



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 69/2016

In the matter between:

PAMELA MOTSA

APPLICANT

and

MINISTRY OF NATURAL RESOURCES &

ENERGY

1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF

NATURAL RESOURCES & ENERGY

2ND RESPONDENT

THE CIVIL SERVICE COMMISSION

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

Neutral Citation : Pamela Motsa v Ministry of Natural
Resources & Energy and 3 Others [2017]
SZIC 43
(09 June 2017)

CORAM : **M. SIBANDZE ACTING JUDGE**
(Sitting with Ms. P. Thwala & Mr. M.
Mamba Nominated Members of the Court)

DATE HEARD : **02ND JUNE 2017**

DATE HANDED DOWN : **09th JUNE 2017**

Summary

Civil Litigation - Appointment as Secretary of Land Control Board in terms of Section 5 (5) of Land Control & Speculation Act compared to Civil Service post of Secretary to Land Control Board.

Employee performing duties in a higher office without appointment and compensation.

Employer acting to avoid the consequences of Government General Order A245 Section 1.

Findings - Appointment of the Applicant as Secretary to the Land Control Board in terms of Section 5 (5) of the Land Speculation Control Act of 1972 is not the same as and does not entitle the Applicant to the substantive position of Land Administrator and the salary and emoluments attaching thereto.

The 3rd Respondent cannot seek to avoid the consequences of the General Order A245 (1) by terminating acting appointment but may not continue to require an employee to perform the duties of the higher office without compensation.

Applicant substantially continued to perform the duties of Land Administrator after her acting appointment terminated, to the knowledge of the employer, without compensation which was an unfair labour practice in the particular circumstances of this matter.

JUDGMENT

1. The Applicant is employed by the Swaziland Government under the Ministry of Natural Resources & Energy as Executive Officer.

2. She has brought an Application in terms of which she seeks the following relief;
 - 2.1 That the Respondents be and are hereby ordered to comply with the Government Gazette No.8 of 2015 appointing the Applicant as the Secretary to the Land Control Board with respect to;
 - 2.1.1 Not changing the Applicant's job title as Secretary to the Land Speculation and Control Board and grade D4 for remuneration.

- 2.1.2 Paying the Applicant her arrear wages and/or allowances with effect from the 01st day of January 2015 in terms of grade D4; and
- 2.1.3 Paying the Applicant her wages and/or allowances in terms of Grade D4 as opposed to B4;
- 2.1.4 Costs of suit against the Respondents.

- 3. The Applicant was appointed in November 2015 to act in the position of secretary to the Land Control Board due to the retirement of the incumbent to that position and she continued to so act until the 01st day of January 2015.
- 4. The Applicant, during her acting appointment was paid an acting allowance in addition to her normal pay. The Applicant was not paid at Grade D4 during this period as she alleges. Her allegation however is based upon a misconception, in our view rather than an attempt at deception.

5. This represented more than a substantial difference in her remuneration in that not only was she paid her basic salary but was paid an acting allowance which ranged from E 8 646.15 on the 23rd February 2015 to E 7 883.66 on the 22nd May 2015 according to pay slips submitted by the Respondents.
6. These allowances were actually greater than her basic salary.
7. After her acting appointment lapsed, the Applicant was appointed as Secretary to the Land Speculation Control Board by Legal Notice No.8 of 2015, in terms of Section 5 (5) of the Land Speculation Control Act 1972.
8. The appointment still subsists, and will terminate on the 31st December 2017 unless it is renewed.
9. In a nutshell the Applicant contends that her appointment in terms of the Land Speculation Control Act (The Act) should attach to payment on Grade B4 as indicated opposite the position of

Secretary Land Control Board as reflected in the Government Establishment Register (2015) at page 23 of the Book of Pleadings.

10. It is on that basis that Applicant seeks confirmation of her job title and payment of arrear wages or allowances attaching to the substantive post of Secretary to the Land Control Board.

11. As a matter of fact the court finds that an appointment as Secretary to the Land Control Board in terms of Section 5 (5) of the Land Speculation Control Act 1972 is not the same thing as employment as Secretary to the Land Control Board in the Ministry of Natural Resources and Energy.

12. The former is a statutory appointment to a Board, by the Minister responsible whereas the latter is a substantive post of employment in the Civil Service, which appointment can only be made by the Civil service Commission in terms of its powers under the Constitution.

13. The substantive Secretary to the Land Control board it appears, would also “double” as Secretary to the Land Control Board under the Land Speculation Control Act, hence the confusion of the Applicant.

14. The Applicant was never appointed by the CSC to the substantive position of Secretary to the Land Control Board and is not entitled to the salary which was attached to that post by virtue of her appointment under Section 5 (5) of the Act.

15. In the circumstances the Applicant is not entitled to the relief as prayed however, based upon the papers before court, the Applicant made the allegation in Paragraph 7.2 of her Founding Affidavit that “I have executed the functions of the office of the Secretary to the Land Control Board diligently”.

16. In context, it appears that the Applicant was referring both to her statutory duties to which she was appointed and the duties of the substantive Secretary.

17. It bears saying and is common cause that due to a restructuring the substantive position of Secretary to the Land Control board was abolished in or about January 2015 and replaced with the position of Land Administrator.

18. The questions which arose in the courts mind were;
 - 18.1 Has the Applicant been performing the duties of the Land Administrator since the retirement of the erstwhile Secretary to the Land Control Board and if so;
 - 18.2 If she has been doing so without compensation is this an unfair labour practice in respect of which the court can intervene.

19. Generally in Civil proceedings, a court would be limited to the cause of action pleaded by the Applicant in his Founding Affidavit and this is also true in the Industrial Court however this will not necessarily be true in all cases before the Industrial Court.

20. This Court, unlike the Civil Courts must not only uphold the law, applying the rules of Civil Procedure, but must, in so doing uphold the

purpose and objective of the Industrial Relations Act, to promote fairness in labour relations and, where appropriate, relax the rules of evidence or procedure, in order to do justice, where to do so is not likely to result in a miscarriage of justice.

21. In the current matter the court after hearing arguments, alerted both Counsel to the issues that had arisen and issued an order that oral evidence be led on the questions raised by the court above.
22. In these circumstances both parties had the opportunity to lead evidence and make submissions on the issues raised by the court and accordingly we are of the view and find that the court is enjoined by its mandates to delve into these issues as long as it does not do so to the prejudice of the either party and gives the parties sufficient notice and opportunity to address it.
23. The Applicant was led in evidence and she testified that she substantially carries out the duties of the Land Administrator and that the duties she was carrying out during her period as Acting Secretary to the Land Control Board have not changed.

24. She stated that although she is paid a sitting allowance for the statutory job of Secretary to the Land Control board her job goes beyond sittings of the Land Control Board.
25. She stated that she also arranges meetings of the Board, visits the sites, performs land inspections for the Applicants to the Board and, monitors all of the tribunals which are the regional Boards that entertain farm dwellers disputes.
26. She also went through the job description with the duties and responsibilities of the Land Administrator and stated that both the positions of Assistant Land Administrator and Land Administrator above her are unoccupied, the former has never been occupied since it was established and the latter, since January 2015.
27. She stated that she supervises the other employees in the section and acts as the section's contact point on all matters of land administration, participates in long term strategic planning, provides feedback from the section's clients, ensures the sound and clear Organisation of work within the department and in fact performs

- substantially of all of the duties of the Land administrator except that she does not write and implement land use plans.
28. Of the 28 duties and responsibilities, according to her evidence, she performs 27 of them.
 29. She also stated that she sits as Secretary of the Natural Resources Board in the place of the Land Administrator. And also as a member of the Crown Land Disposal Board and the Mhobodlweni Local Authority.
 30. Applicant receives a sitting allowance in respect of the Natural Resources Board but it bears saying that other employees of the Swaziland Government also receive the sitting allowances, according to Applicant's evidence, which was not disputed in cross examination.
 31. The court has taken particular notice of the fact that the Applicant's evidence was not disputed in cross examination nor was it put to her that she was not in fact substantially performing the duties of a Land Administrator.

32. The Respondent led the evidence of Ms. Gabisile Mabuza, the Director of the Department of Land Affairs she testified that she was the applicant's supervisor.
33. She stated that when Ms. Ceko the last Land Administrator retired, the Applicant's name was put forward as a successor but she did not qualify for the post as the minimum requirement for the position is an LLB, which Applicant does not possess.
34. The Respondent's witness conceded that the Applicant is the main contact point within the department on matters of Land Management and conceded that she sits on the Natural Resources Board and various other Boards including the Land Management Board.
35. According to her the, Applicant only performs 3 of the functions of the Land Administrator which is to act as the main contact within the department, manage applications from clients for the land department for exemptions consents and sub divisions and provide secretariat services to the Land Management Board and other boards at the Ministry.

36. Her evidence was in contrast with that of the Applicant and was not consistent with the cross examination of Applicant by Respondent's Counsel who did not put Ms. Mabuza's version to the Applicant.
37. The Applicant's evidence was more comprehensive than that of Ms. Mabuza who more or less provided a general denial that Applicant was performing the duties of the Land Administrator.
38. Ms. Mabuza stated that she herself was performing the duties of the Land Administrator citing issues of land planning and advising the Minister on land related issues. During cross examination however Mr. Jele for the Respondent confronted Ms. Mabuza with the proposed job description of the Director and she conceded that these functions were actually the functions of the Director in that it is the Director who acts as the main contact with the Minister, Principal Secretary and the Chairman of all the Boards and is also responsible for long term strategic planning for the department.
39. When confronted with the Applicant's evidence that the Applicant even after her acting appointment ended, the Applicant had stated that

she continued performing the same duties she performed whilst acting and that nothing had changed to date, Ms. Mabuza stated that even during her appointment as acting Land Administrator the Applicant was not performing the duties of the Land Administrator. She then made the somewhat surprising statement to the effect that “in government people are appointed into acting positions and never perform any of the duties” . With all due respect to Ms. Mabuza this simply cannot be.

40. The court then asked her for clarity on her evidence in this regard because our understanding was that she had not yet joined the department in January 2015 and she confirmed that this was so.

41. In the circumstances she is not in a position to testify on what duties the Applicant performed when she was acting and her willingness to testify with such fervor on matters she does not have personal knowledge on has decreased the credibility of her evidence on other matters in the court’s eyes.

42. In the circumstances we accept the Applicant's evidence that she has been and continues to perform the substantial portion of the duties of the Land Administrator and that the Director is aware of this.

43. When the Director was asked about the Applicant's acting appointment she stated that the Applicant's acting appointment was terminated in order to avoid "the 6 month rule", referring to the Government General Order A243 (1).

44. There is nothing in principle wrong with terminating the acting appointment, but, to do so and still expect the employee to perform the duties of the Land Administrator without compensation is an unfair labour practice.

45. The court is not making a general statement that an employee acting in a higher position is entitled to a compensation for same. This would vary from one workplace to another depending upon the particular work place policies of that particular workplace.

46. With regard to the Swaziland Government, acting appointments are accompanied by acting allowances and it was therefore unfair to allow the Applicant to perform the duties of the Land Administrator with no acting allowance.
47. The court is alive to the fact that the Applicant was paid sitting allowances in respect of the various Boards however this does not detract from the fact that she would still be entitled to an acting allowance for doing the work of the Land Administrator.
48. In the circumstances under the prayer of further and/or alternative relief the Court orders as follows;
 1. The 1st Respondent is to pay Applicant the applicable acting allowance she would have been paid for acting as Land Administrator for the period from 23rd May 2015 when she last received an acting allowance to the date of judgment.
 2. The 1st respondent is ordered to pay the costs.

The Members agree.

A handwritten signature in black ink, appearing to read 'Musa M. Sibandze', written over a horizontal line.

MUSA M. SIBANDZE
ACTING JUDGE - INDUSTRIAL COURT

For the Applicant:

Mr. N.D. Jele (Robinson Bertram Attorneys)

For the Respondent:

Ms. T. Dlamini (Attorney General's Chambers)