

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.164/05

In the matter between:

NIKIWE S. NYONI

APPLICANT

And

The Acting Commissioner of Anti-Corruption Unit

1st Respondent

The Principal Secretary - Ministry Of Justice & Constitutional Affairs

2nd

Respondent

The Principal Secretary - Ministry of Public Service & Information

3rd Respondent

The Chairman-Civil Service Board

4th Respondent

The Accountant General

5th Respondent

Attorney General

6th

Respondent

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT : M. MKHWANAZI

FOR RESPONDENTS: V. VILAKATI

JUDGEMENT - 07/09/05

The Applicant was employed by the Anti-Corruption Commission on the 3 July 1998 in the position of an Accounts Officer. On the 12th July 2005 she brought the application against the six Respondents for an order couched in the following terms:

1. Directing the 5th Respondent to pay to the Applicant her acting arrears for the period 1st September 2000 to 31st August 2001, January 2004, and August 2004 to-date of payment
2. Directing the Respondents to confirm the Applicant to the position of Principal Accountant with effect from February 2002,
3. Costs of the application.
4. Further and/or alternative relief.

The application is grounded on the Applicant's Founding Affidavit with annexures marked A-P. The Attorney General, the 6th Respondent opposed the application on behalf of all the Respondents. The Opposing Affidavit was by one Sipho Lukhele, a Director of the Anti - Corruption Commission.

FACTS NOT IN DISPUTE FROM THE DEPOSITION

The Applicant was employed by the Government of Swaziland on the 8th April 1988 as a junior clerical officer in the Ministry of Agriculture and Cooperatives. On the 14th August 1991, the Civil Service Board appointed the Applicant on promotion to the post of Assistant Accounts Officer, On the 11th February 1993, the Applicant was transferred to the accounts department in the Ministry of Justice and Constitutional Affairs,

On the 1st April, 1994, the Civil Service Board promoted the Applicant to the position of Accounts Officer.

On the 3rd July 1998, the Applicant was recruited by the Anti-Corruption Unit as an Accounts Officer.

On the 24th July 2000 she was promoted to the position of Report Centre Commander with effect from the 1st June 2000 on Grade 10.

The appointment with the Commission would be governed by the Government General Orders and other Government Regulations currently in force or as may be amended from time to time. The said appointments are on permanent and pensionable basis.

The Applicant's duties as a Report Centre Commander entails, interalia, to manage, coordinate and run the Report Centre. These are contained in the Anti-Corruption Directive Guidelines No. 1/95 as revised in October 1999.

In September 2000, the Applicant was orally instructed to perform the duties of Principal Accountant and placed on salary grade 12 on an acting basis. The directive was by the Acting Commissioner of the Anti-Corruption Commission.

The duties of the Applicant as a Principal Accountant were supervisory in nature and are contained in annexure 'VG' to the application.

Counsel for the Respondents conceded before court that the Applicant was indeed appointed to act as Principal Accountant, She further conceded that the Applicant continues to act in that capacity to-date although there is not in place an appointing instrument.

She told the court that the Applicant was entitled and should be paid acting allowance for the period 1st September 2000 to 31st August 2001, and January 2004 (excluding 5 days), Indeed the Applicant was paid acting allowance for the period from 1st September 2000 to August 2004, that she has not claimed for.

IN DISPUTE

The Respondent disputes that the Applicant is entitled to payment of acting allowance for the period August 2004 to date. The opposition to payment is for the reason that there is not in place any appointing instrument to the post of Acting Principal Accountant.

Counsel for the Respondent conceded that the Applicant continues to act in the position of Principal Accountant to date inspite of lack of the instrument. For that reason, counsel for the Respondent submitted that the Applicant was not entitled to payment of acting allowance though she continued to do the work. The argument is self defeating. The Respondent cannot rely on its own default to deny an employee remuneration for work that has been admittedly performed. The acting allowance therefore is lawfully due and payable to the Applicant for the period August 2004 to-date.

CONFIRMATION TO THE POST OF PRINCIPAL ACCOUNTANT

The Applicant seeks an order directing that she be confirmed to the position of Principal Accountant with effect from February 2002.

The basis of the claim is that in terms of Government General Orders, an employee employed on acting capacity must be confirmed in that position upon expiry of six months.

The Applicant states that she has now been working in an acting capacity since September 2000 to-date.

Furthermore, except for the months in respect of which she was not paid acting allowance, payment of the acting allowance was notified. and paid. The notification issued to pay her in the acting capacity have been open ended making her acting appointment adfmitum.

The Applicant alleges, which is not in dispute that at all materia! times since September 2000 she had been diligently executing the duties of a Principal Accountant and timeously prepared and filed Monthly Budget Management Reports.

On the 6th May 2003, the Principal Secretary in the Ministry of Finance commended her office for the quality and regularity of the submission of the Unit's Budget Management Report.

She finds no reason why she should be kept on an acting capacity for such an inordinately long period.

Respondents state that for the Applicant to qualify for confirmation to the position of Principal Accountant, she must be in possession of a B.Com Degree. That the Respondent has requested the Applicant to submit a Degree certificate to no avail, For that reason the Applicant is not entitled to

confirmation to the post.

For these submissions the Respondent relied on a document titled "SCHEMES OF SERVICES FOR THE ACCOUNTANCY CADRE" from the Ministry of Finance.

The document was stated by both parties to set the standards, qualifications, direct entry points, progression and promotion for all Civil Service Accounting Cadre.

The Respondent in particular relied on clause 5.15 for its refusal to confirm the Applicant in the position of Principal Accountant.

Clause 5.15 (ii) reads:

Promotion: (a) Senior accountants who possess a B. Com degree (old Style) plus a pass at the final level of the SIA/AAT plus being a registered Accountant (SD) are eligible to be considered for promotion. In addition candidates must possess four years practical experience in that grade.

(b) Senior Accountants who do not possess the qualifications detailed in (a) above but who have five years practical experience in that grade are eligible to be considered for promotion."

It is indisputable that the Applicant has since the 8th April 1988 to-date served the Civil Service in

various capacities. The duties have been specified as Junior Clerical Officer, Assistant Accounts Officer, Accounts Officer, Report Centre Commander and that of Acting Principal Accountant

It is interesting to note that from the date of appointment as Acting Principal Accountant on 1st September 2000 to-date she has acted as Principal Accountant for a period of exactly five (5) years.

In terms of grading, the position of Report Centre Commander was equivalent to that of Senior Accountant in the Civil Service on Grade 10,

It is without hesitation that I find that the Applicant has more than satisfied the requirements of Regulation 5,15 (ii) (b) to be confirmed and/or promoted to the position of Principal Accountant at the Anti Corruption Commission.

Accordingly, the court makes the following order:

- (a) The 5th Respondent is directed to pay to the Applicant acting allowance arrears for the period 1st September 2000 to 31st August 2001, January 2004 (excluding 5 days); and from August 2004 to date of payment.
- (b) The Respondents are directed to confirm the Applicant to the position of Principal Accountant with effect from February 2002.
- (c) The Respondents are to pay costs of the application.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT