

IN THE INDUSTRIAL COURT OF ESWATINI

RULING

CASE NO. 247/2021

In the matter between:-

NDVUNA DLAMINI

APPLICANT

AND

**PARLIAMENTARY SERVICE BOARD
SIMANGA MAMBA N.O.
GOVERNMENT OF ESWATINI
LABOUR COMMISSIONER
BENEDICT XABA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

Neutral citation : *Ndvuna DLamini v Parliamentary Service Board & 4 Others SZIC 109 (19 September 2022)*

CORAM : **DLAMINI J,**
*(Sitting with A. Ntiwane & S.P. Mamba
Nominated Members of the Court)*

Heard : **22 APRIL 2022**

Delivered : **19 SEPTEMBER 2022**

Summary: *Labour law – Industrial Relations – Applicant seeking to review, correct and set aside the decision of the 4th Respondent in relation to changes in his in his terms of employment. Respondents contending that Court should be remitted back to the 4th Respondent. Held: It would not be in the interests of justice to refer the matter back to the 4th Respondent since he has already decided that there are no grounds to review his decision and because he failed to exercise his powers under Part II of the Employment Act.*

1. Ndvuna Dlamini is the Applicant in these proceedings. He is the former Clerk of Parliament. Currently, the Applicant is employed as Under Secretary – Technical, in the Ministry of Agriculture. Dlamini has approached this Court seeking orders as follows;

- *Directing the 4th Respondent to dispatch, forthwith, to the Registrar of this Honourable Court, copying the Applicant, the record of proceedings whose 20 April 2021, decision is sought to be corrected and set aside.*
- *Reviewing, correcting and setting aside the decision of the 4th Respondent in favour of the 1st – 3rd Respondents as per his report issued under Section 26 of the Employment Act 6/1980 dated 20 April 2021.*
- *The decision of the 4th Respondent referred to in prayer 2 above be substituted by a decision upholding the Applicant's Section 26 of the Employment Act 5/1980 challenge.*
- *Directing any of the Respondents who oppose the application to pay the Applicant's costs of the application. .*
- *Granting the Applicant any further and/or alternative relief.*

2. As can be gleaned from above, the Applicant principally wants this Court to review and set aside the Labour Commissioner's decision of 20 April 2021, which he says was issued in favour of the 1st to the 3rd Respondents.

3. The history of this matter is that the Applicant was the substantive Clerk of Parliament for a number of years before he was redeployed to his current position of Under Secretary – Technical, in the Ministry of

Agriculture. According to the Applicant, on 14 October 2020, he was called into a very brief meeting with the Parliamentary Service Board in which he was furnished with a Civil Service Commission (CSC) letter of the same date transferring him to the position he now holds in the Ministry of Agriculture.

4. He says he was not consulted before the decision to transfer him was taken. He also complains that there was no compliance with section 26(1) of the Employment Act 1980, which requires that he be notified, in writing by his employer – the 1st Respondent herein, of any changes to his terms and conditions of employment.
5. Further complaints by the Applicant relate to what he calls patent violations of section 11 of the Parliamentary Service Act 6/2015, which provides that the Clerk may be removed by the Board for misbehavior, insubordination or under performance or any other just cause following the recommendation of an ad hoc disciplinary committee chaired by a Magistrate appointed by the Minister. This he says did not happen in his matter.

6. Ndvuna Dlamini also complains that in his case there was also a violation of section 25(2) of the Public Service Act 5/2018 which provides that an officer shall not, upon transfer, suffer any reduction in salary or scale, without his consent, unless such transfer is as a result of disciplinary proceedings or legitimate adjustment.
7. Being dissatisfied with the transfer, the Applicant says he made efforts to find an amicable resolution of his dispute but all his efforts came to naught. He then instructed his present Attorneys to write a letter to the 1st Respondent requesting that the parties engage in round table negotiations with a view to amicably settle the dispute. The proposal by the Applicant's Attorneys was that the Applicant be allowed to retain all his benefits at his new work post. It would seem that the 1st Respondent though was not interested in the proposed settlement proposal by the Applicant's Attorneys because nothing came out of it.
8. The Applicant then decided to initiate a section 26 of the Employment Act 1980 challenge of his transfer, basically stating that the purported transfer had resulted in less favourable terms and conditions because it

had effectively deprived him of the lucrative benefits he enjoyed as Clerk of Parliament, such as special duty allowance, commuted car allowance, entertainment allowance and recruitment and retention allowance. He also complained that whilst in his position as Clerk to Parliament he was controlling officer, this was no longer the case in the new position of Under Secretary. In effect, the Applicant's complaint was that his transfer amounted to a demotion.

9. In response to the Applicant's section 26 challenge, the 1st Respondent wrote to the Labour Commissioner basically denying that the Applicant had been made worse off by his deployment to the position of Under Secretary. The 1st Respondent further stated that because the Applicant had been deployed with the same grade F4 salary scale, it could not therefore be said that he had been made worse off by the transfer or that such transfer effectively amounted to a demotion.
10. The 4th Respondent, after considering the Applicant's section 26 challenge and the 1st Respondent's response thereto then made findings to the effect that;

a) The Applicant's claim to be paid all the benefits and afforded all the privileges of his previous position of Clerk to Parliament whilst serving as Under Secretary remain unsubstantiated and unconscionable in the absence of a clear opposition and attempts to set aside the employer's decision of his redeployment.

b) The Applicant had not succeeded in establishing a right to the benefits and allowances he was earning whilst serving as Clerk to Parliament beyond his initial contract of employment.

c) In seeking to establish an entitlement to the Parliamentary benefits in his new job station as Under Secretary, the Applicant had strayed into the realm of dispute of interest, which the Commissioner of Labour has no jurisdiction to entertain within the ambit of section 26 of the Employment Act.

11. Being dissatisfied with the Labour Commissioner's decision, the Applicant sought to have the decision reviewed in terms section 26(4) of the Employment Act. However, the Applicant states that the Labour Commissioner declined to exercise his review powers, opting instead to refer the matter to this Court.

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12. The decision of the Labour Commissioner to decline reviewing his decision in terms of section 26(4) was based on his considered view that he found no grounds upon which he could review his decision. In his own words, the Labour Commissioner determined that '*...(The) decision has not been found to be inconsistent with the spirit and purpose of Section 26 of the Employment Act, No.5 of 1980 and it is therefore retained.*'
13. The Applicant though complains that he and his present Attorneys were not made aware that the matter had been referred to this Court by the Labour Commissioner. He confirms though that his Attorneys were served with the document referring the matter to this Court, which he says they got to know of at the end of June 2021. The Applicant's Attorneys then conducted a search in this Court and could not find any such review referral by the Labour Commissioner, hence the decision to institute the present review application before this Court.
14. Upon receipt of the Applicant's application the Respondents raised some points of law and also answered the merits of the matter. On the

date set for hearing of the matter the Respondent's Counsel, Attorney Mr. N Dlamini insisted that the Court should first hear and determine the *points in limine* and issue its ruling before hearing and deciding the merits of the matter.

15. Principally, the Respondents' preliminary challenge is to the effect that the Labour Commissioner's decision under section 26(3) of the Employment Act is not subject to judicial review but reconsideration by the Labour Commissioner himself in terms of section 26(4), failing which he (Labour Commissioner) should then refer the matter to this Court. The argument here is that the Applicant lacks the *locus standi* to personally approach this Court for relief. The Respondents further state that even if it could be said that he has such *locus standi*, the present application was unnecessary and amounts to abuse of Court process because the Labour Commissioner has already referred the matter to this Court.

16. In essence, the Respondents are saying the Court should refer the matter back to the same Labour Commissioner who, after considering the matter after it had been brought back to him in terms of section

26(4), informed the Applicant that he had not been able to find reason or grounds upon which to review and set aside his own decision, and that he did not have jurisdiction over same.

17. One wonders though, what the purpose of taking back the matter to the Labour Commissioner would be because he has stated clearly that he found no reason or grounds upon which to review the decision he has already made. Is the referral proposed by the Respondents meant to force the Labour Commissioner to find a reason or grounds to review the decision he made, when he has already stated that he had found no such grounds and reasons to review the decision? Or is such proposed referral meant to frustrate and delay the Applicant?
18. The Court points out as well that a close scrutiny of Section 26(4) indicates that it makes it peremptory for the Labour Commissioner to endeavour to settle the dispute of the parties using his powers under part II. However, evidence before Court clearly indicates that the Labour Commissioner dismally failed to exercise his powers as provided for by section 26(4). After referral of the matter to him under section 26(4), he could have for instance, called the parties to

conciliate the dispute between them. This is one of the statutory powers of the Labour Commissioner under part II of the Employment Act 1980, specifically under section 8(b). But this, he never did. Instead, in his findings he stated that he had no jurisdiction to entertain the dispute within the ambits of section 26 of the Employment Act. Clearly, the Labour Commissioner misconstrued the functions and powers that he has in terms of section 26(4).


19. Since the Labour Commissioner has already referred the matter to this Court, coupled with fact that he has decided that he has no jurisdiction to entertain the dispute, it would be an exercise in futility to expect him to help the parties settle their dispute. It is accordingly a finding of this Court that it would be a great injustice to the Applicant to have his matter referred back to the Labour Commissioner because he has already decided that there are no grounds to review his earlier decision and that he has no jurisdiction to entertain the Applicant's dispute.
20. The Respondents, through their Counsel, also submitted and argued that this Court's powers in terms of the Employment Act are only

limited to the questions of whether firstly, there was a unilateral variation of the Applicant's terms and conditions and secondly, whether such variation resulted in less favourable terms and conditions.

21. One should point out though that after a matter has been referred to this Court in terms of section 26(4), it is this Court that retains the power to make a determination of the matter and that the powers of the Court cannot be curtailed and limited only to questions of whether there was a unilateral variation or whether such variation amounted to less favourable terms as suggested by the Respondents.
22. Instead, the Court is empowered to make a full determination of the matter and make an appropriate order or orders, as the case may be. The powers of the Court cannot and will not be curtailed, as the Respondents seem to suggest. It is this Court which retains the powers to scrutinise the decision of the Labour Commissioner and make appropriate orders, as empowered by section 26(4).

21. In view of the fore going, it is the Court's considered view that the Respondent's points *in limine* are unmeritorious and are accordingly dismissed. The Court makes no order as to costs.

The members agree.



T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 19th DAY OF SEPTEMBER 2022.

For the Applicant : Attorney Mr. S. Dlamini (Magagula & Hlophe Attorneys)
For the Respondent : Attorney Mr. N. Dlamini (Attorney General's Chambers)