

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 124/2008**

In the matter between:

**SANDILE MBHAMALI**

**Applicant**

and

**SWAZILAND ELECTRICITY COMPANY LIMITED**

**Respondent**

**CORAM:**

**P. R. DUNSEITH**

**PRESIDENT**

**FOR APPLICANT**

**N. MTHETHWA**

**FOR RESPONDENT**

**ADV. F. JOUBERT (instructed by Magagula  
Hlophe Attorneys)**

**J U D G E M E N T -05/08/2008**

1. The Applicant has applied to the Industrial Court by way of Notice of Motion supported by affidavits for an order:

14.1. That the Respondent should be interdicted and restrained from proceeding with the recruitment of an external candidate for the position of Credit Controller.

14.2. That the Respondent should confirm the Applicant to the position of Credit Controller.

14.3. That the prayers contained in paragraphs 1.1 and 1.2 above operate with immediate and interim effect pending the final determination of the matter.

14.4. Costs to be awarded against the Respondent at attorney and own client scale.

2. The Respondent agreed to suspend the process of recruiting an external candidate pending determination of this application, so it was unnecessary for the court to consider whether the Applicant was entitled to any interim relief.

3. At the hearing of the matter, the parties agreed that I should hear the matter sitting alone without the nominated members, as provided by section 6(7) of the Industrial Relations Act 2000.

4. In his founding affidavit, the Applicant sets out that he is presently employed by the Respondent as a Senior Accounts Officer, a position he has held since 10<sup>th</sup> March 2003. The Applicant has been employed in the Respondent's Credit Control Department for a continuous period of 15 years. From 2005 to 2007 he was the Senior Credit Controller and direct assistant to the Credit Controller (also known as the Credit Control Manager). On the 1<sup>st</sup> July 2007 he was appointed to the position of Acting Credit Controller after the incumbent took an early retirement. He was still acting in this position when he instituted the present application on the 18<sup>th</sup> March 2008.

5. On 27 November 2007 the Respondent advertised internally for applications for the vacant position of Credit Controller. The Applicant applied for the position. He was not afforded an interview, but on 19 February 2008 he was informed in writing that his application was unsuccessful. No reasons were given.

6. The Applicant raised a grievance, being dissatisfied with the rejection of his application. He received no response to his letter of grievance, and the Respondent proceeded to advertise the vacant position externally. The Applicant's union representatives were informed that the Respondent would not reconsider its decision to recruit an external candidate. The Applicant then instituted the present application.

7. The present application was argued together with two other applications in the matters of **Sibusiso Satekge v Swaziland Electricity Company Limited (Case No. 125/2008)** and **Pinkie Sibandze v Swaziland Electricity Company Limited (Case No. 126/2008)**. Similar issues arise for decision in all three applications, although the facts are not entirely identical. In Case Nos. 125/2008 and 126/2008, the Applicants are seeking confirmation to the vacant positions of Regional Accountant, Hhohho region and Regional Accountant, Manzini region respectively. The judgements in those cases will refer to the findings in this judgement.

8. The Applicant relies upon clause 16.2 of the Collective Agreement that governs his terms and conditions of employment. This clause states as follows:

*"16.2. Recruitment of personnel to fill existing posts in the establishment shall remain the prerogative of the Board. However, preference shall be given to employees already in the establishment who have the qualifications, ability and or experience acceptable to the Board. Normal procedure of advertising through the media shall be followed in the absence of an employee having qualifications, ability and or experience. Where higher qualifications are needed for the post, the Board shall endeavour to train its employees with proper potential so as to enable them to fill these posts."*

9. In exercising its managerial prerogative to fill a vacant post in its establishment, an employer normally has a wide discretion to decide on the qualifications and qualities which a suitable candidate for the post should have, and the process to be adopted for the recruitment and selection of such a candidate. The employer may however fetter its discretion in terms of its own collective arrangements and policies and bind itself to abide by certain criteria, conditions and/or procedures in the selection process.

10. In terms of clause 16.2, the Respondent has bound itself:

14.1. to give preference to existing employees who have the required qualifications, ability and or experience when recruiting to fill a vacant post; and

14.2. to advertise externally only in the absence of any eligible and suitable internal candidate.

11. The Applicant states that he possesses the required qualifications, ability and or experience and he is both eligible and suitable to be appointed to the position of Credit Controller. He asserts that the Respondent has no right to recruit an external candidate, and the court should order the Respondent to promote him to the position.

12. The Applicant submits further that in any event the Respondent is obliged to appoint him to the position of Credit Controller because he has been acting in the position for more than 6 months, and clause 1.3 of the Respondent's Acting Guidelines provides as follows:

*"1.3 Such acting period shall not exceed six months, otherwise the acting incumbent for a period exceeding six months would be deemed*

*performing at a fully competent level to be confirmed to the position."*

13. Finally the Applicant has referred the court to the Respondent's Recruitment and Selection Policy, which provides inter alia that:

- recruitment will always begin from within the company, except where it is obvious that the required skills are not possessed in the organization.
- the recruitment and selection process shall at all times be conducted fairly, transparently and without discrimination of any Applicant.
- the interview method is targeted selection, which focuses on eliciting specific information relative to the job's required functional and behavioral skills.
- selection decisions should be based on the critical need to fulfill the job requirements and it will happen from time to time that assessment tools are needed to assist in identifying the most suitably ideal candidate who fits the job, through conducting a job fit analysis test.
- all successful candidates must receive feedback. This feedback must provide accurate information as to the reason for their lack of success, and must include guidance on what remedial action or learning the candidate may need to consider in developing his/her career.

14. The Respondent in its answering affidavit, and through its counsel during arguments, raised the following issues:

14.1. The Recruitment and Selection Policy and the Acting Guidelines are not official policies of the Respondent. They have not been approved and adopted, nor have they been brought into operation. The Applicant cannot rely upon these guidelines and policies in support of his claim;

14.2. In any event, Clause 1.3 of the Acting Guidelines does not confer an entitlement on an acting incumbent to be confirmed to the substantive

position;

14.3. The Applicant's application for the position of Credit Controller was correctly rejected because he does not possess the required qualifications, ability and experience.

#### RECRUITMENT AND SELECTION POLICY

14. The Respondent's managing director Pius Gumbi is the chairman of the Respondent's Executive Committee ("EXCO"). He states in his affidavit that the Recruitment and Selection Policy is not an official policy of the Respondent as it is still undergoing the adoption process. In his affidavit in Case No. 125/2008 Mr. Gumbi says that the policy document relied on by the Applicants is merely a draft that was prepared for adoption by the Executive Committee ("EXCO"). These allegations are confirmed in supporting affidavits made by Bonginkosi Nsingwane, the Respondent's Human Resources Manager; Sikhumbuzo Tsabedze, General Manager Customer Services and a member of EXCO; and Sifiso Dlamini, Acting Manager Corporate Services.

15. In his Replying Affidavit, the Applicant insists that the Policy has been adopted, and in support of this he has produced a copy of an email sent by Bonginkosi Nsingwane to various SEB Managers on 3<sup>rd</sup> December 2007. A Recruitment and Selection Policy dated 2<sup>nd</sup> September 2007 is shown as an attachment, and the email states:

*"Dear All*

*This is the Policy that has been adopted by EXCO."*

16. This email suggests that the Policy was adopted by EXCO prior to 3<sup>rd</sup> December 2007 and that Messrs Gumbi, Nsingwane, Tsabedze and Dlamini may have perjured themselves in their denial that the policy was never adopted nor implemented.

#### ACTING GUIDELINES

17. The Respondent decided under pressure from the union to review its existing Acting Allowance Policy, which provided for a minimum acting period of 15 days before the acting employee became eligible for an acting allowance. In early 2007 the Respondent tasked the Human Resources Manager to conduct a comparative

survey in Swaziland regarding industry practice on acting allowances. A report was prepared showing comparative results on minimum acting periods; eligible employees; pro-rated payment; payment formulae; and the consequences of repeated or prolonged acting. The minutes of the EXCO meeting on 8 May 2007 reflect that the report was tabled and discussed. It was recommended by EXCO that the minimum period should be 10 days. Nothing was resolved.

18. The union SESMAWU was consulted about the review of the 15 days acting allowance. At a Joint Consultative Committee (JCC) meeting on 19 July 2007 management reported to the union that the maximum period had been reduced to 10 days. The union was informed that this reduction had already been implemented. The minutes of this meeting further record:

*"Management reported that the employee would be required to meet the qualifying criteria once in a year. They agreed to prepare a policy in due course to prevent any problems on this issue."*

19. At the next JCC meeting on 20 September 2007, the minutes record:

*"Management confirmed that the acting allowance policy was now in place."*

It is reasonable to infer that the acting allowance policy referred to dealt with something more than the new minimum period, which had already been implemented prior to the previous JCC meeting in July 2007.

20. At the next JCC meeting on 14<sup>th</sup> November 2007, the union requested to be given a copy of the acting allowance policy. The Respondent agreed to do so. On 4<sup>th</sup> December 2007 the Respondent's Labour Relations Manager Allen Mdluli sent a copy of the Acting Allowance Policy to the Union's Treasurer by email, stating:

*"Subject: Acting Allowance Policy"*

*As agreed please receive a copy of the above policy. "*

21. The document sent bears the heading SWAZILAND ELECTRICITY BOARD, as the Respondent then called itself. It is headed ACTING ALLOWANCE. The

document purports to be a document dealing with acting allowance policy under three sub-headings: Acting Guidelines, Eligible Grades for Acting, and Formulae.

22. The Human Resources Manager Bonginkosi Nsingwane says that he prepared this policy document on the instructions of the General Manager Corporate Services. He says he does not know whether the policy document was ever accepted at EXCO level.

23. Sifiso Dlamini, the Respondent's Acting General Manager Corporate Services, says that in November 2007 he asked the Labour Relations Manager Alex Mdluli *"to forward the draft policy that reviewed the threshold at which an acting employee becomes entitled to be paid an acting allowance"* to the union. Dlamini says he intended Mdluli to send the comparative survey report prepared by Nsingwane, not the Acting Guidelines. He says the Acting Guidelines document had never been adopted by EXCO and Mdluli had no authority to send it to the union.

24. The court has difficulty accepting this evidence. The union had been specifically told that a new policy was in place. The Respondent agreed to give them the policy document. Dlamini says he intended to send the union the comparative survey report, but this is not a "draft policy" and in fact does not record any policy of the Respondent. The Respondent is unable to produce any policy document other than the policy document containing the Acting Guidelines, and Dlamini's reference to the comparative survey report as the document he intended to send to the union is simply not credible.

25. It is also noteworthy that the union wrote to the Acting General Manager Corporate Services on the 19<sup>th</sup> January 2008 raising a grievance with respect to applications for the Regional Accountant posts, and in their letter the union spells out their reliance on clause 1.3 of the Acting Guidelines, going so far as to quote the clause in full. In his extensive response to this letter, the Acting General Manager Corporate Services does not query the application of clause 1.3, nor does he point out that the Acting Guidelines have never been adopted or implemented, as he now claims.

26. At the end of the day, the court is left with the distinct impression of a manipulation of the facts by the Respondent's officers to avoid reliance by the Applicant on clause 1.3 of the Acting Guidelines. As to whether the policy document was ever adopted by EXCO, the Applicant has no personal knowledge of this and the court is left with the questionable denial of Messrs. Gumbi, Dlamini and Tsabedze -

the same EXCO members who deny that the Recruitment and Selection Policy distributed by Nsingwane was ever adopted by EXCO.

27. Mr. Mthethwa, who represents the Applicant, argues that it is not necessary for the court to make a finding on the papers whether the Acting Guidelines were ever adopted by EXCO because the Turquand Rule applies. This rule provides that a person dealing with a corporation is bound by the terms of the statutes governing its contractual power, but that the necessary acts of internal management of the corporation are presumed to have been performed.

**Mohamed v Ravat Bombay House 1958 (4) SA 704 T**

**Holgate v Minister of Justice (1995) 16 ILJ 1426 (E) at 1436 -7.**

28. Employees are obliged to comply with the policies and procedures implemented by the employer in the exercise of its managerial prerogative. The employer is also bound by such policies and procedures until they are varied. When the senior management of the employer implements a policy and brings it into operation, the employees are entitled to assume that the necessary internal management procedures for approval and adoption of the policy have been performed.

29. The JCC meetings are the very forum where management conveys management decisions and policies to the union. The management officials who attend at JCC meetings are clearly authorized to bind the Respondent at such meetings. These officials represented to the union on behalf of the Respondent that the Acting Allowance Policy was in force, undertook to furnish a copy of the Policy, and duly transmitted such copy to the union. The union was at the material time the recognized representative of all unionisable employees, including the Applicants.

30. In my view, the union and the members of its bargaining unit were thereafter entitled to regard the policy as operative and to regulate their decisions and conduct on the basis that they and the Respondent were bound by the policy. It was not for the union or its bargaining unit to have to check whether the internal procedures had been followed for the adoption of the Policy.

31. In the premises, I hold that the Applicant is entitled to rely upon clause 1.3 of the Acting Guidelines.

32. It is necessary to mention that I am far from convinced that the Acting Allowance



Policy containing the Acting Guidelines was not adopted by EXCO. The evidence of the Respondent's witnesses is most unsatisfactory and lack credence. Nevertheless, it is undesirable to resolve factual conflicts on affidavits on the basis of credibility without the benefit of hearing viva voce evidence, and I make no factual finding as to whether the policy was in fact adopted. If I had not found that the Respondent is bound by the Policy whether or not it was formally adopted by EXCO, I would have directed that this issue be referred to oral evidence for determination.

#### EFFECT OF CLAUSE 1.3 OF ACTING GUIDELINES

32. Clause 1.3 of the Acting Guidelines does not confer any entitlement on the acting incumbent to be confirmed in the acting position. It states that after acting for 6 months he *"would be deemed performing at a fully competent level to be confirmed to the position."* Competence relates to the standard of performance, not eligibility in terms of qualifications and experience. In my view, the clause precludes the Respondent from declining the promotion of the Applicant for the reason that he does not have the ability to competently perform the duties attached to the position of Credit Controller. After all, the Respondent was content to allow the Applicant to act in the position from 1<sup>st</sup> July 2007 until March 2008. The Respondent's present allegation that the Applicant's performance was "disastrous" must be regarded with some skepticism. In any event, it is irrelevant in view of clause 1.3.

33. The advertisement requires more than 5 years experience working in a Senior Credit Control position; 5 years experience in a dynamic debt collection environment; and more than 3 years experience in key account management. The Applicant states that he has the requisite experience after serving in the Credit Control Department for a period exceeding 15 years. He has been the Senior Accounts Officer since March 2003.

34. Mr. Gumbi responds that the functions the Applicant performed in his substantive position are different to those of the Credit Controller. This is stating the obvious since the positions are different. The advertisement does not require experience as Credit Controller.

35. Mr. Gumbi then says that the advert itself requires the Applicant to have worked in a Senior Accounting position for at least 5 years, which the Applicant has not done. The advertisement requires no such thing and Mr. Gumbi appears to have confused the position of Credit Controller with that of Regional Accountant.

36. Whilst the Applicant's substantive position since 2003 is Senior Accounts Officer, his CV reflects that he has been carrying out the duties of Assistant Head of Billing and Senior Credit Controller and direct assistant to the Credit Controller during this period. He also acted as Credit Controller from 1<sup>st</sup> July 2007.

37. I find that the Applicant possesses the necessary ability and or relevant experience to qualify him for the promotion.

38. Regarding the qualifications, the advertisement requires a B Com or LLB degree or Equivalent. The Applicant is a graduate of the Institute of Chartered Secretaries. He says this is an equivalent qualification to a B.Com. The CIS is a well-regarded practical qualification in the accounting field. The modules covered in the Applicant's course appear to cover the accounting and financial skills necessary for the Credit Controller. It is however not possible for the court to tell whether the CIS is the equivalent of a B.Com.

39. The Respondent baldly denies that the Applicant's qualification is equivalent to a B.Com degree, but it does not appear to have ever investigated the status of the CIS. Ironically, it is the Respondent that financed the Applicant's studies for the CIS on the basis that these studies were for his career development in the employ of the Respondent. Mr. Gumbi concedes that the Applicant was not afforded an interview for the position of Credit Controller, but argues that the Applicant was judged not suitable for the position on the basis of an interview he had for the position of Regional Accountant which he says "has more or less the same requirements."

40. In my view it was grossly unfair for the Applicant's application for the position of Credit Controller to be determined on the basis of an interview for the position of Regional Accountant. Contrary to what Mr. Gumbi says, the positions involve entirely different duties and functions, as can be seen from the advertisements for the positions, and require different qualifications. The fact that a degree in law is considered suitable for the Credit Controller but not the Regional Accountant is sufficient indication that the positions require different skills. At an interview for the position of Credit Controller the Applicant would have enjoyed considerable advantages, not least his 15 years experience in the Credit Control Department, the additional courses he has completed relevant to credit control and debt collection, and his experience acting as Credit Controller. These advantages would not have carried the same weight at an interview for Regional Accountant.

41. What is more, there is no evidence before me from the interview panel to indicate whether it considered a CIS to be equivalent to a B.Com, or indeed whether the panel was in a position to make such assessment.

42. Finally, the interviewing panel would obviously not have taken into account that the Applicant must be deemed to have performed competently as Credit Controller, since they were not interviewing him for that position.

43. It is the view of the court that the Applicant's application for promotion to the position of Credit Controller has been handled in a grossly unfair manner, partly arising from the failure to afford him an interview; partly arising from the Respondent ignoring the Acting Guidelines by which it was bound; and partly by the Respondent making judgements about the Applicant's qualifications without ever ascertaining their true status.

44. The court would be extremely loathe to usurp the prerogative of the Respondent to select personnel to fill existing posts in its establishment, particularly managerial posts. It is important that the Respondent should have confidence in its managers and that a relationship of trust and harmony is established. It is regrettable that the deponents to the Respondent's affidavits have seen it fit to make disparaging and discouraging remarks about the Applicant and his performance which in my view were entirely uncalled for. The Applicant has been given cause to apprehend that his future career with the Respondent may be jeopardised by his lawful exercise of his right to challenge his unfair treatment at the workplace. The Respondent, and Mr. Gumbi in particular, have a duty to dispel such apprehension from the Applicant's mind.

45. Taking into account all the above factors and findings, I make the following order in the exercise of my equitable jurisdiction and in order to promote the purpose and objects of the Industrial Relations Act 2000 (as amended):

(a) The Respondent is directed within a reasonable time to obtain an evaluation of the Applicant's qualifications from a recognized professional qualifications evaluation authority with a view to ascertaining whether such qualifications are equivalent (or superior to) to a B.Com degree.

(b) In the event that the Applicant's qualifications are so equivalent (or superior), the Respondent is directed to establish an independent Interview panel for the purpose of re-considering the Applicant's application to be promoted to the vacant

position of Credit Controller. Such panel is to be instructed that the Applicant is deemed to be competent to perform the duties and functions of the Credit Controller, and that he has the necessary experience and qualifications. Internal applications for the same position from other employees may also be considered by the panel. Written reasons for the panel's final decision and/or recommendation shall be furnished to the Applicant.

(c) Pending compliance with paragraphs (a) and (b) of this order, the Respondent is interdicted and restrained from proceeding with the recruitment of an external candidate for the position of Credit Controller.

(d) The Respondent shall pay the costs of the application.

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