act;

All public officers (other than those employed by way of manual labour) whose terms and conditions of service are prescribed by any law or in any other legally binding form, or both.

Part V, Part V11, Part X1 and Part X111.

The Employment Act (EXEMPTION) (REVOCATION) ORDER 1988 reads as follows;

'2 The Employment Act (Exemption) Order 1987 is hereby revoked.'

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This came into force on the 23rd December 1988 and thereby revoked all exemptions of public officers specified in the 1987, Order from the operation of the Employment Act.

The Employment Act (EXEMPTION) ORDER 1989 reintroduced the exemptions from application of the Act as follows;

'2 All public officers except those whose posts do not appear in the Government Establishment Register are hereby together with their employers exempted from Parts V, Vll, XI and Xlll of the Employment Act, 1980.

3. The Employment Act (Exemption) Revocation) Order, 1988 is hereby revoked.'

To the best of our knowledge the 1989 Exemption Order is still operative todate. Therefore, as of today, all public officers whose posts appear in the Government Establishment Register are exempted from the operation of Parts V, Vll, X1 and X111of the Act.

It is common cause and can be seen from paragraph 5 of the Reply that the Applicant's employment was classified as temporary and his position was not in the Establishment Register, however vacant positions to be filled by the employees in his category were created in July 1999.

It follows therefore that at all material times of his employment, the Applicant as an employee of Government was not exempted from the operation of the Employment Act in its entirety.

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