



**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

Case No.285/19

In the matter between:

**MALANGENI DLAMINI**

Applicant

And

**THE EXECUTIVE OF THE CIVIL SERVICE  
COMMISSION**

1<sup>st</sup> Respondent

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

2<sup>nd</sup> Respondent

**THE PRINCIPAL SECRETARY OF THE MINISTRY  
NATURAL RESOURCES AND ENERGY**

3<sup>rd</sup> Respondent

**THE ATTORNEY GENERAL**

4<sup>th</sup> Respondent

**Neutral Citation:** Malangeni Dlamini vs The Executive of the Civil Service Commission and 3 others (285/19) [2022] SZIC 95 (15 September 2022)

**Coram:**

**L.L. HLOPHE-JUDGE**

*(Sitting with Mr.P.M.Dlamini and Mr. E.L.B. Dlamini –  
Nominated Members of the Court)*

**DATE DELIVERED:** 15<sup>th</sup> September, 2022

***SUMMARY: Labour Law- Applicant seeks an order compelling the Respondents to pay him an acting allowance-incumbent deceased and not replaced for a year-immediate supervisor giving Applicant verbal instruction to Act-such supervisor unable to return to the country to testify-Whether the principle of unjust enrichment is applicable. Employee alleging that he is entitled to be paid the difference in salary between his substantive position and the position in which he acted.***

***Held- The employee is lawfully entitled to be paid the difference in emoluments for acting in the vacant position and for discharging the duties of the Senior Water Development Analyst.***

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## **JUDGEMENT**

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### **INTRODUCTION**

- [1] In this application the Applicant seeks the following orders:
- 1.1 An order directing the Respondents to promote the Applicant into the position of Senior Water Development Analyst.
  - 1.2 Payment of the difference in salary between the Water Development Analyst and Senior Water Development Analyst position's to the Applicant retrospectively from 2017 up to August 2018, (13 Months).
- [2] Applicant abandoned prayer 1.1 at the commencement of the proceedings hence this judgment is only in relation to the second prayer.

## **THE PARTIES**

- [3] The Applicant is Malangeni A. Dlamini, an adult male of Hlatikulu area in the Shiselweni Region.
- [4] The 1<sup>st</sup> Respondent is the Executive Secretary of the Civil Service Commission, a statutory organization responsible for hiring and disciplinary issues of civil servants among other duties.
- [5] The 2<sup>nd</sup> Respondent is the Principal Secretary of the Ministry of Public Service Eswatini Government, responsible mainly for the welfare of the civil servants.
- [6] The 3<sup>rd</sup> Respondent is the Principal Secretary of the Ministry of Natural Resources and Energy, a Kingdom of Eswatini department where the Applicant is employed.
- [7] The 4<sup>th</sup> Respondent is the Attorney General, an *ex officio* legal representative of the Government of Eswatini and its institutions.

## **THE FACTS**

- [8] The Applicant is an employee of the Eswatini Government having been employed in September 2009 as an Assistant Rural Sociologist. In 2015 he was promoted to the position of Water Development Analyst under the Ministry of Natural Resources and Energy, based in the Lubombo Region.

[9] In 2017 his supervisor the then Senior Development Analyst Mr. Zeblon Simelane passed on, the Applicant was left to man the Lubombo Regional office alone, which entailed his having to perform the duties of his office and double as a Senior Water Development Analyst as well. His immediate supervisor Ms. Nompumelelo Ntshalintshali who was the Principal Water Development Analyst at the time, when asked by the Applicant whether a replacement of Mr. Simelane would be deployed given the difficulties presented where there is no senior official in place was directed by Ms. Ntshalintshali 'to continue working in the Lubombo Region'.

[10] He submits that as the unit he worked under, that of water development had only two officials himself as the Water Development Analyst and the Senior Water Development Analyst, with the demise of Mr. Zeblon Simelane, he had been left alone for the entire period to discharge the duties of the two positions. The duties of a Senior Water Development Analyst included the following-:

10.1 Preparing monthly performance reports

10.2 Chairing project meetings

10.3 Providing secretarial functions in project meetings.

10.4 Convening meetings with communities regarding matters of developments in those areas.

10.5 Providing detailed plans for upcoming projects.

10.6 Liaising with project developers with regards to proposed projects.

[11] The duration of his “acting period” he contended was between September 2017 and October 2018, which amounts to 13 months.

[12] The Applicant contends that he was shocked when on the 12<sup>th</sup> October 2018, a new officer was introduced as a Senior Water Development Analyst replacing the late Zeblon Simelane. As no one seemed to be prepared to engage him, he then directed a letter to the Director in his Ministry requesting to be paid for the duties he had discharged as Senior Water Development Analyst for the period mentioned above. His request to be paid was declined by all the responsible structures he had approached.

#### **APPLICANT’S SUBMISSIONS**

[13] The Applicant’s case is that from August 2017 to 12 October 2018 when the position of Senior Water Development Analyst became vacant following the death of the incumbent, Mr. Z. Simelane, he performed the duties attached to the said senior post. This was without the payment of any acting allowance compensation which should have been payable at a higher scale as he held a position lower than that of Senior Water Development Analyst when he performed the duties meant for the said senior post.

[14] Accordingly the Respondents benefited from the Applicant’s performance of the duties which would ordinarily have been performed by the Senior Water Development Analyst. This resulted in the Respondents being unjustly enriched at the Applicant’s expense.

[15] The Applicant contends that as proof that he performed duties which were senior in nature to those of the post he occupied which was lower than that he had been tasked with performing the functions of, and for which he was being remunerated, attached reports which are in terms of the establishment meant to be prepared by the Senior Water Development Analyst.

### RESPONDENT'S SUBMISSIONS

[16] In their reply the Respondents averred that the Applicant has never been made to continuously perform the duties of a Senior Water Development Analyst. They go on to contend with regards the specific period of August 2017 to 12 October 2018 that the Applicant never at any point performed duties of the Senior Water Development Analyst. In any event they contend that the said post does not attract any acting allowance in terms of government policies, particularly the general orders.

[17] Particular reference was made in arguments per the heads of argument to **General Order No. A245 (1)** in its entirety the order was extracted and it reads as follows:-

*“An officer shall not normally act in a vacant post for more than six months continuously without being promoted. In the case where the officer has acted in the same vacant post for more than six months continuously, the Ministry under which the vacant post exist shall take immediate action to promote the officer. If the officer does not have the pre-requisite qualification or experience to fill the vacancy he/she shall revert to his/her substantive post and a suitable candidate could have to be appointed to fill the vacancy.”*

[18] Further reference was made to **Establishment Circular No. 5 of 2017**. The relevant portion of the said circular was extracted and reads:-

*“the acting appointments and allowances shall be guided by **General Orders A240 and A245**. Officers appointed for acting appointment should be in the same cadre. No person shall be granted paid allowance if she/he is not in the same cadre.”*

#### **ANALYSIS OF THE FACTS AND THE LAW**

[19] As we understand it, Respondent's case is simply that the Applicant was never appointed to act continuously in the position of Senior Water Development Analyst nor did he ever act in the same position during the period in question. It is contended further that he would not even be allowed to act in that position given that he held a lower position than the vacant position, and was not therefore in the same cadre. He could not be appointed to act in that position as such because **General Order A240 and A245** did not allow it.

[20] We could be saying something with regard the contents of **General Orders No. 245 (1)** but since prayer 1 was dropped by the Applicant from amongst his claims we no longer need to. We say this because in our view the contents of that order are meant for a scenario where the aggrieved employee would be asking for confirmation in a case where he claims to have acted in a post beyond six months. Having stated the above, it should be mentioned that the latter part of the said General Order, does acknowledge that it could happen in practice that an officer who in terms

of the policies does not qualify or is not experienced enough to act in a certain position, did in reality act. It directs that such an officer may not be confirmed in a position concerned but shall have to revert to his/her substantive position.

[21] It does not however say that even though he is not being confirmed in that position but is being reverted to his substantive position what should happen to his having acted. Further, what should happen regarding the payment of an allowance for having so acted, if it cannot be denied that he did act. In other words should it be taken that he would have been actually paying a tribute by so performing in that particular position in an acting capacity? It does not seem so in modern working environment and that the law cannot allow it. If he acted he should be compensated for having so acted. The old common law position is 'no work no pay' whose corollary is, there should be payment for any work done.

[22] As we understand, the issue was not so much about the Applicant not having acted in that position by performing the work that should have been performed by a Senior Water Development Analyst, than it was about him having allegedly acted without a written instrument and that in any event he could not be paid an acting allowance because he was not in the same cadre as the incumbent to the position of Senior Water Development Analyst.

[23] From the facts of the matter and the argument made before us, it is clear that the department to which the Applicant is attached and where the late Senior Water Development Analyst was based never ceased to operate



upon the latter's passing on. There are various reports annexed to the application which it is not in dispute were produced by the Applicant. There was also no dispute that in reality they were meant to be produced by the occupant of the position of Senior Water Development Analyst, who was not there at the time. It has also not been suggested that the meetings which were supposed to be convened by the incumbent of the position, i.e. the Senior Water Development Analyst were no longer being held with the community irrespective of the said incumbent not being there. In fact, there is no dispute he had played the role that would have been played by the incumbent to that position.

[24] The simple question it seems to us is whether it can avail the Respondents in law not to pay the acting allowance determined by the difference in salary between what was payable to the incumbent to the position of the Senior Water Development Analyst for the period concerned and that payable to the position occupied by the Applicant at the time, where it is undisputed that he did act in the said position by performing the duties that were not ordinarily meant for him.

[25] The question concerning the payment to government officers for work done by them in positions where they would have acted, even without written instruments have been a subject of numerous judgments in our courts.

[26] **IN HYSON MKHATSHWA AND 16 OTHER VS PRINCIPAL SECRETARY-  
HEALTH AND SOCIAL WELFARE, PRINCIPAL SECRETARY- PUBLIC  
SERVICE AND INFORMATION, ATTORNEY GENERAL CASE**

NO.117/2002 the position on work done in an acting position was captured in the following words:-

*“In any event, the Applicants are entitled to be paid for work done by way of ‘on call’ duty. Ruling otherwise would be contrary to the doctrine of unjust enrichment. The Applicants acted in good faith and rendered service to save lives at various hospitals throughout the country. A defect in a contract or circular for that matter is beside the point, the fact is that the Respondents did accept the benefit of work done by the Applicants and cannot be allowed to reap that benefit without compensating the Applicants pharmacists. It is a recognised principle of Roman- Dutch Law that no one shall be unjustly enriched at the expense of another.*

[27] Although this case was apparently about an allowance that was supposed to be paid to pharmacists in the employ of government. We have no hesitation the principle enacted therein applies fully in the present matter namely that a person is entitled to be paid for work done unless he had performed it against law or a specific lawful instruction. In other words one cannot be allowed to derive a benefit in a situation where he is not willing to pay what he needs to pay.

[28] There is a need for the Court to comment on the case of **NHLANHLA SYDNEY SITHOLE V CIVIL SERVICE COMMISSION AND 3 OTHERS- INDUSTRIAL COURT CASE NO. 81/2018**: Given that the conclusion reached in that application was its dismissal, the Respondents wants to suggest that the same should happen in this matter. When one looks closer at the said Judgement, it becomes clear that the Respondents are equating things that cannot be equated. The only similarity between that case and the present

one is that it related to *inter alia* the payment of an acting allowance to act in a similar position as in this one by the concerned employee.

[29] It otherwise cannot be denied that it related to a matter where the Applicant, a Water Development Analyst had, in May 2013, acted as a Senior Water Development Analyst until 2016. He thus sought an order directing he be confirmed in the position for having acted in it for the period the incumbent was absent having been seconded elsewhere by the Government. He also sought to be paid an acting allowance during the said period, as a result of the justification advanced the acting allowance was paid (see paragraph 6 of the judgement). It was infact found that it would not have been possible to confirm the Applicant in that position because the incumbent employee had just gone on a secondment elsewhere and **General Order No. A245 (2)** did not envisage a confirmation in such a situation. The application was dismissed for that reason.

[30] In the case of **PAMELA MOTSA V THE MINISTRY OF NATURAL RESOURCE AND ENERGY, THE PRINCIPAL SECRETARY-MINISTRY OF NATURAL RESOURCES AND ENERGY, THE CIVIL SERVICE COMMISSION AND THE ATTORNEY GENERAL CASE NO. 69/2016** the Court stated that:

*“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.”*

In page 16 of the judgement the Court went on to say the following at paragraph 46 thereof:-

*“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.”*

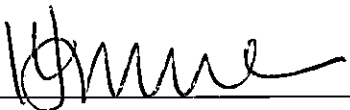
The principle applied in all the foregoing cases was also applied in **COLLIN SHONGWE V SWAZILAND GOVERNMENT INDUSTRIAL COURT JUDGEMENT CASE NO. 77/2000** and that of **In NIKIWE S. NYONI V ACTING ANTI- CORRUPTION COMMISSIONER IC CASE NO. 164/05**

[31] In the circumstances we accept the Applicant’s evidence that he acted and performed the substantial portion of the duties of the Senior Water Development Analyst. The Ministry’s senior officials were aware of this.

[32] As a result we make the following orders under the prayer of further and/or alternative relief:

(i) The 1<sup>st</sup> Respondent is to pay the Applicant the applicable acting allowance he would have been paid for acting as a Senior Water Development Analyst for the period in question, (13 months).

The Members agree.



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**L. L. HLOPHE**  
**JUDGE OF THE INDUSTRIAL COURT**

FOR APPLICANT: Mr. M. Ndlangamandla  
(MLK Ndlangamandla Attorneys)

FOR RESPONDENTS: Ms. Z. Nsimbini  
(A.G. Chambers)