

N THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 126/2008

In the matter between:

PINKY SIBANDZE

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:

1.1. That the Respondent should be interdicted and restrained from proceeding with the recruitment of an external candidate for the position of Regional Accountant - Manzini.

1.2. That the Respondent should confirm the Applicant to the position of Regional Accountant - Manzini.

1.3. 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.

1.4. 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 her founding affidavit, the Applicant sets out that she is presently employed by the Respondent as an Accounts Officer at Manzini Regional Office, a position she has held since 1999. The Applicant has been employed in the Respondent's Accounts Department for a continuous period of 18 years. On the 1st July 2007 she was appointed to the position of Acting Regional Accountant - Manzini after the incumbent took an early retirement. Her acting appointment was terminated on 8th February 2008.
5. During 2007 the Respondent advertised internally for applications for two vacant positions of Regional Accountant. The Applicant applied for one of the positions. She was not afforded an interview, but on 8th November 2007 she was informed in writing that her application was unsuccessful. The union raised a grievance with the Respondent on behalf of another employee whose application had been rejected without an interview. This resulted in that employee and the Applicant being afforded interviews. Nevertheless there was no difference in the result, and on the

11th February 2008 the Applicant received another letter informing her that her application was unsuccessful. No reasons were given.

6. The Respondent advertised the vacant positions externally. The Applicant's union representatives were informed that the Respondent was proceeding to recruit external candidates, and interviews had already been held. The Applicant then instituted the present application.
7. The present application was argued together with two other applications in the matters of **Sandile Mbhamali v Swaziland Electricity Company Limited (Case No. 124/2008)** and **Sibusiso Satekge v Swaziland Electricity Company Limited (Case No. 125/2008)**. Similar issues arise for decision in all three applications, although the facts are not entirely identical. In **Case No. 124/2008** the Applicant is seeking confirmation to the vacant position of Credit Controller. The judgement in that case makes findings which apply to the present matter and are incorporated into this judgement.
8. The Applicant relies upon clause 16.2 of the Collective Agreement that governs her 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:

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

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

11. The Applicant states that she possesses the required qualifications, ability and or experience and she is both eligible and suitable to be appointed to the position of Regional Accountant. She asserts that the

Respondent has no right to recruit an external candidate, and the court should order the Respondent to promote her to the position.

12. The Applicant submits further that in any event the Respondent is obliged to appoint her to the position of Regional Accountant because she acted 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 by the Executive Committee (EXCO), nor have they been brought into operation. The Applicant cannot rely upon these guidelines and policies in support of her 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 Regional Accountant was correctly rejected because she does not possess the required qualifications, ability and experience.

ACTING GUIDELINES

15. In the case of **Sandile Mbhamali v Swaziland Electricity Company Limited (Case No. 124/2008)** I found that the Respondent is bound by the Acting Allowance Policy, whether or not it was formally adopted by EXCO, and I held that the Applicant was entitled to rely upon clause 1.3 of the Acting Guidelines. For the same reasons set out in the judgement in that case, I find that the present Applicant is entitled to rely upon clause 1.3.

EFFECT OF CLAUSE 1.3 OF ACTING GUIDELINES

16. In the **Sandile Mbhamali** case I held that 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 she "*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 she does not have the ability to competently perform the duties attached to the position of Regional Accountant, but it does not entitle the Applicant to promotion merely because she has acted for 6 months. The Respondent's present allegation that the Applicant was "not capable of performing in the position" must be regarded with some skepticism considering that the Respondent was content to allow the Applicant to act in the position from 1st July 2007 until 8th February 2008. In any event, it is irrelevant in view of clause 1.3.

APPLICANT'S EXPERIENCE AND QUALIFICATIONS

17. The internal advertisement requires 5 years experience working in a senior accounting position, and a B.Com or Accounting Degree with

strong accounting background. The Applicant's substantive position of Accounts Officer cannot be regarded as a senior accounting position.

When one has regard to the duties she performs as an Accounts Officer it is clear that she has not been exposed, save during the period of her acting appointment, to experience which would equip her to exercise the level of accounting skills and responsibility required of a Regional Accountant. Moreover, it is conceded by the Applicant that she does not possess the academic qualifications required of a suitable candidate by the Respondent.

18. In the circumstances, although the Applicant is deemed to have performed the duties of Regional Accountant competently during her acting appointment, she is not eligible to be promoted to the position because she does not possess the requisite experience or qualifications.

19. Whether or not the Respondent's Recruitment and Selection Policy has become operational (and I have made no finding in this regard), it is a good employment practice for an employer to give an employee reasons why his/her application for promotion has been unsuccessful, so as to provide some guidance as to measures he/she may take by way of training and study to develop his/her potential. In my view this application would in all likelihood never have been instituted by the Applicant if she had been given an interview without a grievance having first to be raised, and secondly if she had been given reasons at the time why her application was unsuccessful. Section 13(i) of the Industrial Relations Act 2000 requires the court to take into account the requirements of the law and fairness in deciding whether to make an award of costs. It has been held that employees should not be discouraged from approaching the Industrial Court by the risk of an adverse award of costs as this could lead to unresolved resentment and deterioration in labour relations at the workplace

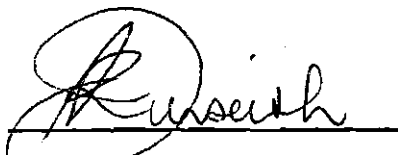
See **NUM v East Rand Gold and Uranium Co. Ltd (1991) 12 ILJ 1221 (A) 1241-1243**

The financial imbalance between employer and employee may also be taken into account in deciding whether to award costs

See **Raymond Mavuso v Swaziland Dairy Board (IC Case No. 1/1999)**

In my view this is not a proper case where the unsuccessful applicant should be ordered to pay costs.

20. **The application is dismissed, with no order as to costs.**

A handwritten signature in black ink, appearing to read "P. Dunseith", written over a horizontal line.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT