

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 523/06

In the matter between:

LAVUMISA DLAMINI

APPLICANT

And

SWAZILAND TELEVISION AUTHORITY

1ST RESPONDENT

CHIEF EXECUTIVE OFFICER

2ND RESPONDENT

CORAM:

NKOSINATHI NKONYANE:

ACTING JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT:

MR.. N. MTHETHWA

FOR 1ST RESPONDENTS:

MR. S. MNGOMEZULU

JUDGEMENT
24.10.06

[1] The applicant brought an application before the court on 22.08.06 on a certificate of urgency.

[2] The applicant was seeking an order in the following terms:

"1. Condoning any non-compliance with the rules of court, time limits and hearing this matter as one of urgency.

2. Interdicting and restraining the 2nd respondent from effecting an appointment to the vacant position of Television Production Manager pending the finalization of the dispute reported at CMAC.

3. That paragraph 2 shall operate with immediate and interim effect.

5. Further and or alternative relief."

[3] The respondent raised certain points in *limine* one of which was that urgency had not been shown. The court made a ruling on 29.08.06 dismissing the points of law..

[4] The matter was finally argued before the court on 27.09.06. Both parties filed written heads of f argument and presented spirited arguments before the court.

The facts of this matter revealed that the applicant was first employed on by the 1st respondent in April 1988 as a Television Producer. Thereafter, in June 2002 she was appointed to be the Acting Broadcast Manager.

[5] She served continuously in the position of Acting Broadcast Manager until 01.08.06 when she was told to go back to her former position of Television Producer. In the meantime the post of Broadcast Manager was advertised. One of the requirements for the job was a B.A. Degree Specialising in TV Production. The applicant did not have this qualification. She therefore did not apply for the post. She said she also did not apply because it would have been ironic for her to be considered when one takes into account that she had been removed from that post without any explanation. She further concluded from the qualification requirement that it would be futile for her to put in her application.

[7] She said she took the 2nd respondent's conduct of instructing her to revert to her former position as a demotion and unfair labour practice. Thus she ran to court to seek the protection of the law.

[8] The respondent's defence was that the applicant was not demoted but merely asked to revert to her previous position. The respondents further stated that the applicant's appointment to the post of Acting Broadcast Manager was irregular in that it was not done by the Chief Executive officer as required by the terms and conditions of the 1st respondent.

[9] It was further stated by the respondents that the applicant's appointment was later revoked in December 2002 by a letter-dated 09.12.02. by the then Acting Chief Executive Officer, Mr. Celani Ndzimandze.

[10] The evidence before the court also revealed that during her tenure as Acting Broadcast Manager, tape recordings of His Majesty the King's 37th Birthday celebrations which took place in April 2005 went missing. A Management Special Committee was set up to probe the disappearance of the tapes. The applicant appeared before this committee.

[11] The applicant told the committee that she did not know the whereabouts of the tapes that were kept in the library. She told the committee that although the library was under her portfolio, the loss could not be imputed on her as every employee had access to the library and that no-one was specifically tasked to man the library.

[12] She told the committee that due to loss of tapes on past occasions she developed a backup system in terms of which she kept two tapes, one recording on site and one recording from the studio. She told the committee that the copies were kept in her locker and that these were available and she produced them. She told the committee that she was away when the issue first arose and that she would have produced the copies earlier had she been around.

[13] The committee was unable to make a finding that the tapes were lost as the available tapes in the library were not all screened to see the contents thereof. The committee recommended that the exercise should stand down until equipment to view the tapes is secured.

[14] The evidence about the missing tapes is important because it was one of the main reasons why the applicant was instructed to revert to her former position.

[15] The letter instructing the applicant to go back to her previous position was dated 1st August 2006. The court will reproduce the contents of the letter as they are central

in this matter. The letter appears as follows:

"RE: OUTCOME OF THE INVESTIGATION BY THE CEOs OFFICE ON THE ISSUE OF THE LOST KING'S BIRTHDAY TAPES

- A) Following investigations by the Chief Executive's Office pertaining the issue of the lost King's Birthday tapes, which you denied, you are hereby requested to resume your previous position as producer.

- B) When investigations resumed I made it crystal clear to your department that I will take serious actions against anyone whom I will find in possession of the tapes. Therefore I put it to you that you denied the tapes while later it transpired that there were in your possession.

- C) According to Section 36 of the Employment Act, 1980 I am supposed to dismiss you for being dishonest and note that your dishonesty is a valid ground to terminate your employment services with STVA as per the aforementioned Act.

- D) Note that in your new position you will receive the same salary that you were entitled to except that now you shall be exempted from getting the car allowance as per the conditions of the car allowance scheme.

- E) Note further that I instructed you that to furnish my office with the calendar of national events and you have failed to do that without any explanation. Kindly note that this amount to insubordination."

[16] From this letter it is clear that the applicant was instructed to revert to her previous position because of the "missing" King's Birthday tapes

and also because of the alleged failure by her to furnish the 2nd respondent with the calendar of national events.

That the applicant was told to revert to her initial position because of the investigation is also confirmed by the respondents answering affidavit. In paragraph 13 the 2nd respondent stated, *inter alia*, that,

"/ submit that it remained the employer's prerogative whether to institute disciplinary proceedings against the applicant after submission of the report and / or findings by the commission of enquiry. However, I opted to recall her to her substantive post of Production Manager as it was clear that she could not properly head the production unit"

It is not clear to the court why did the 2nd respondent decide to instruct the applicant to revert to her former position because of the issue of the tapes. The investigation was not a disciplinary hearing. Furthermore, the investigation was incomplete as there was no equipment to view all the tapes in the library in order to confirm that the supposedly missing tapes were indeed missing.

It seems that the 2nd respondent thereafter concluded that the applicant had failed in her duties as the library from which the tapes went "missing" was under her supervision.

The applicant however was never charged and found guilty of poor work performance. There was therefore no legal justification for the 2nd respondent's conduct.

The 2nd respondent, in terms of paragraph 13 of the answering affidavit, seems to have taken the view that he was doing the applicant a favour by instructing her to revert to her previous position, otherwise he could have instituted disciplinary proceedings against her.

The 2nd respondent misdirected himself in the approach that he took. His failure to institute disciplinary proceedings against the applicant denied him the opportunity to establish a legal basis for the action that he took against the applicant.

Furthermore, the failure to hold a disciplinary hearing also denied the applicant the opportunity to defend herself before the adverse decision against her was taken by the 2nd respondent.

It is clear therefore that the unilateral decision by the 2nd respondent was unlawful and contrary to the *audi alteram partem* principle.

The conduct of the 2nd respondent clearly amounted to a demotion. It was argued on behalf of the respondents that the applicant was not demoted because she was made to retain her salary. Salary reduction is not the only indicator of a demotion. Loss of status is also an indicator of a demotion.

The applicant was the Acting Broadcast Manager for four years. In that position there were people who reported to her. She was part of management and she attended management meetings.

The applicant having acted in the position for four years, she clearly had a legitimate expectation that she will be given an opportunity to make representations before his acting appointment is summarily terminated.

(See NHLANHLA HLATSHWAYO Vs. SWAZILAND GOVERNMENT AND ATTORNEY GENERAL (IC) CASE NO. 398/06.)

The second reason for the order by the 2nd respondent that the applicant reverts to her previous position was insubordination. Again, as already pointed out, no disciplinary hearing was ever held where the applicant was charged and found guilty of insubordination.

The respondents also stated that the applicant had already been dismissed by the former Acting Chief Executive Officer Mr. Celani Ndzimandze by letter dated 08/08/03. In response the applicant said that she never received such letter terminating her service.

The court will accept the applicant's evidence that she is not aware of this letter as she is still employed by the 1st respondent. If such a letter was indeed written by Mr. Celani Ndzimandze, it is strange that he failed to effect the termination. It is hard for the court to believe that someone can be terminated in August 2003 but continue to work until 2006.

[31] It is also important to note that the 2nd respondent himself has failed to effect the termination of the applicant in terms of the letter of termination written by Mr. Celani Ndzimandze dated 08/08/03. It seems that the 2nd respondent himself also did not place any particular importance to the letter as he never acted upon it. The applicant having continued to work for three years after that letter was written and not brought to her attention, it cannot now be invoked to her prejudice.

[32] It is clear to the court that the applicant was unfairly treated by the 2nd respondent when he told her to revert to her former position without first consulting her. The 2nd respondent told the applicant to apply for the position just "like all other candidates". That was not consultation.

[33] The applicant was not "like all other candidates". She had been acting in the advertised position for four full years. In these four years she was never subjected to a disciplinary hearing or to a remedial programme.

[34] There was no evidence that the functions of a Production/Broadcast Manager can only be discharged by a person who holds a B.A. Degree specializing in TV Production. To the contrary, the applicant has been carrying out those duties for the past four years yet she is a Diploma holder. There was also no evidence that she is

not *au fait* with digital broadcasting.

[35] Good industrial relations dictate that if the 1st respondent felt that it now wanted a Production/Broadcast Manager who has knowledge of digital broadcasting, it should have first given the incumbent an opportunity to be trained in the field. If the incumbent fails to acquire those skills, then the parties would have to engage in consultations as to what will happen to her.

[36] The court having found that the applicant was unfairly treated, the court is enjoined to make an order that will uphold the objects and purposes of the Industrial Relations Act.

[37] In terms of section 4(1)(b) of the Act, the court must make an order that will promote fairness and equity in labour relations.

[38] Taking into account all the facts of this case and all the surrounding circumstances, the court will make the following order:-

A) The removal of the applicant from the position of Acting Broadcast Manager without prior consultation is set aside as irregular.

B) The 2nd respondent is interdicted and restrained from effecting an appointment to the position of Production/Broadcast Manager while the applicant is still acting, without prior consultation with the applicant with a view to confirm or identify any other suitable position with similar remuneration, responsibilities and status.

C) The 1st respondent is to pay the costs.

The members agree.

NKOSINATHI NKONYANE A.J.

INDUSTRIAL COURT