

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 80/2006

In the matter between:-

ISHMAEL MTHUPHA

APPLICANT

and

**THE TEACHING SERVICE COMMISSION
UNDER SECRETARY MINISTRY OF EDUCATION
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Neutral citation: *Ishmael Mthupha v The teaching Service Commission and 2 Others (80/2006) [2016] SZIC 11 (11 March 2016)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heads Considered : **10 FEBRUARY 1016**

Delivered : **11 MARCH 2016**

Summary: *Labour law – Applicant alleges unfair demotion by Respondents – Burden of proof- Onus rests on the Applicant to prove on a preponderance of probabilities that he was so unfairly demoted – in casu the Applicant has failed to discharge that onus. His action is therefore dismissed. No order as to costs.*

1. The Applicant in this matter, Ishmael Mthupha, is an employee of the Swaziland Government, under the Teaching Service Commission in the Ministry of Education and Training. He was initially employed as a teacher in May 1980, and has remained in continuous employment since then. The Applicant's case before Court is that in March 1991, he was promoted to the position of Head Teacher. On his appointment as Head Teacher, he contends that he was placed on post EDN 021 and on salary scale D5. Then in September of the year 2004, he noted an anomaly in his pay. This anomaly was that he had been paid on salary scale D4 instead of D5, and no explanation was forthcoming for the change in his pay scale. He contends as well that he was neither consulted nor informed on the change in his remuneration scale. He now complains that the 1st Respondent's conduct is unlawful and unfair and has resulted in his demotion from the position of Head Teacher to that of Deputy Head Teacher. Consequently, Mr. Mthupha has brought before this Court for determination this dispute in which he seeks the following orders; a) Reinstatement to post EDN21 and salary scale D5; b) Payment of the difference in salary for the period that he was demoted (i.e. from September 2004) until the date of his final reinstatement to salary scale D5; c) Interest thereon at the rate of 9% per annum from September 2004 until the date of final payment; and d) costs of suit.

2. The claims of the Applicant are vehemently opposed by the Respondents. Principally, the Respondents contend that the Applicant was not demoted in that in August of the year 2004, he occupied the post of Deputy Head Teacher – post code EDN 020 and salary grade D4. The Respondents also contend that in September 2004 a new remuneration structure was introduced in Government and that this new structure preserved the Applicant's status. Consequently, the allegation of the demotion of Mr. Mthupha is denied.

3. Two witnesses were paraded in support of the Applicant's case, himself and a colleague Moses Mthethwa, whilst only one witness testified in support of the Respondents' case, Tim Nsingwane who is a former Chairman of the Teaching Service Commission. The evidence of the Applicant can be summarised as follows; He testified under oath that he joined the Swaziland Government as an employee in under the Ministry of Education on 27 May 1980, and that he holds he Secondary Teacher's certificate. Initially he was posted to Zombodze National High School as a Teacher. Currently though, he is stationed at Mayiwane High School where he is the Head Teacher of the junior Secondary School, having been promoted to this position in March 1991.

4. The Applicant further testified that he was instrumental in the construction of the junior secondary school at Mayiwane as there was initially no school there. Together with the local community members, he built the school between the years 1991 and 1993 and the classes were up to Form 3. He continued managing the school until it was upgraded to a High School in 1998, and according to his testimony, he was the one responsible for its upgrading. After the school was upgraded to a high school he continued managing it for three years, up to 2001 when a new head teacher was brought to the school since it was now a high school. He even assisted this new head teacher since he did not have much experience. He clarified that in terms of his appointment he was the head teacher of the junior secondary school.

5. The Applicant then referred the Court to exhibit 'IM 1' which he described as his salary advice/pay slip for the month of August 2004. It indicates that he basic salary at the time was the amount of E6,888.58. A new grading structure was then introduced by Government in September Of 2004, which saw an increase in the remuneration of civil servants. In this regard the basic salary of Mr. Mthupha increased to E8,989.33. Mr. Mthupha's main gripe is that there were other teachers who were promoted in the same manner as he

was. These were also head teachers at the junior secondary schools and when their schools were upgraded to high schools, they were promoted to manage and head them, now as high schools. He gave the name of Moses Mthethwa as a perfect example of a head teacher who was promoted to manage and head a school upgraded to a high school or senior secondary school – Maphalaleni High school. He pointed out that their August 2004 basic salaries were the same, E6,888.58. But following the introduction of the new grading and pay structure, their September salaries differed significantly. The Applicant was paid E8,989.33 whereas Mthethwa's basic salary shot up to E10,421.08. He complains that after this grading his basic salary was lower than that of his colleague Mthethwa.

6. Mthupha also testified on the grading before September 2004. He pointed out that his grade was all along EDN021 and that after the regrading of posts his new grade is now EDN020, which is lower than the previous one of EDN021 he occupied. This, he stated emphatically, was a clear indication that he had been demoted without a hearing. He referred the Court to document 'IM 8' which indicates that post EDN021 is occupied by Headmasters of Junior secondary schools. Following this alleged anomaly in his grading and pay, the Applicant wrote a letter of complaint to the TSC

requesting that it be rectified. The response from the Executive Secretary of the TSC, a M.V. Zungu, brought him no joy however. It clarified that before Mayiwane Secondary school was upgraded to a High school, the Applicant was employed as a head teacher of the secondary school. Zungu further stated that when the school assumed the status of a high school Mthupha's position automatically changed to Deputy headteacher of the high school on post EDN 020. Zungu concluded by high lighting that the TSC records show that he was paid on the appropriate scale and that the question of under payment did not arise.

7. The Applicant though would not budge. He wrote back to the Executive Secretary indicating that he was not satisfied his response because it did not address his plight. He received no further responses from the TSC. He now wants to be paid difference in salaries between his and that of his colleague Moses Mthethwa. He also wants his post code to be changed from EDN 020 to EDN 021 with effect from April 2004 and interest thereon.
8. Under cross examination by Attorney Mr. M. Vilakati, the Applicant confirmed that in terms of his qualification he only qualifies to be a Headteacher or Deputy Headteacher of a junior secondary school. He

confirmed as well that he did not qualify to be headteacher of a senior secondary school, and that for that reason he remained on his post of headteacher of junior secondary school when Anderson Mkhonta was appointed headteacher of the now upgraded high school. It emerged under cross examination as well that the long standing practice of Government was that when a school is upgraded the headteacher of the junior secondary school who is not degressed would be appointed deputy head teacher or transferred to another junior secondary school.

9. When questioned on what the grade of a deputy head teacher of a senior secondary was, his response that he was not aware of same. And when Attorney Vilakati put it to him that the grade of a headteacher of a junior secondary school and that of a deputy headteacher of a senior high school were similar in 2001, he stated that he had not been aware of this fact. Vilakati then clarified to Mthupha that in fact, as at August 2004 he was on post code EDN 020, and further that as at 08 September 2004, when Establishment Circular 03/2004 was issued, his post code was not EDN 021 but EDN 020. He was surprised at this analogy, indicating that it the first time he learnt of this here in Court. Vilakati further put it to him that after his job title was that of Deputy Headteacher of the senior secondary school after

the appointment of the new Headteacher, Anderson Mkhonta, and he seemed surprised at this assertion, when in his own pleadings he confirmed that he was performing duties of a deputy headteacher.

10. The Respondents' Counsel further clarified to the Applicant that the introduction of Circular 8/2003 placed both post codes EDN 020 and EDN 021 on a new grade 4, and that the very same Circular 8/2003 also placed these two post codes on grade 12 in the old grade. Vilakati then referred the Applicant to document 'IM 8', which is an extract from Establishment Circular 03/2004. In this regard, he clarified that Circular 3/2004 placed a Headteachers of both junior and senior secondary schools on the same grade 4, and the Applicant confirmed this fact. Further to this, Vilakati clarified that before the introduction of Circular 3/2004 headteachers of junior secondary schools were classified on grade 12 which was junior to that of high schools headteachers who were on grade 13. Again the Applicant confirmed this fact.

11. The Applicant was then referred to his statement of claim, where at paragraph 7 it is stated that *'On his appointment as Headteacher, the Applicant was placed on post EDN021 and on salary D5'*. In this regard, Mr.

Mthupha informed the Court that the code and pay grade as they appear in his statement of claim are incorrect. He shifted the blame to his Attorneys for recording the incorrect information in his particulars of claim. He confirmed that on his appointment he was not placed on post EDN021 and on salary scale D5. Interestingly though, neither the Applicant nor his Attorney sought the leave of this Court to amend his pleadings in this regard, when logically they should have jumped at the first opportunity available to do so. He accepted that he was on post code EDN020 and pay grade D4.

12. On the issue of his equal pay with Moses Mthethwa in August 2004, Attorney Vilakati clarified that in August 2004, the salary of a Deputy Headteacher of a high school and that of a Headteacher of a Secondary school were the same (they were both on pay grade 12), and the Applicant agreed, stating that he had now seen it here in Court after Vilakati had pointed it out to him. Vilakati also clarified to the Applicant that the only similarity in the positions of Deputy Headteacher of a High school and that of Headteacher of a Secondary school was the pay grade and that the job titles and post codes were different, again the Applicant agreed to this analogy.

13. Mr. Mthupha also confirmed that his circumstances and those of Moses Mkhonta, who was at Maphalaleni Secondary school, were not similar. This was after Attorney Vilakati had pointed out to him that Headteachers of Secondary schools were placed on grade D5 in September 2004 and that Deputy Headteachers of High schools remained on grade D4. This, according to the Respondents' Counsel, therefore meant that Moses Mthethwa's case was distinguishable from that of the Applicant because in September 2004 Mthethwa was a serving Headteacher of a Secondary school whereas the Applicant was not, since his school, Mayiwane, had already been upgraded to a high school. This the Applicant again confirmed to be the correct state of affairs entailing during the period in question. The reason, according to Vilakati, their salaries were similar in August 2004 was because Deputy headteachers of high schools and headteachers of secondary schools were on the same grade as at this period. Whereas as at September 2004 Mthethwa was placed on grade D5 and the Applicant on D4. Interestingly, Mr. Mthupha's response was that he was not aware that he was now a Deputy Headteacher of Mayiwane High school. His evidence was that he still regarded himself as a Headteacher of the Secondary school within the same school now upgraded to a high school. However, when the Respondents' Counsel brought it to his attention that at paragraph 6 of his

statement of claim he stated that he was performing the duties of a deputy headteacher, though he said ‘unofficially’, he confirmed that indeed he was the Deputy Headteacher of Mayiwane High School. This clearly indicates that he was in fact aware that he is a Deputy Headteacher of Mayiwane High School.

14. What also came out of the cross questioning of the Applicant was that he wanted to be reinstated to his position as a Headteacher of a Secondary school. In this respect, the Respondents’ Counsel pointed out to him that every secondary school is built with the intention that it will ultimately be upgraded to a high school, to which he concurred. Vilakati also pointed out to him that subsequent to Circular 3/2004, every person appointed as a headteacher of a secondary school must be degreed. The reason for this being that their pay grade D5 is similar to that of high school headteachers and therefore it is only logical that they also be degreed. Under re-examination by his Attorney Mr. Howe, the Applicant confirmed that he became aware before the advent of Circular 3/2004 that to be appointed headteacher, a person had to be degreed. This, he said was even before Mayiwane was upgraded to a high school.

15. The next witness to testify in support of the Applicant's case was Moses Mthethwa. Mthethwa is now retired, he had been in the civil service for 36 years. When he retired he was the Headteacher of Maphalaleni High School. When he started his teaching career, just like the Applicant, he had a Secondary Teacher's certificate. However, when he retired he had upgraded his qualifications and now had a Diploma in school management. His school was upgraded to a high school in 2005, and he was promoted to head the school.

16. Mthethwa informed the Court that he could not recall how much he was paid in 2004. He did not recall what his post code and pay grade were. He could recall though that it was his pay grade was D5 when he retired. Attorney Howe then referred him to documents 'IM 5' and 'IM 6' which are his pay slips for August and September 2004 respectively. These indicate that he was paid salaries of E6,888.58 in August and E10,421.08 in September 2004. He was also referred to 'IM 1' which is Mr. Mthupha's salary advice slip for August 2004. Mthethwa confirmed that in August 2004 their basic salaries were equal in the sum of E6,888.58. When referred to 'IM 4' (Mthupha's salary advice for September 2004) he pointed out that their basic

salaries were no longer equal, Mthupha's was E8,989.33 whilst his was now E10,421.08.

17. Under cross examination this witness could not remember most of the issues probed by the Respondents' Counsel, probably due to the fact that it had been a while since he retired from the civil service. He could not even recall what post code the Applicant occupied in August 2004. He admitted though when probed further that in August 2004 he occupied the position of Headteacher of a Secondary school (EDN021), whilst Mr. Mthupha was a Deputy Headteacher of a High school (EDN020) but they were on the same pay grade. This witness further confirmed under cross examination that in terms of Establishment Circular 8/2003 post code EDN020 was pegged on pay grade D4, similar to post code EDN021. He confirmed as well under cross questioning that in terms of Establishment Circular 3/2004 post code EDN020 maintained pay grade 4 whilst post code EDN021 improved to grade 5. That, according to the Respondents' Attorney, was the principal reason why Mthethwa's basic salary for September 2004 was higher than that of Mthupha. In essence, Mthethwa's pay grade improved and Mthupha's one did not. And in effect, this means that the pay grade of a

secondary school's headteacher and that of a high school headteacher were both pegged on D5. That was the Applicant's case.

18. Testifying in support of the Respondents' case was Timothy Nsingwane. According to him, he joined the civil service in 1965, first as a teacher and thereafter rose through the ranks until he joined the Teaching Service Commission as its Chairman in 2002. Prior to this he had been appointed Headteacher of Lobamba National secondary school in 1975. He was the head of Lobamba for about 2 and a half years when it was upgraded to a High school. This affected his position and he had two options. The first being to move to another secondary school and the second being to move horizontally to be deputy headteacher of the same school. In his case however he chose neither since he transferred to William Pitcher Teacher Training College as an Assistant Lecturer.

19. Nsingwane explained that Government's policy was that high school headteachers had to be degreed, and without a degree one could not head a high school. He further explained that a headteacher of a secondary school was on the same pay grade as a deputy headteacher of a high school. When

questioned on the possibility of having 2 headteachers in one school, Nsingwane stated that this was not possible. He explained that if the headteacher of the secondary school was degreed he could be considered for promotion to head the upgraded high school or move horizontally to be the deputy headteacher of the now upgraded school since the pay grade of a secondary school headteacher and that of a high school deputy head were the same.

20. When questioned on the salaries of the Applicant and Moses Mthethwa in August and September 2004, Nsingwane explained that in August 2004 the Applicant and Mthethwa were on the same pay grade but different post codes. Then in September 2004 a whole new coding and pay regime was ushered in by Establishment Circular 3/2004. The Applicant, as a deputy headteacher of a high school was placed on post code EDN020 and pay grade D4 whilst headteachers of secondary and high schools were placed on codes EDN021 and EDN014 respectively and their pay grade was similar on grade D5. In fact, according to Nsingwane, all headteachers of secondary schools were placed on grade D5 by Circular 3/2004. That is why the basic salary of Mthethwa differed from that of the Applicant. He named some of

these headteachers as Khombisa Dlamini of Jubukweni, John Nhleko of Sigcaweni, Dumisa Mdlovu of Mkhondvo and Moses Mthethwa of Maphalaleni. All these schools were secondary schools which were later upgraded to high schools and the incumbents continued heading them even though they were not degreed but had now acquired personal rights to pay grade D5. According to Nsingwane therefore, there was no anomaly in the pay grade of the Applicant since, in terms of Circular 3/2004, his post code and pay grade had remained EDN020 and D4 respectively as he was already a deputy to Anderson Mkhonta in the upgraded school, Mayiwane High school. Nsingwane further testified that these changes in the grading and coding in the civil service were negotiated between the Government and the public sector unions. He also explained that the horizontal transfer of a headteacher of a secondary school to be deputy headteacher of an upgraded high school was not a demotion since these positions were on the same pay grade at the time.

21. Under cross questioning by Attorney Howe on behalf of the Applicant, Nsingwane maintained that Mthupha's promotion was backdated to 1993 and that thereafter he was moved horizontally to be a deputy in the same

school since it had already been upgraded to a high school. He denied that the letter of promotion (IM 9) was confirming as headteacher of Mayiwane high school.

22. This Court was also referred to documents 'TSC1' and 'TSC2'. Document 'TSC1' requests for the re-designation of post no. EDN 044 to EDN 021, held by Moses Mthethwa, since he was a headteacher. 'TSC2' requested for the re-designation of post EDN021 to EDN020, held by Ishmael Mthupha, since he was Deputy Headteacher of a high school. Nsingwane explained that the change in the post codes of the Applicant and Moses Mthethwa did not affect their remuneration because their salaries were the same at the time. That was the Respondents' case.

23. The gist of the Applicant's case is that he was demoted by the Respondents in September 2004. His case before this Court was that in August 2004, his salary and that of Moses Mthethwa were the same at E6,888.58. However, after the introduction of a new grading and pay structure in September 2004 their salaries then differed quite significantly, he was paid E8,989.33 whilst Mthethwa was paid E10,421.08 – a difference of E1,431.75. He wants to be

paid this difference from September 2004 to date. In argument his Counsel submitted that this money is now in excess of E188,991.00, and that since he has now attained the age of retirement this anomaly would affect his severance allowance and pension.

24. The Respondents deny the allegation there was a demotion of the Applicant in September 2004. They contend instead that there was a revolution in the country's education system through the introduction of Establishment Circular 3/2004. At the time this Circular was issued the Applicant was on post code EDN020 as a Deputy Headteacher of Mayiwane High School, whilst Moses Mthethwa was on code EDN021 as the Headteacher of Maphalaleni secondary school, their pay grades though were both on D4.
25. The question which needs to be unravelled by this Court is whether indeed the Applicant was demoted in September 2004, when Establishment Circular 3/2004 came into effect? In unravelling this mystery, the Court will first have regard to documents 'TSC 1' and 'TSC 2'. These are memorandums from the Principal Secretary in the Ministry of Education directed to his counterpart in the Ministry of Public Service. In effect, memorandum 'TSC 2' was for the re-designation of the Applicant's post from EDN021 to

EDN020 because he was now a Deputy Headteacher of a high school – Mayiwane. Whilst ‘TSC 1’ was for the re-designation of Moses Mthethwa’s post to EDN021 because he was a Headteacher of Maphalaleni Secondary school.

26. In reality therefore, the evidence before this Court indicates the Applicant was placed on post code EDN020 as far back as November 2002 after the re-designation of his post from EDN021. The Respondents have not denied that he was previously on post EDN021, but that was before the re-designation of his post. It is therefore not correct that the Applicant’s post code was still EDN021 in August 2004 because it had been re-designated at the request of M.C.Mtungwa 2 years earlier in 2002. After this re-designation of the posts of the Applicant and Moses Mthethwa their salaries were still the same but they were on different job codes. The Applicant was a deputy headteacher of a high school whilst Mthethwa was the headteacher of a secondary school. Even with the advent of Establishment Circular 8/2003 their post codes differed but the salaries were still the same, at grade D4.


27. However, in 2004 when the regrading of posts was undertaken by Government through Establishment Circular 3/2004, his post remained unchanged at post code EDN020 and pay grade D4 since he was a Deputy Headmaster of a High School. In fact, the evidence before this Court and the Applicant's own admission, indicate that he has never been placed on salary grade D5. He has always been on pay grade D4. What Circular 3/2004 did was regrade post EDN021 to pay grade D5. That is why Moses Mthethwa's basic salary of September 2004 was E10,421.08 (post code EDN021 and pay grade D5) whilst the Applicant's one was E8,989.33(post code EDN020 and pay grade D4). The Applicant wanted the Court to believe that his case and that of Moses Mthethwa were similar but that cannot be. Their cases were different. And this difference manifested itself in November 2002 when their posts were re-designated. The evidence presented to Court therefore indicates that there was never a demotion as he wanted the Court to believe.

28. The Applicant testified that he still regarded himself as the headteacher of the Mayiwane secondary school even though the school was upgraded into a high school. This is absurd and confusing! A school can never have two headteachers. There is one headteacher and a deputy for each school,

according to the evidence of Nsingwane. It cannot be therefore that the Applicant still regarded himself as a headteacher, especially because in his own pleadings he confirms that he is performing duties of a deputy headteacher at Mayiwane High school. 'IM2', the document his Counsel relies on for the contention that he was on post code EDN021 also indicates that he was on post code EDN020 as a Deputy Headmaster to Anderson Mkhonta. Then 'IM7' on the other hand indicates that in May 2001, he was on post code EDN021, this was before the re-designation of his post since he was now a deputy headteacher.

29. After all has been said, can it be said that the Applicant has discharged the onus that rested on him? Can it be said that the Applicant has satisfied the Court on a preponderance of probabilities that he was demoted? Having weighed up and tested the Applicant's allegations against all the evidence, the conclusion and finding of this Court is that Ishmael Mthupha was never demoted as alleged. The general probabilities of this matter indicate that in September 2004, Mayiwane was a high school and that he was deputising Anderson Mkhonta the substantive head of the school at the time, and his post code was EDN020 on pay grade D4. The Court accordingly rejects the

version of the Applicant as being improbable. His case is therefore without merit and stands to be dismissed in its entirety. That is the judgement of the Court. In light of the fact that the Applicant has already retired from the civil service, it would not be fair to mulct him with an order that he pays the costs of this action. The Court accordingly makes no order as to costs. The members agree.



T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

**DELIVERED IN OPEN COURT ON THIS 11TH DAY OF MARCH
2016.**

For the Applicant : Attorney Mr. L. Howe. (Howe Masuku Nsibande Attorneys).
For the Respondent : Attorney Mr. M. Vilakati (Attorney General's Chambers).