

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 588/2006

In the matter between:

STEPHEN T. MOTSA

Applicant

and

GOVERNMENT OF THE KINGDOM OF SWAZILAND

1ST Respondent

ATTORNEY GENERAL

2ND Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : M. SIBANDZE

FOR RESPONDENTS : N. VILAKATI

J U D G E M E N T – 10/02/2009

1. The Applicant is a senior civil servant who has been in the employ of the Swaziland Government since 1985. In his application for determination of an unresolved dispute, the Applicant seeks an order in the following terms:

(a) *Ordering the Respondents to reallocate the Applicant to Grade E6 under the professional category in the civil service grading system.*

(b) *Ordering the Respondents to calculate the difference between Grade E3 Notch 5 and grade D8 Notch 1 and pay the equivalent of 12 months difference to the Applicant.*

(c) *Costs of Suit.*

2. The dispute for determination arises consequent to the promotion of the Applicant on 3rd February 2004 to the position of Under Secretary in the Ministry of Economic Planning and Development, which position he still occupies.
3. The Applicant holds an MSc degree in Agricultural Economics. Prior to his promotion, he was the Senior Planning Officer in the Ministry of Enterprise and Employment under the Planning Cadre in the professional category E on pay scale Grade E3 Notch 5, earning E117,870 per annum.
4. At the time of the promotion, the position of Under Secretary was in the Administrative category D on pay scale Grade D8. The Applicant's new salary on Grade D8 Notch 1 was E130,683 per annum.
5. Notwithstanding the significant increase in remuneration attendant upon his promotion to Under Secretary, the Applicant had certain concerns about this change in his employment status:

- 5.1 Firstly, he considered that his promotion from the professional E category to the administrative D category was effectively a demotion. In his view the E category required a higher level of qualifications than D category, and furthermore the pay scale remuneration ceiling in E category was higher than that in D category.
- 5.2 Secondly, the Applicant had come across a confidential memorandum from the Secretary to the Civil Service Board to the Secretary to Cabinet which indicated that his promotion had been approved by the Civil Service Board on 16th April 2003. The Applicant considered that his promotion, which was only communicated to him on 3rd February 2004, should be backdated to the date it was approved, and he should receive the appropriate backpay.
6. The Applicant raised his grievances with the Chairman of the Civil Service Board. The latter advised him to accept the promotion but to write a letter to the Board recording his concerns.
7. The Applicant wrote the letter on 16th February 2004. He refers to it as a 'letter of appeal'. The letter has not been produced in evidence, but it is common cause that it was received by the Board. In the letter the Applicant apparently detailed his grievances and requested that his promotion be backdated to 16th April 2003 with backpay, and that the position of Under Secretary in the Ministry of Economic Planning and Development be re-graded commensurate with his professional qualifications and expertise.

8. After recording his grievances in his letter, the Applicant reported to his new duty station at the Ministry of Economic Planning & Development to take up the post of Under Secretary. The relevant Civil Board Service Form 7 (a) records that he assumed duty on 2nd February 2004, but the Applicant asserts that he actually reported for duty on 18th February 2004, and this testimony has not been contradicted. The court accepts that the Applicant delivered his “appeal” letter to the Respondent before assuming his new position as Under Secretary.

9. The Board considered the Applicant’s grievances at its meeting on the 18th February 2004. The court has been given a document which it is common cause records the outcome of the Board deliberations on the Applicant’s “appeal” as follows:

“DECISION OR ORDER OF BOARD

The Board approved that Mr. Stephen T. Motsa’s promotion from Senior Planning Officer Grade E3 to Under Secretary Grade D8 in the Ministry of Economic Planning & Development should be backdated to the 16th April 2003 and that his request for the review of his salary grade and notching should be further scrutinized so that the Board is assured of its validity and implications on the laws governing salary administration in the Civil Service.”

10. This Decision or Order of the Board is signed by the Chairman Frank Buckham and four members of the Board.

11. The Applicant says he enquired as to the outcome of his appeal from the Secretary to the Board John Ndlangamandla on 20 February 2004. The Secretary divulged that the Board had agreed to backdate the promotion to April 2003, but that on the aspect of a salary re-grading the Board had directed the Secretary to liaise with the Ministry of Public Service and Information to determine whether the Applicant's re-categorization gave rise to any anomaly and, if so, whether the anomaly could be remedied. Ndlangamandla told the Applicant to expect a written communication to this effect shortly. (John Ndlangamandla denied this conversation in his testimony). The Applicant says the outcome of the appeal was also informally communicated to him by the Chairman of the Board.
12. The Applicant did not receive the promised written communication apprising him of the outcome of his appeal. However a letter dated 28 July 2004 from the Secretary of the Board John Ndlangamandla to the Principal Secretary, Ministry of Public Service & Information was exhibited in court. This letter reads:

"RE: APPEAL TO THE CIVIL SERVICE BOARD TO CONSIDER BACKDATING MR. STEPHEN MOTSA'S PROMOTION AND REVIEW THE EFFECTS OF THE CATEGORIZATION EXERCISE ON THE PRESENT GRADE AND NOTCH AS A RESULT OF THE PROMOTION"

Reference is made to the attached copy of a letter dated 16th February, 2004 from Mr. Stephen Motsa being an appeal to the Board to consider the following:

- (i) *backdating his promotion to April 2003.*

- (ii) *the effects of Circular No. 8 of 2003 on the categorization exercise in particular the notch he should assume in his new post of Under Secretary.*

We are requesting your comments on paragraphs (i) and (ii) above.”

13. The request by the Secretary for comment on paragraph (i) is anomalous in that the Board had already decided/ordered that the Applicant's promotion be backdated to April 2003.
14. With regard to the Board's request that the Principal Secretary, Public Service and Information comment on the categorization and grading of the Applicant's position, this request was somewhat overtaken by events. The Respondent had undertaken a job evaluation exercise in about 2001, but the results had never been implemented. In or about 2004 a consultancy called ESAMI was engaged to review and/or validate the 2001 evaluation after carrying out consultations with all relevant government departments and stakeholders. On 9th September 2004 the Government issued Establishment Circular No. 3 of 2004 which effected a salary restructuring based on implementation of the ESAMI evaluation of posts in the Civil Service.
15. In terms of this circular, all existing jobs within each category and grade were re-considered during the ESAMI evaluation exercise to ensure that they fitted the definition of their category and grade. Those positions that did not fit the definitions were moved to grades with a fitting definition. Some jobs were re-categorised based on these

definitions. New pay rates were developed in respect of the established categories and grades.

16. The position of Under Secretary was re-categorized from D category to F category, and the Applicant was re-graded from D8 to F1. F category refers to the executive category, and the general category definition for F category in the ESAMI report reads as follows:

*“Positions in this category require a second university degree education in a field of specialization or a university degree with many years of experience leading to comprehensive knowledge in that field. Specialized fields include but are not limited to law, engineering, finance, **economics**, international affairs, auditing etc. The incumbents of these positions must also use extensive knowledge, acquired through experience to solve various and difficult problems relating to national policy and the implementation of government programmes and projects. This level will also comprise positions that are responsible for integration and coordination of all the functions of a Ministry or department and are required to balance various and diverse objectives even when these may appear conflicting.....”*

17. The specific grade definition for Grade F1 states further:

“This grade will comprise positions that are responsible for policy integration, coordination and advice to positions vested with ultimate decision-making authority.... Job holders would be expected to exercise high degree of integrity and ability to network with other institutions outside the mainstream public service.”

18. The re-grading of the Applicant's position to F1 resulted in a further

significant increase in his remuneration.

19. Although the ESAMI job evaluation and salary restructuring exercise was not prompted by the Applicant's grievance regarding his promotional grading, his re-categorization from D to F appears to both validate and also address his grievance. In the view of the court, the category definitions quoted above give recognition to the executive status of Under Secretaries and emphasize the dual requirements of professional specialization and administrative knowledge and experience which the incumbents must employ as executive officers responsible for policy integration, implementation of government programmes and projects, coordination of all the functions of their Ministry, and giving advice to their Principal Secretaries.
20. The Circular No. 3 of 2004 made provision for appeals to be submitted should any officer be dissatisfied with the evaluation of his position, including his category and grade. There is no evidence that the Applicant appealed his new categorization and grade.
21. Sometime after July 2004, the precise date being unclear, the Principal Secretary, Public Service & Information Cyril Kunene met with the Civil Service Board. Mr. Kunene testified in court that at the meeting his Ministry opposed backdating the Applicant's promotion, and also took the stand that the Applicant's post could not be re-graded to suit the personal circumstances of the Applicant, as this would undermine the consistency and objectivity of the government salary structure.
22. The Civil Service Board also met with the Postings Committee, who also opposed the backdating of the promotion.

23. At a meeting held on 14th March 2005 the Board took a decision that the Applicant's promotion could not be backdated. The Secretary to the Board wrote to the Applicant informing him of this decision.
24. There is no evidence that the Board came to any decision on the re-evaluation of the Applicant's post, and nothing was communicated to the Applicant with regard to this issue. The most reasonable inference to be drawn is that the Board did not consider the re-evaluation to be a live issue after the publication of Circular No. 3 of 2004 and the re-grading of the Applicant's post to F1.
25. The Applicant reported a dispute to CMAC. Conciliation was unsuccessful because the government representatives said there was nothing to discuss. The dispute was certified as unresolved and the Applicant instituted these proceedings.
26. After carefully examining the factual history of this dispute, which is by and large common cause, the court finds as follows with regard to prayer (a) of the application, namely the claim for re-grading of the Applicant's post:
 - 26.1 The Applicant was promoted to a position attached to a fixed category and grade within the salary structure of the civil service, namely Grade D8.
 - 26.2 The Applicant was free to decline the promotion and remain within the professional cadre. In the view of the court, he chose to accept the promotion, notwithstanding that he was unhappy about the attached grade. He not only assumed duty at his new Ministry, but he even requested that the

date of promotion be backdated.

- 26.3 The Applicant had no claim of entitlement to the re-grading of his post. This was a matter within the sole discretion and prerogative of the 1st Respondent. At best the Applicant was entitled to a fair consideration of his request that the grading of the post should be re-evaluated.
- 26.4 The question of the re-evaluation of the Applicant's post was considered by the ESAMI consultants as part of their job evaluation exercise and finalized by the issue of Circular No. 3 of 2004. The Applicant did not appeal against his re-grading to F1, and he accepted the benefit of the re-grading in terms of status and remuneration.
- 26.5 The anomaly of the remunerative ceiling of D category being lower than that of E category was resolved by the Applicant's re-categorization to F category.
- 26.6 The Applicant made much of a memorandum written by the Principal Secretary, Economic Planning & Development to the Principal Secretary, Public Service & Information on 7 December 2004. The memorandum was written to support a request that the Applicant be assigned a personal secretary, commensurate with his role as an executive officer in the Ministry. In the memorandum, the Principal Secretary notes that various units - such as the Millennium Projects, Micro Projects Unit, Population Unit, Poverty Unit, the National Development Strategy Operationalisation Unit and the SADC Unit – previously reported to him, as did all

management level staff including the Chief Economist and Director of Statistics. The Principal Secretary goes on to detail important changes in the duties and functions of the Under Secretary, Economics Planning and Development:

“The Ministry has now changed the trend and has oriented its focus of the role of the Under Secretary to be more technical and include coordination and liaison of all technical activities within the Ministry’s departments/sections/units. He is expected among other things to cross check and scrutinize, analyze and monitor submissions meant for the Principal Secretary’s office, over and above ensuring the smooth running of the Ministry and all other related administrative issues.”

- 26.7 In our view the changes in the duties and functions of the Applicant, as detailed in the Principal Secretary’s memorandum, are a logical consequence of the re-evaluation of his post to F1 in terms of Circular No. 3 of 2004.
- 26.8 The Applicant also relied on an organogram showing the reporting structure within the Ministry of Economic Planning and Development. This chart reflects that the Under Secretary, the Chief Economic Planning Officer and the Director of Statistics all report to the Principal Secretary. The latter two officers are at the highest grade in the professional cadre, namely Grade E6, earning more than the Under Secretary on Grade F1. The Applicant says that

he is expected to 'cross check and scrutinize, analyze and monitor' the work of these officers, so it is anomalous that he is paid at a lower grade than them. In our view, there is no anomaly. The Applicant does not supervise these officers. As is stated in the memorandum of the 7th December 2004 (see paragraph 27 *supra*) he is only expected to cross check and scrutinize, analyze and monitor submissions meant for the Principal Secretary's office. In other words, he must apply his specialized knowledge as an economist for the 'coordination and liaison of all technical activities within the Ministry's departments/sections/units' and to act as a conduit between the professional heads of department and the Principal Secretary for technical reports and submissions, and for giving advice to the Principal Secretary on matters of a technical nature. We are also unable to find that there is any anomaly in the Applicant being paid at a lower grade merely because the applicant and these professional officers all report to the Principal Secretary. We are not privy to the precise job descriptions of the Chief Economic Planning Officer and the Director of Statistics and the court is certainly in no position to conduct a job evaluation exercise vis a vis the respective responsibilities, expertise and importance of these jobs in relation to that of the Applicant. Such an exercise was carried out by ESAMI and implemented by the government, and it is reasonable to assume that the difference in pay scales is the product of careful and reasoned consideration.

26.9 It is pointless to speculate whether the Applicant would

have risen to the position of Chief Economic Planning Officer at Grade E6 if he had remained in the professional cadre and pursued a professional career path. He accepted a promotion to the administrative cadre, with no more than a *spes* that he might persuade his employer to re-categorise his new post to a professional grade. In any event, we accept the evidence of Cyril Kunene that the Applicant is, and has been since his promotion, entitled to apply for any professional post commensurate with his qualifications and experience, as and when such post falls vacant, if he prefers to revert to the professional cadre instead of pursuing an executive career.

26.10 It is the judgement of the court that the Applicant is not entitled to an order for re-grading as sought in terms of prayer (a) of his application.

27. Regarding the backdating of the promotion, the court finds that the Applicant had no claim of entitlement to this when he sent his letter of appeal to the Civil Service Board:

27.1 The approval of the Applicant's promotion at an internal meeting of the Board was nothing more than a decision to offer a promotion to the Applicant for his acceptance. The Applicant's letter of promotion clearly stated that the promotion was with effect from the date of assumption of duty. This is the offer that was accepted by the Applicant when he reported for duty.

27.2 It is trite law that no contract can arise from an

uncommunicated offer – see **Christie : The Law of Contract in SA (4th Ed) page 52**. The same applies to a promise that has not been communicated – **Christie: op.cit at 12**. The Applicant's chance reading of a confidential memorandum not intended for him did not confer any contractual rights on him. To hold otherwise would greatly undermine the internal and confidential processes of administrative bodies.

27.3 The Applicant did not render any duties as Under Secretary prior to the 2nd February 2004 which would entitle him to a retrospective appointment or backpay.

28. The more important question to be decided with regard to the backdating is whether the Applicant acquired an enforceable right to the backdating of his promotion when the Civil Service Board made a deliberate decision to backdate the promotion at its meeting of the 18th February 2004, and if so, whether that right was destroyed by the subsequent decision of the Board on 14th March 2005 that the promotion should not be backdated.

29. In the view of the court, the decision/order of the Board on the 18th February 2004 was an administrative decision/order that was binding on both the 1st Respondent and the Applicant. It was not a contractual offer that required acceptance before it created rights and obligations, as in the case of the promotion itself. Such a decision/order, like the judgement of a court, created rights and obligations as soon as it was

awarded, and once it was awarded the Board was *functus officio*.

See **Nkosi v Khanyile NO and another 2003 (2) SA 63 (N)**

30. There is no evidence that the Board ever resolved to revoke its decision/order of the 18th February 2004. No such resolution or order has been produced by the Respondent, and the decision of the 14th March 2005 makes no reference whatsoever to the decision/order of the 18th February 2004. It is common cause that a new Board had been appointed in the meantime. When the secretary John Ndlangamandla was asked in court whether he had brought the previous decision/order to the attention of the new Board, he responded, "I don't know." We take this answer to mean that he did not. Challenged to produce the Board's file to show that the Board was aware of the previous decision/order, Ndlangamandla declined to do so without any satisfactory excuse. We conclude on the evidence and the probabilities that the Board was not aware on the 14th March 2005 that a decision on the issue of backdating had already been made. It follows that the Board could not have purported to revoke its previous decision, neither expressly nor impliedly nor tacitly, since it was not aware of it.
31. In the circumstances it is not necessary for the court to decide whether, and in what circumstances, the Board would have been entitled to revoke its own decision. Suffice it to say that there is a general principle of finality in administrative decisions – see **Carlson Investments Share Block (Pty) Ltd v Commissioner, SA Revenue Service 2001 (3) SA 210 (W)**. As stated by **Baxter: Administrative**

Law (1984) at 372: “(W)here the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interest, it is said that the decision maker has discharged his office or is *functus officio*. . . . The ability of a public authority to revoke its previous decision is therefore heavily qualified. . . .”

32. Rightly or wrongly, the Board decided on the 18th February 2004 to backdate the Applicant's promotion to 16th April 2003. The Board was thereafter *functus officio* with regard to the decision of that particular issue. In our view, so long as this decision has not been lawfully revoked or rescinded, any subsequent conflicting decision on the same issue is null and void. This is especially so where the subsequent decision is taken without any knowledge that the matter had already been finalized. The first decision is still binding on the 1st Respondent, and the Applicant is entitled to an order confirming the backdating of his promotion.
33. On the question of costs, the Respondents have successfully defended the Applicant's claim for re-grading. This claim occupied a great deal of the trial. In our view it is fair for each party to pay its own costs.
34. The court makes the following order:
- (a) The Respondents are ordered to backdate the Applicant's promotion to 16th April 2003 and to calculate the difference between Grade E3 Notch 5 and grade D8 Notch 1 and pay the equivalent of

9 months difference to the Applicant.

- (b) Each party is to pay its own costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT