

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 215/2001

In the matter between:

BHEKI ZWANE AND SEVEN OTHERS

APPLICANT

and

S.O. S. CHILDREN'S VILLAGE ASSOCIATION OF SWAZILAND

RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: P. R. DUMSEITH

FOR RESPONDENT: Z. JELE

J U D G E M E N T - 13/10/05

The eight Applicants are professional teachers currently working in different institutions in the country.

At the time the dispute arose all the eight Applicants were stationed at the Herman Gmeiner High School, Sidwashini South Mbabane (hereinafter S.O.S. School).

The school is owned and run by the S.O.S. Children's Village Association of Swaziland, a voluntary charitable association duly constituted with power to sue and be sued, and having its principal place of business at the school, Sidwashini South Mbabane.

The Applicants were employed by the Teaching Service Commission of Swaziland and seconded to the S.O.S School by agreement between the Swaziland Government and the Respondent. These are Bheki Zwane, Luke Malindzisa, Emmanuel Odame, Augustine Fiagbor, Sizakele Vilakati, Lindiwe Christie, Freddie Dladla and Richard Simelane.

Seven of the Applicants were seconded to S.O.S. as ordinary teachers except one Mr. Freddie Dladla, who came to S.O.S. as a head of department. It is common cause that the Teaching Service Commission (hereinafter T.S.C.) paid head of department allowance (hereinafter H.O.D. allowance) to the head of departments over and above the basic salary. The administrators of S.O.S. School were aware of the fact at the time of the secondment.

By a written agreement dated the 31st May 1999, the Respondent appointed the eight Applicants to the

positions of head of departments backdated to the 1st January 1999.

The Applicants had in fact commenced their duties as head of departments in January, the appointment letter was a mere formality.

In terms thereof, each of the Applicants was designated a specific department to head, manage and oversee with specific duties as communicated verbally by the head teacher and the Director of the Respondent and later captured in the letter of appointment as summarized below:

1. The appointment was to commence beginning of January 1999 with a monthly allowance of E300.00. Some of the Applicants received E400.00 monthly allowance.
2. The position was to be reviewed on a yearly basis as is normal in the S.O.S Appraisal System.
3. The school expressed great confidence and faith in each of the appointee's ability to fulfill the new role.

RESPONSIBILITIES

The head of department was to:

- (a) Lead the department by good example, teaching a broad cross-section of the courses in the department, liaise constantly with colleagues and other heads of departments to promote efficiency and cross curricular activities.
- (b) Keep up to date on all current developments in the subject especially about all new books, audio visuals and other teaching aids and encourage colleagues to use them, foster good relations of staff in the department and that of staff and students.

© Be the chief administrator of the department and prepare an annual budget thereof, prepare the syllabus for the subject and update this regularly as the need arose, supervise teaching plans by the staff and keep a regular check on these, hold regular departmental meetings (at least three per term) to discuss academic and student matters and liaise with the Deputy

Headmaster on matters pertaining to teachers performance, administrative requirements and the general status of the department, (d) Conduct yearly appraisals of members of the department and forward same to the Head teacher. Furthermore the head of department was to assist the staff in drawing up personal annual objectives, represent the department at the school curriculum committee, assist new staff in settling in and appraise the staff on the unique policy of S.O.S. Children's Village to enhance the welfare of disadvantaged children. Finally the heads had to conduct themselves in a professional and worthy manner especially in their relationship to staff and students.

According to the headmaster Mr. Wilton Dlamini, all the eight Applicants commenced their new roles as detailed to them. That all of them performed reasonably well as head of departments and those of them who were still at the school at the time of the trial continued to perform the duties of head of department as stipulated in the letter of appointment. Several of the Applicants had since left the employ of the Respondent for various reasons not the subject matter of the application before court.

Mr. Wilton Dlamini however informed the court that in the month of June 2000, the Respondent took a decision to terminate the payment of the head of department allowance to the eight Applicants. This had been preceded by a suspension of the allowance in December 1999. This resulted in the dispute the cause of the application before court.

The Applicants in the particulars of claim state that the termination of the payment of departmental allowance was a unilateral and unlawful conduct by the Respondent. That this constituted a repudiation and breach of the respective contracts of appointment entered into between the individual Applicants and the Respondent.

That the Applicants did not accept but resisted the repudiation of the contracts and demand specific performance thereof.

The Applicants stated in the particulars of claim and in court that the Respondent did not revoke the appointments to the departmental head positions but continued to require them to perform as head of departments performing the additional duties and requirements set out in the letters of appointment.

Those of the Applicants still in the employ of the Respondent continued to perform such duties. Those who have since left the employ of the Respondent continued to perform such duties until their respective dates of departure.

The headmaster Mr. Wilton Dlamini confirmed this position in his testimony before court. This is inspite of the blatant denial by the Respondent of this fact in paragraph 7 of the Respondent's Reply.

Mr. Wilton Dlamini further in his testimony denied knowledge of the conduct of any formal appraisal of the head of department appointments in terms of the letters of appointment prior to the suspension and subsequent termination of the head of department allowance. Again this is inspite of the bold assertion in paragraph 6 of the Reply that "the allowances were withdrawn in terms of the agreement after a formal appraisal had been conducted of all the Applicants and when it became apparent that

there was no remedial action on the part of the Applicants."

To the contrary Mr. Wilton Dlamini told the court that all the Applicants conducted their duties as head of departments to his satisfaction. He emphasized that those that were still at the school continued to render quality performance to the school.

The only drawback according to Mr. Wilton Dlamini arose when some of the Applicants, not specified to the court submitted their annual reports later than December 1999, as had been required of them by the National Director.

Mr. Dlamini concurred with the Applicants that initially there was a difficulty in understanding the nature and content of the report requested from them by the Board of Directors.

That the teachers sought clarification which was provided to them by the National Director. That during the last quarter of the year the Applicants set, supervised and marked examination papers. The combination of these factors led to a delay in preparing the reports before December. As a result of the delay, the National Director withdrew the head of department allowance.

It became common cause that several of the Applicants presented their reports, beginning of January 2000. That others sought an extension of time to polish their documents and were granted extension to March 2000. That all the Applicants did submit their reports by the end of the extended deadline. That notwithstanding the Board of Directors decided that due to poor work performance by the Applicants, the Respondent did not gain value from the extra payment of head of department allowance and same was withdrawn.

During cross examination of the Applicants by Mr. Jele for the Respondent, Mr. Jele repeatedly put to the Applicants that their appointment was terminated in June 2000 together with the withdrawal of the allowances. He put to them that Mr. Wilton Dlamini will testify to this fact. He further put to the Applicants that the termination was for poor work performance as head of department and Mr. Wilton Dlamini will testify to this. Furthermore he put to the Applicants that Mr. Wilton Dlamini will testify that the withdrawal was upon a formal appraisal in terms of the letter of appointment conducted of all the Applicants and it was realized that there was no remedial action on the part of the Applicants.

As alluded to earlier, when Mr. Wilton Dlamini took the stand, he adduced evidence contrary to the aforesaid versions by counsel. The evidence also rubbished the averments contained in paragraphs 5, 6 and 7 of the Respondent's Reply.

Even more damaging was the contents of paragraph 7.2 of the Reply to the effect that "the Applicants were unbeknown to the Respondent already receiving a head of departments allowance from the Ministry of Education". This was again put to the Applicants by Mr. Jele stating that the Respondent's evidence will show that some of the Applicants received double payment of head of department allowance unbeknown to the Respondent.

The two witnesses for the Respondent Mr. Wilton Dlamini and Dr. Ntiwane told the court that only Freddie Dladla was seconded to S.O.S. School whilst still a head of department. They also stated that this position was well known to the Respondent and therefore there was no 'suspicion' of double payment of head of department allowance as alluded to by counsel for the Respondent.

The Applicants filed in a list of their respective claims in annexure TV to the application. It was also agreed by counsel for the parties that in the event the Application was successful, the specific date of departure in respect of the Applicants that have since left the Respondent will be confirmed interse for purposes of arrear payments of the allowances.

During the evidence of Mr. Wilton Dlamini, it became apparent to the court that his testimony sharply contradicted the Respondent's pleadings and what was put to the Applicants by Mr. Jele for the Respondent.

The court postponed the matter to enable further consultations between Mr. Jele and the Respondent with a view to a possible curtailment of the proceedings given the evidence already before the court.

When the matter was re-set for a call, the Respondents chose to proceed with the matter to finality and brought testimony of a member of the Board of Directors of the Respondent Dr. Ntiwane.

Dr. Ntiwane made a genuine attempt at damage control detailing the philanthropic mission of the Respondent in Swaziland. He further defended the Respondent's action from an economic point of view.

He suffered constraints because the National Director who was involved directly in the programme the subject of the dispute had since passed away.

He stated however that the Applicants were consulted through their representatives by the Board prior to the stoppage of the allowances. He however was non committal as to whether the actual appointments of the Applicants to the positions of head of department were terminated by the Respondent when the allowances were withdrawn. He told the court that the decision to terminate the allowances was largely due to financial reasons rather than being a result of poor work performance by the respective heads. He emphasized that the work of a head of department was not beyond the ordinary daily chore of a teacher hence there was no necessity to pay extra in the circumstances.

The witness was unable to produce any documentation relating to the appraisal of the individual teachers and the alleged failure to make amends as pleaded by the Respondent.

A belated attempt to produce Minutes of the Board meeting after the close of the Respondent's case was refused by the court. This was because no witness was present to produce the documents and it was not shown that any new matter that could not or was not in the knowledge of the Respondents had since been discovered and was crucial to the determination of the suit.

This matter was instituted in the year 2001. Pleadings had been closed as early as August 2001. The matter had been postponed severally and therefore the respondent had every opportunity to prepare its case. There was no excuse whatsoever for the attempted introduction of bulky documentation by counsel from the bar after they had closed their case. The objection by counsel for the Applicants was then upheld. The admission of the documentation belatedly would have in the court's view prejudiced the Applicants' case in a manner not remediable by costs.

Upon a careful analysis of the facts of the case, the Applicants on a balance of probabilities established

that the Respondent appointed each one of them as head of department with effect from January 1999. They performed their duties in terms of the appointment to the satisfaction of the Headmaster. They were paid allowances of E300.00 and E400.00 as shown in the annexure to the Application in terms of the contracts of appointment until same were suspended arbitrary by the National Director in December 1999.

No proper consultation and/or evaluation of their performance had been conducted at the time by the Respondent. The allowances were never reinstated up to the time the matter came to court.

Some of the Applicants left the employ of the Respondent. They had served as head of departments until the date of their respective departure.

Those that remained continued to perform as head of departments to-date.

The attempt by the Respondent to rebut the evidence of the Applicants failed dismally. Glaring discrepancies between the testimony of the witnesses of the Respondent and the pleadings put paid to the defence advanced.

Accordingly, the Application of all the eight Applicants succeed entirely.

The parties are to compute the specific amounts due to each Applicant and file the same within two weeks from the date of judgement.

In terms of Section 13 (1) of the Industrial Relations Act No. 1 of 2000, this is a proper matter where requirements of the law and fairness demand that the Respondent pay the costs of the Application.

The award to the Applicants is to be paid with interest at the rate of 9% per annum a tempore morae to date of payment

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT