

**IN THE INDUSTRIAL COURT OF ESWATINI
HELD AT MBABANE**

CASE NO: 424 / 2017

In the matter between:

AGRIPPA VELAPHI BHEMBE

Applicant

And

CHAIRMAN, JUDICIAL SERVICE

COMMISSION

ATTORNEY GENERAL

PRINCESS KHULEKILE MALINGA

First Respondent

Second Respondent

Third Respondent

JUDGMENT

Murphy AJ

1. This application concerns a dispute regarding the transfer of the applicant, the Registrar of the Industrial Court, by the Judicial Services Commission ("the JSC"), to the position of magistrate at Nhlanguano.

2. The applicant was appointed by the JSC as Registrar of the Industrial Court with effect from 8 February 2016 in terms of section 7(1) of the Industrial Relations Act¹ ("the IRA"), which provides for the appointment of a Registrar "in accordance with the law relating to the recruitment and appointment of judicial officers". The law in question is the Judicial Services Commission Act, 1982 ("the JSC Act").

3. In terms of section 5 (1) of the JSC Act, the JSC is empowered to i) appoint persons to hold or act in any judicial office; ii) exercise disciplinary control over any person holding or acting in a judicial office; iii) to remove, for good cause, such persons from office; and (iv) to do all such other things as it may consider appropriate for the performance of its functions under the JSC Act or any other law. Section 6 of the JSC Act provides that in the performance of its functions, the JSC may *inter alia* do all such things as are incidental or conducive to the exercise of its functions. In terms of section 5(2) of the JSC Act, the following are designated to be judicial offices: (a) the office of Registrar or Assistant Registrar of the High Court or of the Court of Appeal; (b) the office of a magistrate; (c) such other office connected with any court as the Minister may, by notice in the Gazette, determine. The Registrar of the Industrial Court is thus a judicial office in terms of section 7(1) of the IRA read with section 5(2)(c) of the JSC Act.

4. During late 2017, the JSC, acting in terms of Regulation 13 of the Judicial Services Commission Regulations, advertised positions for magistrates throughout Eswatini. Interviews were conducted and suitable candidates were identified for appointment. At the conclusion of the initial process, certain positions remained vacant and thus the JSC began a process of seeking to transfer and appoint suitably qualified persons in government service to the vacant posts. The JSC identified the applicant as a possible candidate.

5. On 1 December 2017, the applicant was invited by the first respondent to visit him in his chambers. He was informed that despite his not having applied for a position as a magistrate he was being considered for such a position. In his founding affidavit, the applicant maintains that he was not informed of the reasons for his proposed transfer

¹ Act 1 of 2000

but that he indicated to the first respondent that he had no interest in taking up a position as a magistrate because of the workload and extra responsibilities that came with the position. In his replying affidavit, he denied that the reasons for his proposed transfer were explained to him or that he was given a meaningful opportunity to make representations in that regard.

7. According to the deponent to the answering affidavit, Ms. Pholile Dlamini, a member of the JSC, the reasons for transferring and appointing the applicant as a magistrate were explained to him. The respondents maintain that there were two legitimate and valid reasons for the decision. Firstly, the JSC was seeking to strengthen the magistracy by appointing capable individuals who had adequate experience in working in the magistrates' court environment. The applicant had the necessary experience, as he had previously worked as a clerk, interpreter and prosecutor in the magistrates' court in Manzini. He is also an admitted attorney. Secondly, there was the question of career progression. It was felt that the post of Registrar was career limiting for the applicant, whereas a position as magistrate would allow him to progress over time through the ranks of the magistracy and possibly the higher judiciary.

8. In the answering affidavit the respondents confirmed that the applicant had raised the issue of the workload and had additionally complained that the proposed transfer constituted a demotion. The JSC took the view that the workload could never be a reasonable basis for declining a transfer. Moreover, the two positions were on the same grade (E3) and it was explained to the applicant at the meeting that he would be permitted to hold on to his existing benefits.

9. The version of the respondents regarding the meeting of 1 December 2017 is borne out by the minutes of the meeting annexed to a supplementary affidavit, which the respondents by notice of motion, delivered to the applicant's attorneys on 14 February 2018, sought leave to file. The deponent of the supplementary affidavit explained that it was necessary to file it on account of the applicant's averments in the replying affidavit that there had been no consultation with him before the decision to transfer him. The application to file the supplementary affidavit was not opposed and no answer was filed controverting the averments in it. I granted leave for the filing of the

affidavit during the proceedings of 5 October 2017. The factual allegations in the supplementary affidavit must accordingly be taken to have been admitted.

10. The relevant extracts of the minutes read as follows:

"The Commission advised that there are posts for Magistrates and the Commission has seen that he has not filed an application....The Commission stated that since he has prosecution experience, and the Commission wished for him to grow, he will be considered for the post of Magistrate so that he is able to grow within the Judiciary as the Commission wants to ensure that he is able to grow.

Mr. Bhembe stated that he appreciates the Commission's consideration and confirmed that he was a Prosecutor before and stated that there is a lot of work as Magistrate. He stated that if it was a promotion he would appreciate it, and it should not be on the same Grade. The Commission advised that it would look into his representation and consider his submissions. The Commission advised that the purpose of the meeting is to consult with him as the employee on the basis that as an employer, it is bound to consult with an employee before a decision is taken that will affect him.

He enquired for the Commission whether he would continue to enjoy his benefits, cell phone and newspapers in the event that he was appointed Magistrate. The Commission assured him that in terms of the Constitution he was entitled to retain his benefits.....

The Commission informed him that it would consider his submissions.'

11. On 4 December 2017, the JSC considered the matter, including the representations made by the applicant at the meeting of 1 December 2017, and resolved to transfer and appoint the applicant to the position of magistrate at Nhlangano. On that day the Acting Secretary of the JSC addressed a letter to the applicant in the following terms:

"1. I am directed by the Judicial Services Commission to inform you that you have been appointed to the position of Magistrate, Grade E3 in the Shiseleweni region based at the Nhlangano Magistrate's Court.

2. Your appointment is with effect from 04 December 2017. May I take this opportunity to congratulate you on your appointment and to wish you all the best in your new assignment.

3. We are hopeful that this appointment will be a worthwhile experience in your career development."

12. The applicant responded by letter on the same day indicating that the transfer and appointment came as a shock, that he needed time consider the transfer and pointing out that his wife worked in Mbabane and his children were at school there. He queried the benefits to which he was entitled and pointed out that he was currently housed in government accommodation in Mbabane. He reiterated his concern about the workload of a magistrate and asked for three months to consider "the offer on the table"

13. The first respondent replied to the applicant on 5 December 2017 as follows:

"2. After due consultation between yourself and the Judicial Services Commission on the 1 December, 2017, the Commission subsequently resolved to appoint you as Magistrate-Nhlangano with effect from 4 December, 2017.

3. In compliance with the law, you will retain all benefits that you enjoyed in your previous position as Registrar of the Industrial Court. Pending the allocation of accommodation at Nhlangano, the office of the High Court Registrar will provide you with transport to and from your place of employment.

4. Accordingly, you are directed to vacate and hand over the keys of your previous office to the Judge President of the Industrial Court forthwith and report to the Principal Magistrate at Nhlangano on 6 December, 2017."

14. In response, the applicant on 6 December 2017 wrote to the JSC informing it that he had decided not to take the position of magistrate as he had not applied for it and maintained that he was entitled to continue as the incumbent Registrar of the Industrial Court.

15. On 12 December 2012 the applicant filed an urgent application with this court seeking i) to review and set aside the decision to appoint and transfer him to the position of magistrate at Nhlangano; ii) a declarator that the transfer is unfair, unlawful and irregular, void *ab initio* and with no further effect; and iii) an interdict restraining the JSC from effecting the transfer and appointment. The relief originally sought was

in the form of a rule nisi calling on the respondents to show cause why such final relief should not be granted and for an interim interdict restraining the JSC from effecting the transfer until the main application was heard. The matter was delayed in view of the necessity (given the applicant's position) to appoint an acting judge of the Industrial Court. The application was eventually enrolled before me on 5 October 2017 and I am tasked with considering the merits of the application for final relief.

16. In terms of section 8(1) of the IRA, the Industrial Court has jurisdiction to hear, determine and grant any appropriate relief in respect of any infringement of relevant labour legislation (including the IRA) or in respect of any matter which may arise at common law between an employer and employee in the course of employment. Section 8(3) of the IRA provides that the Industrial Court in the discharge of its functions under the IRA shall have all the powers of the High Court, including the power to grant injunctive relief. Additionally, section 8(4) of the IRA provides that in deciding a matter, the Industrial Court may make any other order it deems reasonable which will promote the purpose and objects of the IRA. Section 4(1)(b) of the IRA includes among the purpose and objectives of the Act the promotion of fairness and equity in labour relations. In terms of section 4(2) of the IRA, any person applying or interpreting any provision of the IRA shall take into account and give meaning to the purposes and objectives referred to in section 4(1) of the IRA. The legal representatives of both parties accepted in argument before me that these provisions permit the Industrial Court to determine the fairness of the decision to transfer the applicant and to make any order it deems reasonable.

17. In making its decision to transfer the applicant, the JSC essentially exercised a power to remove him from the office of Registrar of the Industrial Court and simultaneously appointed him as a magistrate. Section 5(1)(d) of the JSC Act permits the JSC to remove a person from judicial office, including the office of Registrar of the Industrial Court, for good cause. Likewise, in terms of section 5(1)(b) of the JSC Act, the JSC was empowered to appoint the applicant to hold the judicial office of magistrate. Insofar as it might be suggested that a transfer from one judicial office to another is *sui generis*, then section 5(1)(e) of the JSC Act permits the JSC to do all such things as it may consider appropriate for the performance of its functions under law, and section 6 of the JSC Act provides that in the performance of its functions, the

JSC may *inter alia* do all such things as are incidental or conducive to the exercise of its functions. Furthermore, section 14 of the Interpretation Act² provides that where a power to make an appointment is conferred by a law, then, unless the contrary intention appears, the authority having power to make the appointment shall also have the power to remove, suspend, dismiss, re-appoint, or re-instate any person appointed by it in exercise of the power.

18. These provisions, read together, leave no doubt that the JSC had the statutory authority to transfer the applicant from the post of Registrar of the Industrial Court to magistrate at Nhlanguano. However, the applicant's challenge to the legality and fairness of the decision to transfer him requires the determination of two related questions. Firstly, was there good cause to remove the applicant from the post of Registrar of the Industrial Court, as contemplated in terms of section 5(1)(d) of the JSC Act? Secondly, was the decision to transfer the applicant fair in terms of the IRA?

19. An employer has the right to manage and deploy resources in its best interests and is thus entitled to transfer employees for operational reasons. A decision to transfer staff thus falls within the employer's prerogative and all that is required is a *bona fide* operational reason and consultation on the consequences of that decision.

20. In *Hopson Duma Gule v. Teaching Services Commission & Two Others*³ this court held that in order for a transfer to be procedurally and substantively fair, the employer is required to have a valid reason for the transfer and for the employee to be consulted before the decision to transfer is taken. There is no need for the parties to reach agreement. To consult merely means to take counsel or seek information or advice from the employee.⁴ The employer must bring an open mind and be willing to be persuaded by arguments against the transfer. In *John Gwebu v The Teaching Service Commission & Another*⁵ this court stated:

"Before the commission exercises its powers to transfer there must be a valid reason for the transfer. The reason for the transfer must be communicated to the teacher concerned before the decision

² Act 21 of 1970

³ Eswatini Industrial Court Case No. 166 / 2012.

⁴ *Howell v International Bank of Johannesburg Ltd* (1990) 11 ILJ 791 (IC)

⁵ Eswatini Industrial Court Case No. 63 / 2015

is taken. The concerned teacher must be given a hearing in accordance with the *audi alteram partem* rule to analyse and challenge the reason which may obviate the transfer. The commission must be open to be persuaded by arguments against the proposed transfer".

21. In my opinion, the JSC has put forward valid reasons for transferring the applicant, who moreover was properly consulted and afforded an opportunity to persuade the JSC not to transfer him, as appears from the minutes of the consultation that took place on the 1 December 2017.

22. The applicant was informed that due to his experience as a court clerk and prosecutor he was considered a suitable candidate for the position of magistrate, as the JSC was seeking to strengthen the Magistracy by appointing individuals with relevant experience. After conducting interviews it had not found sufficient proper candidates and therefore had resorted to transfers of suitable employees. The decision to transfer the applicant was accordingly justifiable as it was taken for sound operational reasons. There was accordingly a valid reason to transfer the applicant. Good cause existed for his removal as Registrar of the Industrial Court and transfer to the Magistracy.

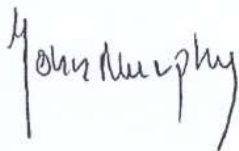
23. The applicant's contention that the transfer on short notice inconvenienced him, in that his wife works in Mbabane and his children are schooling there, while entirely legitimate does not alone suffice to characterise his transfer as substantively unfair. An employer is undeniably obliged to take account of the personal circumstances of an employee selected for transfer and the possible inconvenience occasioned by re-deployment. But such may reasonably be expected in certain circumstances to yield to the operational requirements of the employer. Besides, the respondents in this case agreed to ameliorate the inconvenience faced by the applicant. While he is sorting out the consequences of his transfer, transport to and from Nhlanguano will be provided for him and he will not be expected vacate his designated government house. Such arrangements, the respondents aver, are common with transferred judicial officers and public servants. The applicant's circumstances are not exceptional. Transfers often will disrupt family life but the disruptions are not insurmountable or wholly unreasonable.

24. The applicant's argument that the appointed position amounts to a demotion, in that he will not enjoy the same benefits from his previous position and that it is lower in status, is also not sustainable. Both posts are at Grade E3 and the applicant has been assured he will continue to enjoy his benefits in his new position. Likewise, the applicant has failed to demonstrate how the appointment will amount to a diminution of status and rank. The positions are of equal or similar social status. The JSC previously has appointed registrars to the position of magistrate.

25. Consequently, it cannot be said that the decision to transfer the applicant was substantively unfair. Moreover, as is evident from the minutes, the meeting of 1 December 2017 constituted sufficient consultation.

26. In the premises, I am not persuaded that the transfer of the applicant was substantively or procedurally unfair. The application thus falls to be dismissed. However, given the implications of the transfer for the applicant, fairness dictates that he should not be mulcted in costs by his legitimate attempt to challenge the decision.

27. The application is accordingly dismissed and there is no order as to costs.

A handwritten signature in black ink, appearing to read 'John Murphy'. The signature is written in a cursive, slightly stylized font.

JR Murphy

Acting Judge of the Industrial Court

Date heard: 5 October 2018

For the appellant: Mr Mkhwanazi of Mkhwanazi Attorneys

For the respondents: Mr Jele of Robinson Bertram Attorneys

Date of judgment: