

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 218/08

In the matter between:

NHLANHLA HLATSHWAYO

Applicant

and

CHAIRMAN-CIVIL SERVICE COMMISSION

1ST Respondent

SWAZILAND GOVERNMENT

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. Z. MKHWANAZI

FOR RESPONDENT: V. KUNENE

J U D G E M E N T -8/08/2008

1. The Applicant is the Acting Registrar of the Industrial Court. He has applied to court on notice of motion for an order reviewing and setting aside the decision of the Civil Service Commission approving his promotion to the post of Examiner of Patents and Designs on Grade C4.

2. In a previous application instituted by the Applicant in Case No. 398/2006, wherein

the Applicant sought protection against the unfair termination of his acting appointment as Registrar, the Industrial Court made the following order on the 11th September 2006:

(a) the Judicial Service Commission is directed to commence the recruitment exercise for the appointment of a Registrar of the Industrial Court de novo, after the establishment of its secretariat in terms of section 183 of the constitution;

(b) The Judicial Service Commission is directed to consult with the Applicant regarding the appointment of a substantive Registrar of the Industrial Court; the anticipated time-frame of such appointment; and the arrangements that the JSC intends to make regarding the Applicant's future career in the public service;

(c) The 1st Respondent is directed in consultation with the Applicant, to identify and promote the Applicant to a suitable position in the civil or judicial service, at a grade not lower than Grade C4 (unless the Applicant consents). Pending such promotion, the applicant shall continue to receive the remuneration and benefits he had enjoyed whilst acting as Registrar of the Industrial Court.

3. On or about 7th May 2008 the Applicant received a letter from the Civil Service Commission informing him that the Commission has approved his promotion to the grade of C4 in the post of Examiner of Patents &

Designs in the Ministry of Justice and Constitutional Affairs with effect from the date of assumption of duty.

4. At the foot of this letter, the Principal Secretary in the Ministry of Justice & Constitutional Affairs has certified that the Applicant assumed duty in his new post on 7th April 2008.

5. This certification is patently false, since the Applicant was not even informed of his new appointment until 7th May 2008.

6. The Applicant alleges that he has never been consulted by the 2nd Respondent regarding the identification of a suitable position in the civil or judicial service at Grade C4 or above, as required by our order on the 11th September 2006. The Applicant further alleges that he was not consulted about his appointment to the position of Examiner of Patents and Designs, also contrary to our order.

7. The Chairman of the Civil Service Commission, Mntonzima Dlamini, states in his

answering affidavit that according to his understanding of our order, *"the Judicial Service Commission had to only inform the Applicant about any new post, not as whether he agrees or not, or not as to request or beg him about any new post as long as that post was on Grade C4 or above. The Judicial Service Commission has done just that."*

8. The fundamental purpose of consultation with an employee is to give the employee the opportunity to make representations with a view to influencing a decision. As we held in our judgement in **SAPWU v Usuthu Pulp Company Ltd t/a SAPPI (Unreported IC Case No. 423/06)** at page 26:

"Consultation, on the other hand, involves seeking information, or advice on, or reaction to, a proposed cause of action. It envisages giving the consulted party an opportunity to express his opinion and make representations, with a view to taking such opinion or representation into account."

This is what our order of 11th September 2006 required the 2nd Respondent to do. Merely informing the Applicant of a decision already made is not consultation and does not constitute compliance with our order.

See **SAPWU v Usuthu Pulp Company Ltd op.cit. at page 27;**

Hadebe & Others v Rantex Industrial Limited (1986) 7 ILJ 726 (IC) at 735.

10. Mntonzima Dlamini alleges in his affidavit that he *"was informed by the Chairman of the Judicial Service Commission that the Applicant was consulted where he attended together with his lawyer."*

11. Apart from the fact that this allegation is hearsay and extremely vague, it has been explained by the Applicant and verified on oath by his attorney that this meeting with the Judicial Service Commission ("the JSC") took place after the present application had already been instituted; that the purpose of the meeting was to communicate to the Applicant that his application for appointment to the position of Assistant Judicial Commissioner has been unsuccessful; and that the issue of the Applicant's appointment to the post of Examiner of Patents & Designs could not be discussed because it was already sub judice.

12. On the evidence then it is clearly proven that the decision to appoint the Applicant to

the post of Examiner of Patents & Designs was taken without the prior consultation required by our order dated 11th September 2006.

13. The Applicant also submits that the Civil Service Commission acted *ultra vires* in appointing him as Examiner of Patents & Designs because that is the sole preserve of the JSC, once its secretariat has been put in place in terms of section 183.

14. We do not agree with this submission. The post of Examiner is a post in the Civil Service under the Ministry of Justice and Constitutional Affairs, and appointment to such post is the prerogative of the Civil Service Commission - **see section 187 (1) of the Constitution**. That is not however the end of the matter. The Registrar of the Industrial Court is a judicial officer - **see section 7 (1) of the Industrial Relations Act 2000 (as amended)**. The power to appoint the Registrar and to remove him from office vests in the JSC - **see section 7 (1) of the Industrial Relations Act read with section 160 (2) of the Constitution**. The fact that the Applicant's appointment as Registrar is an acting appointment does not alter the fact that he may only be removed by the JSC - **see section 18 bis (2) of the Interpretation Act 21 of 1970**.

15. The Civil Service Commission cannot by itself remove the Applicant from his judicial office. It may only appoint him to his new substantive post in the Civil Service subject to termination of his acting judicial appointment by the JSC.

16. To hold otherwise would be to undermine the independence and integrity of judicial office, as guaranteed by sections 62 (4) and 159 (3) of the Constitution.

17. It is clear from the affidavit of Mntonzima Dlamini that the JSC was very much aware of the proposed appointment of the Applicant to the post of Examiner of Patents and Designs and approved such appointment. Indeed the Chairman of the Civil Service Commission is an ex-officio member of the JSC, and the Secretary of the JSC is the Principal Secretary in the Ministry of Justice and Constitutional Affairs (to which the Applicant was being posted). Nevertheless, the JSC did not consult with the Applicant regarding his removal as acting Registrar of the Industrial Court, as directed by our order dated 11 September 2006; nor did the JSC take any steps to terminate the Applicant's acting appointment; nor did the JSC inform the President of the Industrial Court of the imminent removal of his Acting Registrar.

18. What is even more astonishing is that the JSC has taken no steps to replace the acting Registrar. Mntonzima Dlamini says that as a member of the JSC he knows that the appointment of a substantive Registrar is *"underway even though it has not yet been advertised,"* and *"the issue that the JSC has not yet recommended the recruitment has nothing to do with the Applicant"* He goes on to say that *"the new Registrar cannot be appointed when the Acting Registrar is still in office the Acting Registrar has to vacate the office before a new one is appointed."*

19. These statements reflect badly on the JSC. The Industrial Court has no Deputy Registrar. The Registrar is solely responsible for the issue of legal process out of the court. He is responsible for the supervision of the administrative staff of the court. He is responsible for the security of the court records. He is in charge of the administrative functions of the Industrial Court and the Industrial Court of Appeal. According to Mntonzima Dlamini, the JSC was content to bring the administration of the Industrial Court to a complete standstill by permitting the removal of the Acting Registrar without having recruited and appointed a substantive Registrar to take his place.

20. Such an aberration on the part of the JSC must in our view be attributed to its equally aberrant reluctance to establish an independent secretariat in accordance with section 183 of the Constitution and our judgement of the 11th September 2008. In that judgement, we stated in no uncertain terms that *"it is manifestly improper and unconstitutional for the Principal Secretary of an executive Ministry to be performing the functions and duties of the Judicial Service Commission secretariat."* We pointed out that safeguards have been provided by the Constitution to protect the integrity of the JSC

from any perception of interference by the Executive, and one of these safeguards is the requirement that the JSC has its own secretariat. The functions of the secretariat include providing technical and administrative support, keeping the files, correspondence and minutes of the JSC; convening and preparing for JSC meetings; and acting as public relations officer for the JSC. - **see sections 161 (2) and (3) and 183 (2) of the Constitution.** The performance of these functions by the Principal Secretary in the Ministry of Justice and Constitutional Affairs is irreconcilable with the requirement of section 178 of the Constitution that, in the performance of its functions, the JSC *"shall be independent of and not subject to any Ministerial or political influence."*

21. In our judgement of the 11th September 2006, we held that the process of recruiting a substantive Registrar of the Industrial Court had been tainted by the involvement of the Principal Secretary in the administration of the JSC. We directed the JSC to recommence the recruitment exercise *"after the establishment of its secretariat in terms of Section 183 of the Constitution."*

Notwithstanding the elapse of 20 months, the JSC has failed to establish a secretariat and the Principal Secretary continues to perform the duties of the secretariat. This disregard for the Constitution and the judgement of this Court has brought the JSC and its members into disrepute. Not only that, but the independence of the Judiciary as a whole is compromised by the perception that the Secretary of the JSC is a conduit for interference in the affairs of the JSC by the executive arm of government.

23. Mntonzima Dlamini argues that *"current Commissioners were allowed to continue working pending their terms of contract and thereafter they have to comply with the provisions of the Constitution within six months."* This argument has no application to the Secretary of the JSC. First of all, he is not a "Commissioner". Secondly, the office of the Secretary has never been personal to holder: prior to the Constitution,; the Principal Secretary was Secretary ex officio. Thirdly, the Principal Secretary can no longer serve as Secretary because this is inconsistent with section 178 of the Constitution and the independence of the JSC. For that reason, Section 161 of the Constitution directs and requires that a new secretariat be established. The suggestion that the independence of the JSC is subject to some kind of transitional period is, with respect, quite preposterous.

24. The non-involvement of the JSC in the appointment of the Applicant as Examiner of Patents and Designs appears to have been deliberate in order to evade compliance with our order of the 11th September 2006, in particular the implicit directive that the JSC establish a secretariat in accordance with the Constitution before removing the Applicant

as acting Registrar. This is the only reasonable inference to be drawn from the JSC's failure to consult with the Applicant, failure to terminate the Applicant's acting appointment, and - most significantly - failure to recommence the recruitment process for a new Registrar. We come to the regrettable conclusion that the JSC was prepared to sacrifice the good administration of the Industrial Court in order to maintain an unconstitutional state of affairs.

25. The court makes the following order:

25.1. The appointment of the Applicant to the post of Examiner of Patents & Designs is set aside.

25.2. The 2nd Respondent is to pay the costs of the application on the attorney-client scale.

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