

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 299/2019

In the matter between:

**NATIONAL PUBLIC SERVICE™ AND
ALLIED WORKERS UNION obo
PHILLIP MNDENI NXUMALO**

Applicant

And

**THE EXECUTIVE SECRETARY OF
THE CIVIL SERVICE COMMISSION**

1st Respondent

**THE PRINCIPAL SECRETARY OF
THE MINISTRY OF PUBLIC SERVICE**

2nd Respondent

**THE PRINCIPAL SECRETARY OF THE
MINISTRY OF PUBLIC WORKS AND TRANSPORT**

3rd Respondent

ATTORNEY GENERAL

4th Respondent

Neutral Citation: National Public Service and Allied Workers Union obo Phillip Mndeni Nxumalo vs. The Executive Secretary of the Civil Service Commission and 3 Others (299/2019) [2022] SZIC 101(24 August 2022)

CORAM:

V.Z. DLAMINI – ACTING JUDGE

*(Sitting with Mr.D.P.M. Mmango and Mr.M.T. E Mtetwa –
Nominated Members of the Court)*

SUBMISSIONS FILED:

16 May 2022

JUDGMENT DELIVERED:

24 August 2022

Summary: Applicant filed an application for the determination of an unresolved dispute alleging that he was assigned the duties and responsibilities of a superior officer, but was not paid an acting allowance throughout that period. Respondents dispute that the Applicant executed the said duties and contend that, in any event, he was not entitled to the acting allowance because he was never appointed to act in the superior position.

Held: On the pleadings filed of record and evidence adduced by the parties, the Applicant's version was more probable. Further that by failing to issue an instrument of acting appointment for the Applicant, the Respondents could not benefit from their own wrong.

JUDGMENT

INTRODUCTION

- [1] The Applicant is the National Public Service and Allied Workers Union (NAPSAWU) on behalf of Phillip Mndeni Nxumalo, an adult liSwati male of Mbabane in the Hhohho region.
- [2] The 1st Respondent is the Executive Secretary of the Civil Service Commission; an organ of the Government of Eswatini responsible for hiring and disciplinary control of public officers. The 2nd Respondent is the Head of Department and Controlling Officer in the Ministry of Public

Service, which is responsible for formulating public officers' terms and conditions of service and human resource development among others.

- [3] The 3rd Respondent is the Head of Department and Controlling Officer in the Ministry of Public Works and Transport under which the Central Transport Administration (CTA) where the Applicant was stationed falls. The 4th Respondent is the Principal Legal Advisor and Representative of the Government of the Kingdom of Eswatini.
- [4] The Applicant was employed by the Respondents in July 1986 as Mechanic II based at the CTA; he was promoted in November 1997 to the position of Mechanic I. The Applicant was promoted again in December 2013 to the position of Production Control Officer; however when the promotion was about to be effected in the Government system, it was discovered that the post of Production Control Officer was remunerated at a lower scale than Mechanic I; consequently, the promotion was withdrawn.
- [5] A dispute ensued regarding the events that followed after the withdrawal of the Applicant's promotion. The Applicant contended that he was assigned the duties of the Inspector of Works, a superior position than Mechanic I, which he performed from 2013 to 2019. He subsequently demanded confirmation to the higher position and compensation for performing the responsibilities. The Respondents did not accede to the Applicant's claim, as such the latter reported a dispute for unfair labour practice to the Conciliation, Mediation and Arbitration Commission (CMAC), but the dispute remained unresolved, which resulted in CMAC issuing a certificate of unresolved dispute.

[6] The Applicant then filed an application for the determination of an unresolved dispute on the 4th October 2019, in which he claimed the following relief:

- (a) Payment of the salary difference between Mechanic I and Inspector of Works positions with effect from 2013 to 2019.
- (b) Costs of suit.
- (c) Further and/or alternative relief.

PLEADINGS

[7] According to both parties' pleadings, the facts that are outlined in **paragraph 4** above are common cause. The scope of disputed facts is quite narrow. On the one hand, the Respondents contend that the Applicant was neither appointed to act as Inspector of Works nor was he assigned the duties and responsibilities of the said post by his superiors. While the Applicant does not dispute that there was no instrument appointing him as Inspector of Works, he contends that he was assigned and performed the duties of the said position.

APPLICANT'S VERSION

[8] The Applicant testified in-chief that his main duties as Mechanic II and I entailed opening job cards, inspecting, repairing and testing motorcycles issued to various Government departments especially those from the Royal Eswatini Police Service. Moreover, the Applicant was responsible for

ordering motorcycle parts and training apprentices who were grade tested at the Eswatini College of Technology (ECOT), formerly SCOT.

- [9] After the Applicant's promotion to the position of Production Control Officer was withdrawn, he was assigned the duties of the Inspector of Works, which he performed in addition to the responsibilities of his substantive position (Mechanic I). The Inspector of Works' duties included marking the register, signing requisitions for motorcycle parts, supervising welders at the workshop, overseeing the operations of the motorcycle unit of the workshop, inspected and approved repairs of motorcycles carried out by sub-contractors, and processing invoices submitted by sub-contractors. The Applicant presented a memorandum issued by the General Transport Manager directed to the Accountant General in which a list of officers under the CTA and their specimen signatures was enclosed (*Exhibit "A5"*). The listed officers were authorized to collect cheques, receive goods and spare parts, receive and sign invoices. In that list, the Applicant was referred to as Inspector of Works.
- [10] The Applicant also presented a letter written to the General Transport Manager on the latter's request following a conciliation meeting at the CMAC. The letter (*Exhibit "A3"*) listed the duties Applicant performed as Inspector of Works. According to the Applicant, after submitting *Exhibit "A3"* to the General Transport Manager, the latter wrote a letter (*Exhibit "R1"*) to the former instructing him to revert to the Mechanic I position.
- [11] Under cross-examination, the Applicant conceded that he was not formerly appointed to the substantive position or to act as Inspector of Works, nonetheless he asserted that a letter was written instructing him to perform

the duties of the Inspectors of Works unfortunately for him, that letter got lost. He maintained that he performed the duties of the position and reported to the Workshop Manager. The Applicant further told the Court that as Inspector of Works, he supervised two employees; regrettably these former subordinates passed away some time in 2019 before he retired from the public service in November 2019.

[12] The Applicant disputed that Mechanic I was authorized to mark the register or to sign over a thousand requisition books. According to the Applicant, the salary scales for the positions he occupied or performed duties under were as follows:

Mechanic II – Grade 12

Mechanic I – Grade 14 (E86, 000/annum)

Production Control Officer – Grade C2 (E72, 000/annum)

Inspector of Works – Grade A4

RESPONDENT'S VERSION

[13] The Respondent led the evidence of one witness, namely Mr. Mandla Kunene (RW1). RW1 testified that in 2013, the same year the Applicant was promoted to the position of Production Control Officer, he was appointed Workshop Manager. He confirmed that the Applicant never assumed the position because it was remunerated at a lower salary grade than Mechanic I. During his tenure as Workshop Manager, the Applicant had become an expert in motorcycles, water pumps and brush cutters; consequently, the latter was tasked with overseeing the maintenance of

Government's motorcycle fleet; all departments reported motorcycle faults to him.

[14] RW1 further told the Court that the Applicant was provided with a bakkie (utility vehicle) to go about collecting the motorcycles that had broken down; these were then delivered to the workshop for assessment and repairs. As an expert, the Applicant repaired some in-house; but where some required further expertise, he recommended that they be given to dealerships to fix. According to RW1, he was succeeded by the late Mr. Titus Bhembe as Workshop Manager.

[15] It was RW1's evidence that all but four (4) of the duties listed in *Exhibit "A3"* were the duties of the Inspector of Works and to his recollection, the Applicant performed all of them except for ten (10). He disputed that the Applicant marked the time book. RW1 stated though that the Applicant would check if repairs on motorcycles were carried out according to required standards and sign off the job cards. He added that some of the duties of the Inspector of Works were delegated to Mechanic I.

[16] According to RW1, it was a typographical error to include the Applicant's name and to refer to him as an Inspector of Works in *Exhibit "A5"* (Memo to Accountant General). He added though that he was not the author of *Exhibit "A5"*; consequently, he could not say more than that it was a misprint.

[17] During cross-examination, RW1 stated that when he was employed in 1988, an apprentice reported to Mechanic I and the latter reported to Inspector of Works. He did not know the duties of the Inspector of Works at the time because he had been recently employed. He added that the Inspector of Works supervised Mechanic I, Mechanic II, Mechanic III and other employees. RW1 denied that the Applicant was given the utility vehicle for an extended period, but on occasions to attend to breakdowns of motorcycles.

[18] RW1 also stated that the Applicant never performed the duties of the Production Control Officer and was redeployed to the position of Mechanic I as per his request; however RW1 could not explain why it took four years for the Applicant to be redeployed. He admitted that the letter of redeployment was written after the Applicant had reported a dispute at CMAC. According to RW1, the inclusion of the Applicant's name in *Exhibit "A5"* was the only misprint on the document. RW1 conceded that the former Workshop Manager, the late Mr. Bhembe endorsed *Exhibit "A3"*, but as far as he could recall, the Applicant was never appointed Inspector of Works.

ANALYSIS

[19] In the Court's view, there are two issues for determination. Firstly, whether the Applicant has discharged his onus of proving that he performed the duties of the Inspector of Works from 2013 to 2019. If he has not proved that he carried out the duties of the said position, his claim will fail. If the Applicant succeeds in discharging his onus, the second issue to decide is

whether his claim is legally enforceable in the absence of an instrument appointing him to the position of Inspector of Works.

[20] With regard to the first question for determination, we find that the Applicant's version is more probable than that of the Respondents. Our finding is premised on the reasons that follow below. The Applicant gave a clear and detailed account of the responsibilities of the Inspector of Works which he performed and his account was backed by *Exhibit "A3"*. Same cannot be said of RW1's evidence.

[21] At first, RW1 said the duties listed in *Exhibit "A3"* were those of the Inspector of Works, but as he continued giving his evidence-in-chief, he singled out four duties. As he continued to give evidence, he admitted that the Applicant performed the duties, but not all of them; he identified the tasks that were not performed by the Applicant. While Respondents' counsel put to the Applicant that he never performed all the duties listed in *Exhibit "A3"*, the specific duties that he did not execute were never put to him. Moreover, it was never put to the Applicant that some of the duties listed in the document did not form part of the Inspector of Works' job description. The Applicant was not afforded the opportunity to rebut RW1's version and as such it would be grossly unfair and improper to hold that he should be disbelieved. See: **Sipho Gamedze v Dumsani Matsebula SZHC Civil Case No. 175/2002 (unreported)**.

[22] RW1 conceded that *Exhibit "A3"* was approved by the Applicant's former supervisor, the late Mr. Titus Bhembe who was the Workshop Manager at the time of the execution of the letter. No reasonable explanation was proffered by the RW1 why he was in a better position to dispute the late Mr. Bhembe's endorsement of *Exhibit "A3"*.

[23] RW1's credibility was put in further doubt when he disputed the authenticity of *Exhibit "A5"*, the Memorandum that was directed to the Accountant General, which referred to the Applicant as an Inspector of Works. RW1 acknowledged that the Memo was issued by Mr. Khumalo the General Transport Manager, a senior officer to him. He was therefore not in a position to attest that the Applicant's name was included erroneously; only Mr. Khumalo could attest to that. Nonetheless, Mr. Khumalo was never called to give evidence by the Respondents.

[24] It is common cause that the Applicant never performed the duties of the Production Control Officer upon his promotion in December 2013. There is also no dispute that it was only in July 2019 when the Mr. Khumalo instructed the Applicant through *Exhibit "R1"* to revert to the position of Mechanic I. If the Applicant did not execute the duties of Mechanic I and Production Control Officer between 2013 and July 2019, what responsibilities was he performing? RW1 did not offer any explanation except to say that in the case of the Applicant, some duties of the Inspector of Works were delegated him, but these should be considered as being within the scope of his responsibilities as Mechanic I.

[25] RW1 downplayed the fact that *Exhibit "R1"* instructed the Applicant to hand over the keys to the utility vehicle. In the Court's view, if the vehicle was given to the Applicant as and when there was a motorcycle breakdown, there would have been no need for the General Transport Manager to write a letter instructing him to surrender its keys. What is significant about the letter is that, in the same paragraph, the Applicant was instructed to surrender the office keys to RW1. Clearly, being issued with the vehicle

and office keys was an indication that he was performing a supervisor or managerial role at the time these were taken from him.

[26] The Respondents argued that even if the Applicant was assigned duties that were normally performed by the Inspector of Works, these were within his scope of employment as Mechanic I. This proposition is untenable. Firstly, it flies in the face of *Exhibit "R1"*. Secondly, the Respondents never put this defence as an alternative in their Replies. The Respondents' grounds for opposing the claim was that the Applicant never performed the duties in question and that he was not entitled to compensation because he was never appointed to act in the said position. Consequently, we find that the Applicant did perform the duties of the Inspector of Works for a period of six (6) years between December 2013 and July 2019.

[27] Having found that the Applicant performed the duties of the Inspector of Works between December 2013 and July 2019, the Court has to determine whether the absence of an instrument appointing him to act in that position disqualifies him from claiming acting allowance.

[28] The foregoing contention by the Respondents has long been answered by the Court. In the case of *Nikiwe Nyoni v The Acting Commissioner of Anti-Corruption Unit & 5 Others SZIC Case No. 164 (unreported)* at page 4, the Court said the following:

"The Respondent disputes that the Applicant is entitled to payment of acting allowance for the period August 2004 to date. The opposition to payment is for the reason that there is not in place any appointing instrument to the post of Acting Principal Accountant."

Counsel for the Respondent conceded that the Applicant continues to act in the position of Principal Accountant to date in spite of lack the instrument. For that reason, counsel for the Respondent submitted that the Applicant was not entitled to payment of acting allowance though she continued to do the work. The argument is self-defeating. The Respondent cannot rely on its own default to deny an employee remuneration for work that has been admittedly performed. The acting allowance therefore is lawfully due and payable to the Applicant for the period August 2004 to-date."

[29] Also see: **Collin Shongwe v Attorney General N.O. SZIC Case No. 77/2000 (unreported)**; **Pamela Motsa v Ministry of Natural Resources & Energy and 3 Others (69/2016) [2017] SZIC 43 (09 June 2017)** and **Derrick S. Dlamini v The Commissioner of Anti-Corruption Commission & Others (187/2016) [2016] SZIC 90 (2017)**.

[30] Moreover, Government **General Order A.240 (1)** reads as follows:

"When an officer who is considered to be of promotion calibre, and who possesses the specific qualifications demand of the post, is required to act in one of the posts set out in Appendix A.41, provided:-

(a) *he performs duties which are separate and distinct from those of his substantive post; and*

(b) *he assumes a substantially higher degree of responsibility;*

he shall be granted an acting appointment allowance in accordance with the terms of General Order A.243, subject to the provisions of General Order A.241."

[32] Then **General Order A.243** provides as follows:

The approved rates of acting appointment pay shall be:

(a) either the entry notch for the post in which an officer is acting;

or

(b) two notches above an officer's substantive salary; whichever is the greater."

[33] The Court has already held that the Applicant performed the duties of the Inspector of Works. It was also proven that these responsibilities were not just separate and distinct from those of Mechanic I, they were of a substantially higher level. In the premise, the Respondent's opposition to the Applicant's claim based on the fact that there was no instrument appointing him to act as Inspector of Works has no legal basis.

CONCLUSION

[34] For the above stated reasons, we hold that the Applicant's claim should succeed. The Respondents did not challenge the rate of pay applied by the Applicant for computing the acting allowance due; in any event, it is consistent with the provisions of **General Order A.243** quoted in paragraph 32 above.


[35] In the result, the Court orders as follows:

(a) **The Respondents are ordered to pay the Applicant the difference in pay enjoyed by the Applicant in his substantive**

post of Mechanic and the Inspector of Works post he acted under, with effect from 11th December 2013 to 12th July 2019.

(b) Respondents to pay costs of the application at ordinary scale.

The Members agree.



V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT

: Mr. G. Hlatshwayo
(MLK Ndlangamandla Attorneys)

FOR RESPONDENTS

: Mr. M. Mashinini
(Attorney General's Chambers)