

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 398/06**

In the matter between:

**NHLANHLA HLATSHWAYO**

**Applicant**

and

**SWAZILAND GOVERNMENT**

**1<sup>ST</sup> Respondent**

**ATTORNEY GENERAL**

**2<sup>ND</sup> Respondent**

**CORAM:**

**P. R. DUNSEITH : PRESIDENT**

**JOSIAH YENDE : MEMBER**

**NICHOLAS MANANA : MEMBER**

**FOR APPLICANT : M. MKHWANAZI**

**FOR RESPONDENT : S. KHUMALO**

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**J U D G E M E N T**

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[1] On the 26<sup>th</sup> June 2006 the court issued a rule nisi, calling upon the Respondent to show cause why a final order should not be made:

*1.1 Directing the Respondents to confirm and or promote the Applicant to the position of Registrar of the Industrial Court of Swaziland in terms of the*

*Government General Order amendment No. A115 of 1999 and order No. A243 (1) with effect from April 2004.*

Alternatively:

*1.2 Declaring that the Applicant, on reverting to his substantive post or any other post of equivalent or higher grade in the civil service, shall retain a personal entitlement to the grade and benefits he enjoyed at the date he ceased acting as Registrar of the Industrial Court.*

1.3 Costs.

- [2] Pending finalization of the application, the court ordered that the recruitment exercise to fill the post of Registrar be stayed.
- [3] The matter was argued on the 27<sup>th</sup> July 2006 and judgement was reserved. At the close of arguments the parties indicated that they were engaged in negotiations to settle the applicant's claims. The court has delayed the delivery of its judgement to afford the parties time to reach an amicable settlement. Unfortunately the negotiations do not appear to have borne fruit and it is necessary for the court to deliver its judgement

### **FACTUAL BACKGROUND AND EVENTS**

- [4] The facts giving rise to the dispute are largely common cause between the parties.

[5] The Applicant was first employed by the 1<sup>st</sup> Respondent as a clerical officer on a temporary basis on 1<sup>st</sup> February 1996. He was appointed to the position of Trainee Clerk of Court on 6<sup>th</sup> June 2000, and promoted to be Clerk of Court on Grade 8 with effect from 1<sup>st</sup> September 2002.

[6] The Judicial Service Commission (JSC) thereafter appointed the Applicant to act as the Registrar of the Industrial Court. In its formal “Notification of Decision/Order”, the JSC records the following:

*“ACTION APPROVED*

*Officer’s acting paid appointment in respect of Nhlanhla Hlatshwayo as acting Registrar of Industrial Court, Grade 14 with effect from 22<sup>nd</sup> September 2003 until further notice.”*

[7] The Applicant has acted continuously as Registrar from 22<sup>nd</sup> September 2003 to date.

[8] During May 2006, the JSC published an advertisement in the local press inviting interested persons to apply for the position of Registrar of the Industrial Court. Under the heading “Qualifications“, the advertisement states that:

*“The candidate must be of matured age and must hold a Bachelor of Laws Degree with a strong bias in law relating to labour issues and of administration; be an admitted attorney of the High Court of Swaziland; and have a minimum working experience of six (6) years as a legal practitioner or judicial officer.”*

- [9] Prior to the publication of this advertisement there was no communication from the JSC to the applicant informing him that a decision had been taken to recruit a substantive holder of the office of Registrar. The applicant was not consulted, and he was not invited to make any representations to the JSC, regarding the appointment of a substantive Registrar and the consequences of such appointment for the Applicant's future career in the civil or judicial service.
- [10] It is common cause that the Applicant does not possess the advertised qualifications laid down by the JSC. He is not of "matured" age, being only 31 years of age this year. He does not hold a Bachelor of Laws Degree, and he is not an admitted attorney of the High Court. He does not have the minimum of six years working experience as a legal practitioner or judicial officer.
- [11] The Applicant concluded from the advertisement, and the qualifications set out therein, that he would not be confirmed in his acting position. Indeed no other inference could be drawn. On 31<sup>st</sup> May 2006 he wrote to the Secretary of the JSC to express his concern regarding his future status, stating as follows:
- "Please be advised that in the event I am to cease acting as Registrar of the Industrial Court, I expect to leave with all my rights to whatever new position I may be transferred."*
- [12] The JSC Secretary responded by suggesting that the Applicant waits until the JSC has considered the Applicant's letter at its meeting on 8<sup>th</sup> June 2006, whereafter a "comprehensive response" could be expected.

- [13] In a letter dated 9<sup>th</sup> June 2000, the JSC informed the Applicant that “there is no need to be panicking about the matter” ; that he is at liberty to apply for the advertised post should he meet the requirements of the job; and that (regarding his concerns over his future status) he should refer to his letter of acting appointment, which he would find to be “self explanatory and instructive on this matter.”
- [14] Far from being the “comprehensive response” promised to the Applicant by the JSC Secretary, this letter is curt and dismissive. The JSC knows full well that the Applicant does not hold the qualifications set out in its advertisement, but it cynically states that the Applicant is at liberty to apply, “should you meet the requirements of the job.” With regard to the Applicant’s reasonable and legitimate enquiry as to his future status, he is cryptically referred to his letter of appointment, which is neither self-explanatory nor instructive.
- [15] The court also notes with concern that the letter from the JSC is on the letterhead of the Ministry of Justice and Constitutional Affairs and is signed by S. M. Dlamini in his capacity as Principal Secretary in the Ministry of Justice and Constitutional Affairs.
- [16] The Principal Secretary to the Ministry responsible for Justice used to be ex officio Secretary to the JSC in terms of the Judicial Service Commission Act, 1982. However, the Constitution of Swaziland now requires that the JSC has its own secretariat.
- See section 161 of the Constitution of Swaziland Act, 2005.
- [17] Section 178 of the Constitution directs that “in the performance of its

functions under this Constitution, a service commission shall be independent and not subject to any Ministerial or political influence.”

[18] The independence of the JSC is inextricably linked to the independence of the Judiciary:

*“... the attributes of judicial independence lie at the very heart of the due process of the law. They represent the true essence of a proper judicial process. It follows logically that all attempts must therefore be made to avoid any perception or indication of dependence by the Judiciary on the Executive,”*

-per **Bosielo J in Van Rooyen v De Kock NO and Others 2003 (2) SA 317 (T) AT 323 (para 12.1).**

[19] It is manifestly improper and unconstitutional for the Principal Secretary of an executive Ministry to be performing the functions and duties of the Judicial Service Commission secretariat. Whilst a degree of delay in establishing a “competent and qualified” secretariat (as directed by section 183 of the Constitution) may be expected due to practical constraints, no compromise of the constitutional principles and provisions safeguarding the independence of the judiciary should occur.

[20] The court also notes that the Principal Secretary is the deponent to the 1<sup>st</sup> Respondent’s answering affidavit in these proceedings. The affidavit canvasses factual issues pertaining specifically to judicial posts under the responsibility of the JSC. The Ministry of Justice & Constitutional Affairs apparently continues to be privy to the files, affairs and deliberations of the JSC. This is not permitted by the

Constitution.

[21] The court should not be understood as suggesting that any improper ministerial influence has in fact been exerted on the JSC. It is solely a matter of principle and perception. The Constitution recognizes that public confidence in the Judicial Service Commission is crucial for the credibility and legitimacy of the Judiciary. For that reason, safeguards have been provided to protect the integrity of the JSC from any perception of interference by the Executive. One of those safeguards is the requirement that the JSC has its own secretariat.

[22] It is the view of the court that the entire process relating to recruitment of a substantive Registrar of the Industrial Court is tainted by the JSC permitting the Principal Secretary in the Ministry of Justice and Constitutional Affairs to act as its Secretary after the Constitution came into force.

### **AUDI ALTERAM PARTEM**

[23] The Applicant's counsel submitted that the decision to recruit a substantive Registrar holding qualifications which the Applicant does not possess, of necessity implied a decision to terminate his acting position. In the absence of any other appointment, the Applicant will revert to his former post as Clerk of Court. This will involve considerable loss of status and remuneration. Counsel submitted that the Applicant had a legitimate expectation that he would be afforded an opportunity to make representations before a decision so adverse to his interests was made.

- [24] It is well-established in our law that an administrative body (such as the JSC) “may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say”

**Schmid v Secretary of State for Home Affairs 1996 (2) CH 149 (CA)**

**Administrator, Transvaal v Traub 1989 (10) ILJ 823 (A)**

- [25] In the case of **Ntshontsho V Umtata Municipality 1998 (3) SA 102 TK**, the court dealt with the doctrine of legitimate expectation in relation to the termination of an acting appointment. Madlopha J held as follows at page 109:

*“Although the Applicant’s appointment was temporary and the termination thereof must have been looming ever largely in the Applicant’s mind, the appointment nevertheless created, for its duration, at least one vested right, the entitlement to the acting allowance. The temporary appointment and such attendant vested rights could only be terminated by lawful means ... the audi alteram partem rule, comes into play because the decision to terminate the acting appointment would of necessity bring about the termination of the entitlement to the acting allowance. That the appointment has the tag of being temporary is no magic wand that makes the respondent a law unto itself and entitles it to terminate the appointment in a manner that is at variance with the rules of natural justice. It is not as though the making of representations by the Applicant would benefit only*



*himself. The respondent would also receive information which might turn out to be crucial to the decision whether or not to terminate the acting appointment.”*

[25] The court considers that the conduct of the JSC in appointing the Applicant to act in a post six grades higher than his substantive post and allowing him so to act for a period of almost three years, gives rise to the legitimate expectation that he will be given an opportunity to make representations before his acting appointment is summarily terminated. Such opportunity to make representations should have been given before the substantive post was advertised.

[26] For this reason also, the recruitment process is fatally flawed.

[27] The Applicant asked the court to suspend the recruitment exercise pending finalization of this application, but he did not ask for an order setting aside the recruitment exercise. The relief he seeks is for confirmation of his acting position, alternatively a declaration that he has obtained a vested personal entitlement to the grade and benefits which he has enjoyed as acting Registrar of the Industrial Court. The court must now turn to an examination of the legal basis upon which this relief is claimed.

#### **APPLICANT’S CAUSE OF ACTION**

[28] The Applicant alleges in his founding affidavit that he is entitled to be confirmed in his acting position by virtue of the provisions of Government General Order No. A 243, which forms part of his contract of service with the Government.

General Order No. A 243 (1) reads as follows:

**“An officer shall not normally act in a vacant post                    ACTING**  
for more than 6 months without being promoted.                    APPOINTMENT  
In the case where the officer acted in the same                    NOT TO LAST  
**vacant post for more than 6 months continuously,                    MORE THAN**  
the Ministry under which the vacancy falls shall                    SIX MONTHS  
**take immediate action to promote the officer. If**  
**the officer does not have the pre-requisite**  
**qualifications, he/she shall revert to his/her**  
**substantive post and a suitable candidate**  
**would have to be appointed to fill in the vacancy.”**

[29]        The Applicant argues that on the expiry of the 6 months period after he commenced acting as Registrar, it was mandatory for the 1<sup>st</sup> Respondent to take immediate action to either promote him to the position of Registrar or, if he did not qualify for promotion, to return the Applicant to his substantive post of Clerk of Court and appoint a suitable candidate to fill the vacancy. By failing to take immediate action after 6 months to revert the Applicant to his substantive post, the Respondents must be taken to have satisfied themselves that the Applicant is qualified for the position of Registrar and accordingly qualified for promotion.

[30]        The Applicant advances an alternate argument that, even if General Order A.243 does not create a contractual right to promotion, the Applicant had a legitimate expectation that he would be promoted after acting as Registrar for almost three years. By advertising the post and attaching qualifications which he does not possess, the Respondents are thwarting his expectation of promotion.

[31] It is also argued by the Applicant that he has acquired a vested personal right to the remuneration and employment conditions which he has enjoyed whilst acting as Registrar for three years, and on reverting to his substantive post or any other post to which he may be appointed he should retain his right to such remuneration and employment conditions.

### **RESPONDENTS DEFENCE**

[32] The Respondent's answer to the Applicants claims may be briefly summarized as follows:

32.1 General Order A243 states that an officer shall not normally act in a vacant post for more than 6 months without being promoted (emphasis added)

The circumstances under which the Applicant acted as Registrar were not normal, nor was he acting in a vacant post.

The abnormal circumstances arose when the former Registrar of the High Court, one Selby Gama was appointed Principal Magistrate by the JSC when no vacant post existed. Mr. Gama accordingly "left with his post" and continued to be paid as if he was still Registrar of the High Court. The incumbent Registrar of the Industrial Court, the late Shiyumhlaba Dlamini, was appointed as Registrar of the High Court, but since Mr. Gama still held this post (on

paper), the late Shiyumhlaba Dlamini also “left with his post”, namely the post of Registrar of the Industrial Court. Thus, the post of Registrar of the Industrial Court was not “vacant” when the Applicant was appointed to act.

This abnormal state of affairs was only regularized on 1<sup>st</sup> April 2006, when a new post of Principal Magistrate was created for Mr. Gama. Thereafter the JSC took prompt action to recruit a substantive Registrar of the Industrial Court.

32.2 General Order A243 (2) states:

“In the case of an officer who is acting in a post which is not vacant e.g. when the substantive officer is on long term study leave, sick leave, secondment etc, the provision of this General Order shall not apply.”

32.3 The Applicant does not have the pre-requisite qualifications for the substantive post, and in terms of General Orders he must revert to his substantive post once a new Registrar has been recruited.

32.4 The doctrine of legitimate expectation only applies to procedure, and cannot confer a substantive benefit - see **Cedric Meyer v Iscor Pension Fund 2003 (24) ILJ 338 (SCA).**

32.5 The power to promote /appoint to a

judicial post lies squarely with the JSC, and the court should not usurp the powers of the JSC.

32.6 The Applicant was paid an acting allowance as remuneration for acting as Registrar. When he ceases to act, the acting allowance cannot be paid. The General Orders do not provide for acting benefits to be retained.

[33] The Respondent initially questioned whether the General Orders apply at all to the Applicant so long as he is under the Judicial Service, but this was subsequently abandoned by the Respondent's counsel during argument. The Applicant also correctly abandoned an argument based on Section 26 of the Employment Act 1980, which has no application in the circumstances of this case.

#### ANALYSIS OF THE ARGUMENTS

[34] In the case of **NIKIWE NYONI v THE ACTING COMMISSIONER OF ANTI CORRUPTION UNIT & OTHERS** (Industrial Court Case No. 164/2005), this court ordered that the Applicant be confirmed to the position in which she had been acting for a period of five years, on the basis of General Order A 243. The court had no difficulty in usurping the powers of the Civil Service Board in promoting the Applicant, since the Civil Service Board had neglected to exercise such powers in accordance with the General Orders. However, the court first satisfied itself that the Applicant qualified for the promotion in terms of the relevant Schemes of Services for the Accountancy Cadre.

[36] The Applicant in the present case does not possess the necessary

qualifications which might otherwise have entitled him to promotion in terms of General Order A. 243 (1), and in this respect the Nikiwe Nyoni judgement is distinguishable.

[37] It is true that Regulation 16 of the Judicial Service Commission Regulations, 1968 expressly enjoins that “no appointment to any judicial office may be made before the Commission has determined the suitability of the candidate concerned.” Regulation 9 further directs the JSC to “have regard to the maintenance of the high standard of integrity and efficiency necessary in such office and shall take into account qualifications and experience.”

[37] The Act defines “appointment” to include acting appointment - see Section 2 of Act 13/1982.

[38] The JSC was apparently satisfied with the Applicant’s integrity, efficiency, qualifications and experience when it appointed him to act as Registrar and permitted him to continue acting for a further three years. It is disconcerting that the JSC now sees fit to disparage the qualifications of its own appointee.

[39] Nevertheless, the JSC is the appropriate authority for determining the qualifications required for the holder of a judicial office. The court is also mindful that the role and responsibilities of the Registrar of the Industrial Court have been significantly developed by the Constitution, which requires that the Judiciary shall keep its own finances and administer its own affairs. The qualifications contained in the advertised post reflect this development, and it would not be proper for the court to interfere with the discretion vested in the JSC to determine

pre-requisite qualifications.

[40] Assuming that General Order A. 243 (1) applies to the Applicant and that the Respondent is in breach of its duty to take immediate action after six months to either confirm the Applicant or return him to his substantive post, the terms of the General Order still do not confer an entitlement on an unqualified officer to be promoted (by default, as it were).

[41] The court is unable to find that the Applicant has any contractual right arising from the General Orders entitling him to promotion.

[42] It is not necessary in the circumstances for the court to consider whether the Applicant was acting in a “vacant” post or whether his acting appointment was “normal”.

#### LEGITIMATE EXPECTATION

[43] The court has already found that the Applicant has a legitimate expectation to be heard before his acting appointment is summarily terminated. It does not however follow that he also has a legitimate expectation to be promoted to the substantive position.

[44] In *Meyer v Iscor pension Fund* (op. cit.) at 340, the S.A. Supreme court of Appeal considered that the doctrine of legitimate expectation is limited to procedural relief and cannot be used as a basis for a substantive claim.

[45] The Supreme Court of Appeal did not close the door entirely to the development of the doctrine to substantive claims for substantive relief – see judgement at page 352 para 28 – and many jurists and legal writers consider that such development is overdue – see Rycroft: SA Labour Law at page 111 and the article cited in note 721. Nevertheless, there is unerringly no legal precedent to accord substantive rights on the basis of a legitimate expectation.

[46] The Industrial Court is expressly enjoined to promote fairness and equity in labour relations and there is more scope in the labour law filed for the court to come to the assistance of an employee whose legitimate expectation of some benefit or advantage has been denied, particularly where the conduct of the

employer amounts to an unfair labour practice

- see Ceskon v Marshall & Others (2002) 23 ILJ 251 9LC)  
AT 2258

(para 22).

[47] To be “legitimate” an expectation must have some reasonable basis. It must be more than a mere hope or ambition. In the present case, there is no evidence that any promises or assurances were made to the Applicant to justify a belief that he would be promoted. He was all along aware that his position was temporary and that he was acting pending a substantive appointment. When he became aware that the post of Registrar was being advertised, the Applicant’s reaction was to state that “I expect to leave with all my rights to whatever new position I may be transferred”.

[48] In the circumstances, the court is unable to find that the Applicant has an expectation, let alone a legitimate or reasonable expectation, that he would be promoted to the position of Registrar.

#### RIGHT TO BENEFITS

[49] It remains to determine whether the Applicant acquired a vested personal right to retain the remuneration and employment conditions when he enjoyed whilst acting as Registrar.

[50] Such right clearly does arise en contractu. An employee receiving an acting allowance whilst acting temporarily in a position above his normal grade cannot legitimately expect to retain the acting allowance when he ceases acting. In law it would appear that no vested right to the higher remuneration is obtained.



[51] However there can be no doubt that the Applicant has been treated unfairly:

51.1 In terms of General order No. A243 (1), the JSC should have made a substantive appointment of a new Registrar of the Industrial Court within six (6) months after 22 September 2003. At the end of the six months period, the Applicant should have either been promoted or he should have reverted to his post of Clerk of Court.

51.2 The JSC apparently made no attempt to recruit a new Registrar, and left the Applicant acting in the position for 33 months before it finally advertised the post.

51.3 The reason given for the inaction of the JSC is bizarre, namely that the substantive post could not be filled because it was not vacant. The cause for this anomaly was that the JSC appointed Selby Gama to a non-existent post of Principle Magistrate and paid him as though he was still Registrar of the High Court. The new Registrar of the High Court was then paid as though he still occupied his former post of Registrar of the Industrial Court. This manipulation of establishment posts created the fiction, now relied on by the Respondents, that the post of Registrar of Industrial Court could not be filled earlier because it was not vacant.

The fact of the matter is that the JSC acted irregularly in order to meet some exigency, and then perpetuated the irregularity for an unreasonable period of three years. The Applicant is an innocent victim of an irregular expedience.

51.4 The Applicant was elevated to an acting position six (6) grades higher than his substantive post at Grade 8. This resulted in an increase in his monthly remuneration of more than E10000.00. Initially, this may have seemed to be a windfall to the Applicant, but as the months and years rolled by, he would have become accustomed to his new remuneration and adapted his lifestyle and standard of living accordingly. Indeed, in July 2004 he applied for and was granted a government loan to purchase a motor vehicle which he needed for the performance of his duties as Registrar.

51.5 Whether or not he qualifies for the position, the Applicant has performed the duties of Registrar for three years. This involved acting as the Chief Executive Officer of an important and busy department of the Judiciary, supervising court staff, generally administering the daily affairs of the Industrial court. No evidence has been adduced to indicate that his performance of these duties was not entirely satisfactory.

51.6 It is unconscionable that the Applicant

should now, after three years of diligent service in a judicial office carrying significant status and managerial responsibility, be expected to revert to his post of Clerk of Court and relinquish the enhanced status and benefits which he has enjoyed for the last three years.

[52] In deciding a matter, the Industrial Court may make an order it deems reasonable which will promote the objects of the Industrial Relations Act. One of the objects of the Act is to promote fairness and equity in labour relations.

[53] The Court has already found that it would be unconscionable for the Applicant to revert to the substantive post and grade of Clerk of Court. It is the view of the court that in the particular circumstances of this case, it would be fair and equitable for the Applicant to be transferred on promotion, once a substantive Registrar has been appointed, to a position not less than four grades below the position of Registrar of the Industrial Court.

[54] The Applicant's future career path in the public service must be determined by the relevant service commission of the Government in consultation with him. It is not for the court to intervene in this process more than is strictly necessary to ensure that the Applicant is treated fairly.

[55] In the exercise of its equitable discretion, the court makes the following order:

- (a) **the Judicial Service Commission is directed to commence the recruitment exercise for the appointment of a Registrar of the Industrial Court de novo, after the establishment of its secretariat in terms of section 183 of the**

**constitution;**

**The Judicial Service Commission is directed to consult with the Applicant regarding the appointment of a substantive Registrar of the Industrial Court; the anticipated time-frame of such appointment; and the arrangements that the JSC intends to make regarding the Applicant's future career in the public service;**

**(b) The 1<sup>st</sup> Respondent is directed in consultation with the Applicant, to identify and promote the Applicant to a suitable position in the civil or judicial service not less than four grades below the position of Registrar of the Industrial court. Pending such promotion, the applicant shall continue to receive the remuneration and benefits he had enjoyed whilst acting as Registrar of the Industrial Court.**

[56] Although the Applicant had not succeeded in obtaining the relief he sought in launching the application, he had been substantially successful in terms of the outcome. Moreover, the application was prompted by the unfair conduct of the 1<sup>st</sup> Respondent. **The Applicant is awarded the costs of the application.**

The members agree.

**P. R. DUNSEITH**

**PRESIDENT OF THE INDUSTRIAL COURT**

