

## IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 174/2007

In the matter between:

**MASWATI S. DLAMINI**

**Applicant**

and

**SWAZILAND DEVELOPMENT & SAVINGS BANK**

**Respondent**

### CORAM:

**P. R. DUNSEITH:                      PRESIDENT**

**JOSIAH YENDE:                      MEMBER**

**NICHOLAS MANANA:                MEMBER**

**FOR APPLICANT:                      S. SIMELANE**

**FOR RESPONDENT:                    M. SIBANDZE**

### **J U D G E M E N T - 16/5/07**

1. The Applicant is an employee of the Respondent. In April 2002 he was transferred from the position of Financial Controller on grade M4 to be an Operations Officer at the Respondent's Mbabane branch, reporting to the branch manager. Prima facie, this transfer was a demotion from a managerial to a clerical position but the Applicant's remuneration was not affected.

2. The Applicant did not contest this apparent demotion, and tacitly acquiesced to his transfer to the position of Operations Officer. Four months later, he left on extended study leave. The terms upon which study leave was granted to him have not been disclosed.

3. Upon completion of his studies the Applicant returned to the Respondent's employ in December 2006. He was informed that he could resume his position as an Operations Officer on Grade C4.

4. During the Applicant's absence on study leave, the Respondent had changed its personnel reporting and grade structures. The Applicant now reported to an Assistant Branch Manager. Grade C4 was not equivalent to the grade at which Applicant was remunerated when he was a Financial Controller.

5. The Applicant considered that his re-appointment as an Operations Officer was tantamount to a further demotion. He exercised his right to challenge the alleged demotion by requesting the Respondent to furnish the Commissioner of Labour with information concerning the changes in terms of his employment in the terms of section 26 of the Employment Act 1980.

6. Section 26 of the Act empowers the Commissioner to examine changes in the terms of employment of an employee and determine whether such changes operate to the disadvantage of the employee. If the Commissioner is of the opinion that the changes result in terms and conditions of employment less favourable than those previously enjoyed by the employee, he notifies the employer of his opinion and the changes are thereby rendered void and of no effect.

7. Until such time that the Commissioner has reached an opinion on the changes, the new terms of employment may be regarded as provisional only. Nevertheless, the employee is expected to comply with the new terms pending the Commissioner's determination.

8. If compliance with the new terms will occasion undue hardship or prejudice to the employee, and the employer does not agree to suspend implementation of the new terms until the Commissioner has notified his opinion, the employee's remedy is to apply to the Industrial Court for an interim order restoring the status quo ante until such time that the matter has been determined by the Commissioner.

9. The Commissioner has been seized with the Applicant's complaint since about 8 December 2006, but no determination has been reached. The Applicant complains that the Respondent has been obstructive and fails or refuses to furnish the Labour Commissioner with the documentation necessary for his investigation. The purpose of section 26 is to provide an employee who believes that his rights are infringed by a unilateral change in his terms of employment with a speedy and robust remedy. The aim of the section is subverted if the Labour Commissioner delays in reaching a determination. The Commissioner and his Inspectors have extensive powers to enforce the provisions of the Employment Act, including powers of search and seizure, criminal prosecution, and applying to court for an enforcement order. It is unacceptable that 5 months have elapsed without the Applicant's complaint under section 26 being determined by the Commissioner.

10. Nevertheless, the Applicant has provisionally accepted the appointment and performed the duties of an Operations Officer at remuneration on grade C4 under protest, pending the Commissioner's determination.

11. On 27<sup>th</sup> March 2007 the Respondent advised the Applicant of his transfer to OPC Manzini as OPC Checking Officer, effective 2<sup>nd</sup> April 2007. The Applicant was informed that this is a horizontal transfer with no effect on his salary or current terms of employment. The reason given for the transfer is that the Respondent is centralizing certain operational activities from all branches to the OPC Manzini.

12. The Applicant alleges that the position of OPC Checking Officer is substantively junior to the position of Operations Officer, and his transfer to this position means that he is being demoted twice over.

13. The Applicant has not invoked the provisions of section 26 of the Employment Act in respect of the second alleged demotion. He has applied to the Industrial Court on a certificate of urgency for an order interdicting and restraining his transfer to the position of OPC Checking Officer, pending finalization of the proceedings in the Department of Labour under section 26 of the Act.

14. The Respondent opposes the application and has raised preliminary points of law, namely that no grounds for urgency have been made out, and that the requirements for an interim interdict have not been established in the Applicant's founding papers.

15. The Applicant states that the application is urgent because the Respondent is insisting that he takes up the position of OPC Checking Officer and has threatened disciplinary action if he fails to do so. He also says that if he is forced to take up the position in Manzini, his remuneration would be adversely affected since he will be paid at a significantly inferior scale, and his status will also be diminished.

16. The letter of transfer to OPC Manzini expressly states that it is a horizontal transfer and that the Applicant's salary and terms of employment are not affected. The Applicant has not advanced any factual basis for his bald averment that his remuneration and status will be adversely affected by the transfer.

17. The Applicant can avoid the threat of disciplinary action by simply accepting the transfer under protest and reserving his rights with respect to the pending section 26 proceedings.

18. The court notes that the Applicant has not challenged his transfer to OPC Manzini in terms of section 26 of the Employment Act, nor are any court proceedings to set aside such transfer pending. To obtain an order staying the transfer pending the determination of the section 26 proceedings regarding his appointment as an Operations Officer, the Applicant must show that he will suffer irreparable harm if his transfer to OPC Manzini is not interdicted and he is ultimately successful in the pending section 26 proceedings.

19. The court does not find any well grounded apprehension of irreparable harm to have been shown. If the Commissioner of Labour declares the Applicant's appointment as Operations Officer to be an illegal demotion in terms of status and/or remuneration, the horizontal transfer of Applicant to OPC Manzini will be a perpetuation of such demotion and will have to be corrected. The Applicant was willing to perform his duties as Operations Officer pending the Commissioner's determination, and the court is not persuaded that he will suffer any additional harm by taking up his transfer to OPC Manzini under protest.

20. The court does not consider that any grounds for urgency have been shown. Furthermore, the Applicant has failed to show any reasonable apprehension of irreparable harm if the interlocutory interdict is not granted.

21. The application is dismissed, with no order for costs.

The members agree.

**P. R. DUNSEITH**  
**PRESIDENT OF THE INDUSTRIAL COURT**