

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 109/07

In the matter between:

JOEL LUKHELE

APPLICANT

And

THE CIVIL SERVICE COMMISSION

1ST RESPONDENT

**THE PRINCIPAL SECRETARY - MINISTRY
OF PUBLIC SERVICE & INFORMATION**

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

CORAM:

NKOSINATHI NKONYANE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT:

C.S. NTIWANE

FOR RESPONDENTS:

P. DLAMINI

JUDGEMENT 02/08/07

[1] The applicant brought a notice of application on a certificate of urgency for an order, inter alia,

" b) That applicant be paid a salary equivalent to that of Under Secretary in the Ministry of Agriculture and Co-operatives with all the benefits of that office from the 1st July 2005.

b) Costs

c) Further and/or alternative relief."

[2] On behalf of the respondents a notice to oppose was filed.] No further papers were thereafter filed and the court granted the application in default on 20 March 2007.

[3] The respondents filed a rescission application. The court allowed the application.

[4] An Answering Affidavit was filed by the respondents and the applicant also filed its Replying Affidavit. The matter was set down for argument on the merits on 19 July 2007.

[5] The applicant has since filed a notice to amend. The application was not opposed. The notice to amend reads as follows:-

" a) That the rules of the above Honourable Court in respect of form, manner of service and time limits be dispensed with and the matter be heard as one of urgency.

b) That the applicant be appointed Under Secretary in the Ministry of Agriculture and Co-operatives and/or his appointment as Under

Secretary in the said Ministry be confirmed.

c) Costs."

[6] There is no prayer for further and/or alternative relief.

[7] The applicant joined the Civil Service in 1969 as an Assistant Accounts Officer. He was promoted to the position of Accounts Officer in 1971. In May 1973 he rose to the position of Assistant Accountant Grade II. On 28 March 1974 he was further promoted to the post of Assistant Accountant Grade 4.

[8] On the 1st April 1977 he was promoted to the post of Accountant Grade 9. On the 1st October 1979 he became Senior Accountant. On 30 July 1984 he was promoted to the post of Clerk to Parliament. On the 5 May 1995 he was appointed Assistant Commissioner of Taxes and was transferred to the Income Tax Department.

[9] A year later, on the 5th March 1996, he was appointed to the post of Principal Personnel Officer in the Ministry of Agriculture and Co-operatives. On 24 November 2005 his appointment was varied to that of Principal Assistant Secretary in the same Ministry.

[10] The applicant is presently the Principal Assistant Secretary in the Ministry of Agriculture and Cooperatives. His main complaint is that notwithstanding his vast

experience and letter of recommendation by the former Under Secretary, the Civil Service Commission in July 2005, by passed him and appointed Mr. Siphon Nxumalo to be the Under Secretary in the Ministry following the retirement of the former Under Secretary Mr. E.J. Vilakazi.

Prior to his promotion, Mr. Nxumalo was junior to the applicant. Further, the applicant had acted as Under Secretary when Mr. Vilakazi went on leave pending his retirement. The applicant acted for the period starting on 13 December 2004 up to the 31st January 2005.

The applicant also acted as Under Secretary in the Ministry from 1st February 2005 to 28 February 2005. He also served in an acting capacity from 1st March 2005 to 31st May 2005. He again acted on the 1st June 2005 up to 30th June 2005.

The applicant asks the court to consider the various periods in which he acted in the position of Under Secretary cumulatively and find that he had acted for a period of six months and that he should therefore be appointed and/or confirmed as per the provisions of the General Orders.

It was argued to the contrary on behalf of the respondents that the court has no power to consider the various acting periods in a cumulative fashion and further that the applicant did not act for six months continuously in a vacant post as envisaged by the General Orders.

[15] The applicant also argued that because of his experience

as Clerk to Parliament and also his acting experiences, he had a legitimate expectation that he would be consulted before a substantive appointment of the Under Secretary was made.

[16] The relevant General Order in this matter is A.245 (1) and (2). The order states as follows: -

"(1) An officer shall not normally act in a vacant post for more than 6 months without being promoted. In the case where the officer has acted in the same vacant post for more than 6 months continuously, the Ministry under which the vacancy falls shall take immediate action to promote the officer. If the officer does not have the pre-requisite qualifications, or experience to fill in vacancy he/she shall revert to his/her substantive post and a suitable candidate would have to be appointed to fill the vacancy.

(2) In the case of an officer who is acting in a post whose incumbent is on long-term study leave, sick leave, secondment etc, the provision of this General Order shall not apply."

[17] When the applicant acted as Under Secretary from 13 December 2004 to 31 January 2005, the post was not vacant, as Mr. E.J. Vilakazi had not yet retired, but away on leave. It cannot therefore be said that the applicant acted for six months continuously in the same vacant post as required by

the General Order A.245(1) and (2) even if the periods that he was acting in were to be considered as unbroken.

[18] The provisions of the General Order are therefore clearly not applicable to this case.

[19] This case is distinguishable from that of **NHLANHLA HLATSHWAYO V. SWAZILAND GOVERNMENT AND ANOTHER (IC)** case No. 398/06. In that case the applicant was acting in a vacant post continuously for more than six months and was still holding the acting appointment when he brought the application to court when the post was advertised without him having been first consulted. Further, this case is distinguishable from that of **NIKIWE NY ONI V. THE ACTING COMMISSIONER OF ANTI CORRUPTION UNIT & OTHERS (IC) CASE NO. 164/05**. In that case again the applicant was still acting when she approached the court for an order that she be confirmed. As she had acted continuously for more than six months and had the relevant qualifications, the court granted the order.

[20] In the present case the applicant ceased to hold the acting capacity at the end of June 2005. The court cannot therefore make an order for confirmation, as he is not currently acting in a vacant post. When the position was filled in July 2005, he did not approach the court for an intervention, if he felt that it was not fair that he had not been considered for the post.

[21] The applicant has only approached the court two years later because he is about to retire. In terms of paragraph 21.1 of the Founding Affidavit, the applicant is due to retire on 8 August 2007. His main concern now is the retirement package. He wishes that it could be computed on a better scale, to wit, that of an Under Secretary.

[22] The applicant having more than once acted in the post clearly had a legitimate expectation that he would be consulted before the post could be filled (see the case of **NHLANHLA HLATSHWAKO** supra).

[23] The doctrine of legitimate expectation is however limited to procedural relief and cannot be used as a basis for a substantive claim. (See the case of **NHLANHLA HLATSHWAKO** supra at p. 15 and the cases cited therein).

[24] Taking into account all the above factors, the nature of the order sought and all the circumstances of this case, it is clear that the applicant's application cannot succeed.

[25] The application is accordingly dismissed. No order to costs is made.

The members agree.

NKOSINATHI NKONYANE

JUDGE - INDUSTRIAL COURT