



IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 395/2016

In the matter between:

HARVEYSHONGWEAND26OTHERS

Applicants

And

CIVIL SERVICE COMMISSION

1st Respondent

**PRINCIPAL SECTRETARY - MINISTRY OF
PUBLIC SERVICE**

2nd Respondent

**PRINCIPAL SECTRETARY - MINISTRY OF
ECONOMIC PLANNING**

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation: Harvey Shongwe and 26 Others v Civil Service Commission
and 3 Others [2021] (395/2016) SZIC 31(21July 2021)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard: 10 December 2020

Date Delivered: 21 July 2021

JUDGMENT

- [1] The Applicants are 27 in number and were employed at various times in the position of Junior Clerical Officers in the Ministry of Economic Planning and Development (MEPD).
- [2] In January 2017, they filed an application for the determination of an unresolved dispute that they had with their employer regarding arrear salaries as well as placement on a particular salary grade being grade BH4 (level 2).
- [3] The application was opposed by the employer who filed a reply in which prescription of the claim was raised as a preliminary point.
- [4] Following the closing of pleadings and an allocation of a trial date by the Registrar the parties came to trial on 15th October 2019. The Respondents abandoned the ,prescription point in line with **Industrial Court of Appeal decision of John Kunene v Teaching Service Commission and 2 Others ICA Case No. 02/2016.**

[5] On the merits, the parties decided to enter a Special Case for Adjudication in terms of **Rule 28(a) of the Industrial Court Rules** as read together with **Rule 33 of the High Court Rules**. The parties tendered a statement of agreed facts as follows:

- 5.1 The applicants were employed as junior clerical officers (JCO) in the Ministry of Economic Planning and Development.
- 5.2 Government, as employer unilaterally re-designated the applicants from Junior Clerical Officer into two categories - Statistical Clerk and Statistical Assistant. This followed a routine job grading exercise in 2006.
- 5.3 Applicants, being aggrieved by their re-designation and regrading took the matter up with Government. In 2011 the Ministry of Public Service (MOPS) held that applicants had been prejudiced by the re-designation and regarding of their positions and sought the advice of the Civil Service Commission (CSC) on four (4) suggested solutions (by memorandum dated 31st October 2011 from Principal Secretary (MOPS) to the Chairman CSC-pages 11-13 of bundle of documents).
- 5.4 The Civil Service Commission resolved that the best option was the creation of holding positions for the applicants at commensurate pay

grades with effect from 28th November 2011 (Memorandum dated 2nd December 2011 at page 14 of the bundle).

5.5 The Ministry of Public Service then changed the implementation date suggested by the Civil Service Commission from 28th November 2011 to 1st June 2013. Consequently the applicants were not paid salary arrears from 28th November 2011 but from 1st June 2013. They were also placed on holding positions and graded to grades BH4 and BH5, also with effect from 1st June 2013 instead of 28th November 2011.

[6] The applicants were dissatisfied with this outcome which they contend went against the first respondents recommendation in so far as the implementation date was concerned. A dispute was reported to CMAC as a result of the applicant's dissatisfaction but it could not be resolved. Consequently the applicants approached the Comi for relief.

[7] The parties agreed that there were two questions to be determined by the Comi;

7.1 Whether the MOPS was bound by the CSC recommendation on the effective date of the holding positions and the corresponding adjustments on the applicants wages; and

7.2 Whether applicants ought to progress from level 1 to level 2 of the salary grade BH4 in terms of Cabinet Circular No.3/2013 and/or Cabinet Circular No. 5/2014.

- [8] The applicants submit that the 1st respondent is the ultimate and exclusive authority on the management of the Civil Service. Therefore, its decision concerning civil servants such as the applicants is final. It was their submission that having exercised its power by ordering that the applicants be compensated with effect from 28th November 2011, it was not open to the MOPS to change the effective date to 1st June 2013.
- [9] The applicants referred the Court to **Section 187** of the **Constitution of Eswatini** as well as to the case of **John Bongwe v The Secretary of the Civil Service Board High Court Case No. 482/06** for the proposition that the CSC's decision cannot be subjected to ministerial approval.
- [10] **Section 187** of the **Constitution of Swaziland** reads as follows:-
- "J 87 (i) Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments and confirmation of appointments, promotion, transfer, termination of*

appointments, dismissal and disciplinary control of public officers shall vest in the Civil Services Commission. "

[11] Mr Bhembe, for the applicants, submitted that the Civil Service Commission, acting within its powers as aforementioned, properly decided the effective date from which the applicants were to be compensated.

[12] The respondents' case was that the Civil Service Commission had exceeded its mandate in fixing the effective date; that the Ministry of Public Service had only sought that that CSC advise on the most favoured option to be used in compensating the Junior Statistical cadre as requested; that the issue of remuneration of the applicants is not one of those within the exclusive province of the Commission under **Section 187** of the **Constitution**. It was Mr Dlamini's submission that it was always clear that the favoured option would be subject to cabinet approval; and that issue of remuneration require executive action in the form of an enabling instrument.

[13] On the claim for progression from level 1 to level 2 ofBH4 it was submitted that the holding position does not have notches or level as it is not an established and settled grade. It was submitted, in the alternative, that if the

Court found that holding position BH4 has notches or levels, then the applicants' claim is unfounded because Cabinet Circular 3/2013 (which created the applicants holding position BH4) makes no provision for any progression from level 1 to 2; that the applicants had not pleaded criteria for the alleged progression and if they met such criteria; that even the Establishment Circular No.5/2014 on which they rely does not provide for progression. It was the respondents' submission that a case had not been made for the applicants to progress within the holding post BH4.

[14] The Court will address the issue of the holding position BH4 and the claim for progression to level 2 thereof. Oral evidence was led with regard to the concept of holding positions generally and holding position BH4, in particular. The Director of the Management Services Division at the Ministry of Public Service, Mr Bathandwa Emmanuel Hlatshwayo ably assisted the Court with evidence given under oath and under cross-examination by Mr Bhembe for the applicants.

[15] The crux of Mr Hlatshwayo's evidence was that government has a grade structure as well as a pay structure for all positions in the civil service; that from time to time government departments would restructure and certain

positions would need to be upgraded and that such upgrade position may require certain entry level qualifications that the current position holders may not have; that instead of retrenching those who do not meet the new criteria for positions, they would be retained and holding positions would be created specifically for each such employee; that the unqualified employee would remain in the holding position until he exited the Civil Service in which case the holding position would lapse, until he obtained the required qualification, in which case he would be graded and posted within that specific cadre's update pay structure and the holding post would fall away.

[16] It was Mr Hlatshwayo's evidence that the applicants had been placed in holding position BH4 following that their department had restructured and they did not qualify for the regarded positions. He stated that position BH4 did not have nothing level and thus those at level one represented specific cadre of employees who would stay at that level until they exited the holding position. He testified that they would be entitled to cost of living adjustments and that their pension contributions continued as normal.

[17] Mr Hlatshwayo's evidence was largely unchallenged. He conceded that while BH4 had two levels that did not translate to a pay structure that would enable

the applicants to be notched. He admitted that the applicants were paid on level 2 of BH4 for one month but explained that this had been at the start of the financial year and had been unintentional and had been corrected immediately such that no further payments at the BH4 level 2 were made to the applicants.

- [18] It appears, as from the evidence of Mr Hlatshwayo that there is not progression from level to level 2 of Grade BH4. We accept the evidence as unrefuted. In the circumstances the applicants have not been able to show that there is progression on the grade. We therefore find that the applicants are unable, in the circumstances, to progress to level 2 of grade BH4.

[19] Effective date of the Holding Positions

With regard to the question of the effective date of the holding positions, the parties' submission are set out above. It is common cause that the Ministry of Public Service requested the Civil Service Commission to consider certain recommendations and advised the Ministry on the most favourable to enable it to prepare a Cabinet paper and seek Cabinet approval of the adopted recommendation. It is common cause that in its memorandum of 31st October 2011, the Ministry did not include any implementation date for the favoured

option and that the Civil Service Commission *meri motu* introduced the effective date.

[20] The applicants' case is based on **Section 187 of the Constitution and the case of John Bongwe v The Secretary of the Civil Service Board High Court Case No. 482/06**. It was their submission that once the CSC had pronounced the effective date, the Ministry had no authority to change that date.

[21] In terms of the Memorandum of 31st October 2011 from the Principal Secretary, Ministry of Public Service to the chairman Civil Service Commission, the Civil Service Commission was asked to "*consider the recommendations as advanced above and advise (sic) on the most favoured option to enable the Ministry to prepare a Cabinet paper and seek Cabinet approval of the adopted option*"

By memorandum dated 2nd December 2011, the Executive Secretary of the Civil Service Commission advised the Principal Secretary of the Ministry of Public Service of the favoured option and further added that "*This is with effect from 28th November 2011.*"

[22] It was only by memorandum dated 16th August 2013 that the Principal Secretary of the Ministry of Economic Planning and Development was advised that the

matter involving the applicants had been concluded in terms of establishment Circular No.3 of 2013 and that the effective date for the regrade would be 1st June 2013. We are, unfortunately not privy to what was happening between 2nd December 2011, when the CSC gave the Ministry of Public Service its favoured option and whether the Cabinet paper it prepared included the effective date suggested by the CSC. We are not privy to the reason why the effective date was set as 1st June 2013, except for a suggestion by the Director of Statistics in a minute of 3rd March 2015 where he says that. *"This was to be effective 28th November 2011, but due to lack of funds, Government did not act promptly to this directive until May 2013."*

[23] What we do know is that on 4th March 2015, the Principal Secretary of the Ministry of economic Planning and Development being the applicants' Ministry wrote a memorandum to the Principal Secretary of the Ministry of Public Service. In that memorandum the Economic Planning and Development Principal Secretary stated the following: *"The officers (applicants) were paid with effect from May 2013 instead of 28th November 2011 indicated in the CSC memorandum. The Ministry now wants to finalise this issue with the officers by ensuring that the officers are paid effectively*

from the date indicated by the CSC, this means that the officers need to be paid arrears from November 2011 to April 2013."

[24] In terms of **Section 187** of the **Constitution** the power of appointments (including acting appointments, secondments and confirmation of appointments) ... The Commission is empowered to administer, monitor and/or look after the welfare of public officers in terms of **Section 186(2) (b) and (d)**. In our view, the first respondent did not exceed its mandate in fixing the effective date. It was acting to give effect to its mandate to look after the welfare of public officers.

[25] On the issue of costs, we are of the view that this matter was a matter capable of settlement by the parties but the respondents unnecessarily dug in their heels when the applicants' claim had already taken years to finalise, the job grading complained of having happened in 2006. We therefore award costs to the applicants on the normal scale.

[26] In the circumstances we find that the Ministry of Public Service is bound by the effective date set by the first respondent on the issue of the holding positions.

[27] In the circumstances the court makes the following order;

1. The applicants are to be paid salary arrears from November 2011 to April 2013 as per the Memorandum of the Civil Service Commission dated 2nd December 2011.
2. The claim for progression level 1 to level 2 of BH4 is dismissed.
3. The respondents are to pay the costs of this application.

The Members Agree

S.NSIBANDE

JUDGE PRESIDENT OF THE INDUSTRIAL COURT

For Applicants: Mr. C. Bhembe (Bhembe & Nyoni Attorneys)

For Respondents: Mr. G.N. Dlamini (Attorney General's Chambers)