

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.

548/07

In the matter between:

PHUMELELE DLAMINI

APPLICANT

And

CIVIL SERVICE COMMISSION

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

CORAM:

NKOSINATHI NKONYANE

: JUDGE

DAN MANGO

: MEMBER

GILBERT NDZINISA

: MEMBER

**FOR APPLICANT
SIBANDZE**

: MR. M.

FOR RESPONDENT

: MR. S.

MDLULI

JUDGEMENT 21.12.07

[1] The applicant is an employee of the Swaziland Government in the Ministry of Enterprise and Employment.

[2] She has applied to the court on an urgent basis for an order;

“1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule nisi be issued with immediate and interim effect, calling upon the respondent to show cause on a date to be appointed by the above Honourable Court, why an order in the following terms should not be made final:-

2.1 That the 1st respondent be and is hereby interdicted from causing and effecting the variation or transfer of the applicant to the Ministry of Economic Planning and Development.

2.2 That the variation and transfer of the applicant to the Ministry of Economic Planning and Development be set aside by virtue of her position and that the applicant retains her position at the

Ministry of Enterprise and Employment,
alternatively;

- 2.3 That the 1st respondent be interdicted from appointing a substantive person to the position of Director of Industries, pending reporting of a dispute and final determination of the matter in due course.
- 2.4 That service on the 2nd respondent of all processes be deemed to be proper service on all respondents.
- 2.5 That paragraphs 2, 2.1, 2.2, 2.3 and 2.4 above operate with immediate and interim effect pending finalization of the matter.
3. Costs be awarded against the respondents only if the matter is opposed.
4. Further and/or alternative relief.”

[3] The application is opposed by the 1st respondent and an answering affidavit was dully filed deposed thereto by the Deputy Executive Secretary of the 1st respondent Mr. Allen McFadden. The applicant thereafter filed her replying affidavit.

- [4] The pleadings having been closed, the court will issue a final order.
- [5] The facts are common cause. They show that the applicant joined the Swaziland Government in 1986 as Assistant Planning Officer in the Ministry of Commerce, Industry and Tourism. She was promoted to the post of Planning Officer in 1995 after she obtained an MBA in 1994. In 1996 she varied/ transferred to the Ministry of Enterprise and Employment in the Industry Section because she was involved in issues relating to industrial promotion and also due to staff shortage in the Industry Section.
- [6] During 2003 the Government carried out a restructuring exercise and review of salary scales and categorization of Government posts. The applicant's post was down graded as the result of that exercise. She took up the matter with the then Principal Secretary in the Ministry, Mr. Myekeni Vilakati. The Principal Secretary engaged the Ministry of Public Service and Information with a view to correct the situation by writing a letter dated 13 September 2004 (Annexure "PO1" hereto.)
- [7] For two years there was no response from the Ministry of Public Service and Information. The applicant said this was frustrating her and also affecting her work. As a result thereof, the applicant wrote to the Principal Secretary in the Ministry of Economic Planning and Development and requested a variation/transfer to the position of Senior Planning Officer. The application was approved by the 1st

respondent on the 19th December 2006.

[8] The Ministry of Enterprise and Employment however was reluctant to let the applicant go. The current Principal Secretary, Mr. Bertram Stewart wrote to his counterpart in the Ministry of Economic Planning and Development indicating the difficulties that his Ministry would experience if the applicant were to variate/transfer to the Ministry of Economic Planning and Development.

[9] The difficulty that Mr. Stewart's Ministry would have was that the applicant was involved in the restructuring exercise, policy formulation and industrial development in the Ministry. A copy of the memorandum that Mr. Stewart wrote was sent to the 1st respondent. The memorandum was dated 29th January 2007. Mr. Stewart also held discussions with the applicant on this issue. The applicant agreed to remain in the Ministry of Enterprise and Employment.

[10] The applicant then wrote to the Ministry of Economic Planning and Development on the 2nd May 2007 and revoked her request to variate/transfer to that Ministry. She also wrote to the 1st respondent on the 18th May 2007 asking that she remains in the Ministry of Enterprise and Employment. On the 27th June 2007 the Principal Secretary, Mr. Stewart also wrote a memorandum to the 1st

respondent indicating that a new post has been created, being that of Director of Industries and that he was recommending the applicant for this position.

[11] The 1st respondent however did not accede to the applicant's request to remain in the Ministry of Enterprise and Employment. The 1st respondent wrote a letter to the applicant dated 2nd July 2007 in which it did not approve the applicant's request.

[12] The applicant wrote a letter appealing against the 1st respondent's decision dated the 24th July 2007. On the 14th November 2007 the 1st respondent dismissed the applicant's appeal.

]13] There was no indication from the letters by the 1st respondent as to the reason or reasons why the 1st respondent was refusing to accept the applicant's request to remain in the Ministry of Enterprise and Employment. In terms of the answering affidavit however the reasons may be gleaned and they appear as follows:-

13.1 In its paragraph 14 the 1st respondent says, "It is within the prerogative of the Commission to consider the applicant's application for the post and recommendation and other applicants..."

13.2 In paragraph 19 the 1st respondent says that “... the applicant abandoned her request for transfer after the transfer/promotion had been approved by the commission...”

13.3 In paragraph 21 the 1st respondent says “Save to admit that the applicant had a right to abandon her request, I aver that she did that very late after her initial request of transfer/promotion had been approved.”

[14] It seems therefore that the 1st respondent had no other reason to refuse the applicant’s request to withdraw or revoke her application to variate/transfer except for the fact that it has the power to do so.

[15] This attitude of the 1st respondent offends against Section 1(i) of the Constitution of the country which states that;

**“SWAZILAND IS A UNITARY SOVEREIGN,
DEMOCRATIC KINGDOM.”**

In a society that espouses democratic values, it is unacceptable that an important body like the 1st respondent which exercises quasi-judicial powers can make a decision that adversely affects another person without giving reasons therefore.

[16] Assuming that the 1st respondent had no obligation to furnish reasons for its decision to the applicant, before the court, the 1st respondent had an obligation to do so as the applicant had asked that its decision be set aside.

[17] In paragraph 24 of its answering affidavit it is stated as follows;

“Government on the other hand is suffering prejudice because she is not productive at the transferred/promoted post as Senior Planning Officer in the Ministry of Economic Planning and Development

[18] There is no factual basis for this averment. There was no allegation in the 1st respondent’s papers that there is a crisis at the Ministry of Economic Planning and Development as the result of the applicant’s not being there.

[19] Secondly, the applicant stated in the founding affidavit that the Principal Secretary in the Ministry of Economic Planning and Development had no objection to the applicant’s advise that she no longer wanted to go to that Ministry. The principal Secretary only asked her to submit a formal letter for purposes of putting the matter on record.

[20] The two Principal Secretaries have reached a consensus on the issue. It is not clear to the court what prejudice will the 1st respondent suffer if the applicant remains in the Ministry of Enterprise and

Employment.

[21] Taking into account all the foregoing observations and all the evidence before the court, the court will make an order in terms of prayers 2.2 and 3 of the applicant's application.

The members agree.

NKOSINATHI NKONYANE
JUDGE – INDUSTRIAL COURT