IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 398/06**

In the matter between:

NHLANHLA HLATSHWAYO **Applicant**

and

SWAZILAND GOVERNMENT **1ST Respondent**

ATTORNEY GENERAL **2ND Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. MKHWANAZI**
FOR RESPONDENT	**:**	**S. KHUMALO**

R U L I N G

The Applicant approached the court by way of urgency seeking an order in the following terms:

1. *Dispensing with the rules of court in respect of form, manner of service and time limits and hearing this matter as one of urgency.*
2. *That a rule nisi do hereby issue and returnable on a date to be fixed by the above Honourable court calling upon the Respondents*

to show cause why an order in the following terms should not be made final.

2.1 *Directing the Respondents to confirm and or promote the Applicant to the position of the Registrar of the Industrial Court of Swaziland in terms of the Government General Orders Amendment No. A115 of 1999 and Order No. A243 (1) with effect from April 2004.*

2.2 *Suspending and or staying the recruitment exercise to fill in the above post pending finalization of this application.*

2.3 *Costs of application.*

2.4 *That paragraph 2.2 be operative with immediate effect pending finalization of this application.*

2.5 *Further and or alternative relief.*

The application was served on the Attorney-General in his capacity as legal representative of the Swaziland Government. Unreasonably short notice of the application was given, so that the Attorney-General was unable to prepare an Answering Affidavit or even to take proper instructions in the period of 24 hours between service of the application and the matter being called in court. Mr. Sifiso Khumalo appeared for the respondent and raised two points in limine, namely that:

1) The Applicant has failed to satisfy the requirement that the matter be treated on the basis of urgency. He has failed to set out special circumstances which qualify this matter to be treated differently from any other labour matter.

The Applicant has failed to establish the requirements for the interim interdict that he is seeking.

At the outset, the court raised the issue whether there was a need to serve upon the Judicial Service Commission ("JSC"), which is the appointing authority in respect of the appointment of the Registrar of the Industrial Court. Mr. Khumalo for the Respondents took this issue a step further by submitting that the JSC should have been cited as an interested party.

Having considered the provisions of the Judicial Service Commission Act No. 13 of 1982 (as amended), read together with Chapter V111 Part 4 of the Constitution of Swaziland and the Government Liabilities Act No. 2 of 1967, the court is of the view that the JSC has no locus standi in judicio in its own right. It is an independent and impartial service commission established to exercise powers and functions regulating the judicial service. As such it is an organ of government; it does not have any existence separate from government; and it cannot be sued (or sue) in its own name as a separate legal entity. There was no need to cite the JSC as a party to the application, and service upon the Attorney - General is sufficient and good service in terms of the Government Liabilities Act No. 2 of 1967.

After hearing full argument on the two preliminary legal issues raised by the Respondents, the court reserved its ruling. The decision now follows:

URGENCY

An Applicant who wishes on grounds of urgency to abridge the normal rules applicable to notice and hearing of applications must explicitly set forth the circumstances which render the matter urgent and state the reasons why he cannot be afforded substantial relief if the matter is dealt with in the normal way. He must show that he will be prejudiced if the dispute he wishes to have

determined first follows the conciliation process prescribed by Part V111 of the Industrial Relations Act No. 1 of 2000 and is subsequently referred to court in the normal way for determination as a unresolved dispute. See Vusi Gamedze v Mananga College (Industrial Court Case No. 267/06).

In his Founding Affidavit the Applicant sets out that he has acted as registrar of the Industrial Court on Grade 14 since September 2003, a period of 33 months. Prior to his acting appointment, he held the substantive post of Clerk of Court on Grade 8. During May 2006 it came to the Applicant's notice that an advertisement had been published inviting interested persons to apply for the vacant post of Registrar of the Industrial Court, the same post in which the Applicant is acting.

The Applicant inferred from this advertisement that he would not be confirmed in his acting post. On the 31st May 2006 he wrote to the Secretary of the JSC regarding his future status and in particular expressing the expectation that he would retain his "rights" in the event that he is transferred to a new position.

The JSC Secretary responded by suggesting that the Applicant waits until the JSC has considered the Applicant's letter at its meeting on 8th June 2006, whereafter a "comprehensive response" could be expected.

On the 9th June 2006 the JSC wrote again to the Applicant, informing him that there was "no need to be panicking about the matter"; that he was at liberty to apply for the advertised post should he meet the requirements of the job; and that he should refer to his letter of appointment to the acting position, which is self explanatory and instructive on the matter. The letter also states that Section 26 of the Employment Act 1980 (which deals with unilateral changes in terms and conditions of employment) is not applicable in the case of the Applicant.

The Applicant derived no comfort from this letter. It gives him no reassurance regarding his retention of the grade and remuneration he has enjoyed for the last thirty three months and simply invites him to compete for the post of Registrar against external candidates. He is reminded that his letter of appointment reflects an acting appointment "until further notice".

The Applicant alleges in his affidavit that he has a right to be confirmed in his acting position in terms of Government General Order No. A243, which 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."

The Applicant states that this General Order forms part of his contract of service. He argues that he should have been promoted to the substantive post of Registrar after he had acted in that post for 6 months continuously. He says that by advertising the post, the Respondent is breaching his employment contract. He also advances an alternative argument that, even if General Order A.243 does not create a right, he had a legitimate expectation that he would be confirmed after acting in the post for almost three years. By advertising the vacant post, the Respondent is thwarting his expectation.

The Applicant submits that the matter is urgent because the recruitment process is continuing and the closing deadline for applications is the 23rd June 2006. If the application is heard in the normal course, he says, the recruitment exercise will be concluded and in all likelihood a substantive candidate will have been appointed. This will result in the competing rights of an innocent third party (the

successful candidate) complicating the matter, and the possibility of the Applicant being removed from the position before his entitlement has been finally determined.

Mr. Khumalo, Crown Counsel for the Respondents, advanced the argument that the Applicant has created his own urgency, since he saw the advertisement in May 2006 but delayed until 21 June 2006 before approaching the court. He cited the case of Gallagher v Normans Transport Lines (Pty) Ltd 1992 (3) SA 500 (W) as authority that it is unacceptable for a litigant to unduly delay in bringing a matter to court and then plead urgency to justify a departure from the usual time limits.

This is good law but the court is not satisfied that the Applicant delayed unduly in approaching the court. He first wrote to the appointing authority expressing his concerns and seeking reassurance. When no such reassurance was forthcoming, he instituted proceedings after a period of about ten days. In our view, this period does not constitute an unreasonable delay, bearing in mind the need to consult with an attorney and draft court papers, not to mention the natural reluctance of an employee to rush into litigation against his employer without careful consideration of his legal position.

Mr. Khumalo also submitted that the Applicant has not shown that he will suffer any prejudice should the matter be heard in the normal way. Even if the substantive appointment is made in the interim, this will not render the Applicant's rights nugatory because if his application ultimately succeeds, the court can undo what has been done in the meantime, and compensate the Applicant by award of damages. Mr. Khumalo also referred to the case of SAPWU v Swaziland United Plantations (Industrial Court Case No. 79/98), in which the Industrial Court refused to grant an urgent interim reinstatement order because the Applicants could obtain adequate relief in due course.

The SAPWU case is distinguishable from the present matter in one important aspect: in that case, the Applicants had already been dismissed and the alleged infringement of their rights had already occurred. In the present case, the Applicant approaches the court to prevent a threatened (alleged) infringement.

It appears to the court that the Applicant is justified in apprehending that he will not obtain substantial redress if the matter is heard in due course. A contested application heard in the normal way often takes many months before it is finally heard and determined. If a substantive appointment is made in the meantime, this implies the Applicant being transferred to another post, possibly even reverting to his old position of Clerk of Court at Grade 8.

Without in any way venturing any view at this stage on the merits of the Applicant's claim that he is entitled to be confirmed as Registrar, the court considers that it would be inequitable and unfair if the Applicant's employment status and remuneration may be drastically altered to his detriment whilst he waits for his claim to be determined.

The court accordingly holds that Applicant has shown that the matter is urgent and that he will not obtain substantial redress if the matter follows its normal course.

It should be noted that there are degrees of urgency, and it was unreasonable for the Applicant to give the Respondents such short notice as to make it impossible for the Attorney-General to properly consult with the affected organ of government. The court places practitioners on alert that should reasonable notice in future not be given depending on the degree of urgency, the court may sanction the inconvenience caused to the Respondent and the court by an appropriate order as to costs.

PRIMA FACIE CASE

The Respondents further argued that the Applicant has failed to establish the requirements for the interim interdict that he is seeking.

In this regard, Mr. Khumalo correctly submitted that if a prima facie case for final relief has not been made out in the Founding Affidavit, the court cannot grant interim relief. See Ferreira v Levin 1995 (2) SA 813.

Mr. Khumalo submitted that the Applicant has failed to establish:

- a prima facie right
- that he has no alternative remedy

that he will suffer irreparable harm if the interim relief is not granted.
that the balance of convenience favours the granting of interim relief.

PRIMA FACIE RIGHT

The Applicant's right can be prima facie established even if it is open to some doubt.

Rawjee Bros v De Vega & Another (SLR 1979-1981 at 132 B)

In the absence of any Answering Affidavit, the court at this stage is only required to consider the facts as alleged by the Applicant.

The Applicant relies on General Order A.243, as quoted above. He states that this General Order is applicable to his employment by the Respondent. The General Order provides that immediate action shall be taken to promote an officer who has acted in a vacant post for more than six months continuously, and states the general rule that an officer shall not normally act in a vacant post for more than 6 months without being promoted.

These provisions establish the Applicant's prima facie contractual right to promotion, since he has acted continuously as Registrar for a period of 33 months.

The General Order contains an important limitation on the right to promotion. It expressly provides that if the officer who has been acting for longer than six months does not have the pre-requisite qualifications, he shall revert to his substantive post and a suitable candidate would have to be appointed to fill in the vacancy.

The Applicant does not deal with his qualifications for the substantive post of Registrar of the Industrial Court in his affidavit, and he does not assert expressly that he is qualified for the position. The general rule is that an officer shall not normally act in a vacant post for more than 6 months without being promoted. It is also an objective fact that the Respondent considered the Applicant to be sufficiently qualified to act as Registrar for a period of almost three years. In these circumstances it is incumbent on the Respondent to show that the Applicant does not have the pre-requisite qualifications to entitle him to the promotion he seeks.

The advertisement published by the Respondent lists the pre-requisite qualifications as inter alia; a Bachelor of Laws degree; admission as an attorney of the High Court of Swaziland; and a minimum of working experience of 6 years as a legal practitioner or judicial officer. The qualifications appear to accord with the important duties and functions of the office of the Registrar of the Industrial Court, which is referred to in the Constitution as a "judicial office" (under Section 160 ©.

The court has no knowledge whether the applicant possesses these

qualifications, and cannot speculate in this regard. Suffice it to say that in the absence of any evidence that the Applicant is not qualified for the promotion he seeks, the court is satisfied that a prima facie right (though open to some doubt) has been sufficiently established.

Although the Applicant has not sought specific relief in this regard, the court also remarks that an officer who has acted in a position for a considerable period of time has a legitimate expectation, at the very least, that he will be consulted and given the opportunity to make representations before he is removed from his acting position and reverts back to his substantive post - particularly where there is a significant disparity between the acting salary grade and the substantive salary grade.

An employer which allows an employee to act in a vacant position for an unreasonable period of time should not be surprised when the employee claims a vested personal right to the remuneration and employment conditions which accompany the acting position.

OTHER REQUIREMENTS FOR AN INTERIM INTERDICT

For the reasons set out in this ruling when dealing with the question of urgency, the court is satisfied that the other requirements for interim relief have also been established. It is in accordance with the dictates of fairness and justice that the recruitment exercise be suspended until the rights of the Applicant have been finally determined. Having delayed for a substantial period before taking steps to fill the vacant post, the Respondent cannot claim to be prejudiced if the process is further delayed until this dispute has been determined. The balance of convenience favours maintaining the status quo in the interim.

In the exercise of its equitable jurisdiction, and at the invitation of Mr. Mkhwanazi for the Applicant, the court shall also amplify the terms of the rule nisi sought by the Applicant.

The court makes the following order:

1. **The court dispenses with the normal rules and procedures relating to applications for determination of disputes and permits the matter to be enrolled as one of urgency.**

2. **A rule nisi hereby issues, returnable on a date to be fixed immediately after delivery of this ruling, calling upon the Respondents to show cause why an order in the following terms should not be made final :**

2.1 **Directing the respondents to confirm and or promote the Applicant to the position of the Registrar of the Industrial Court of Swaziland in terms of the Government General Orders amendment No. A115 of 1999 and order No. A243 (1) with effect from April 2004.**

ALTERNATIVELY

2.2 **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.**

2.3 **Costs.**

3. **The recruitment exercise to fill the post of Registrar of the Industrial court is stayed pending finalization of this application.**

The members agree.

P. R. DUNSEITH

PRESIDENT – INDUSTRIAL COURT