

**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

Case No. 36/2022

In the matter between:

**THE REGISTRAR OF THE SUPREME COURT**

1<sup>st</sup> Applicant

**TIMOTHY MSIBI**

2<sup>nd</sup> Applicant

And

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

1<sup>st</sup> Respondent

**THE CIVIL SERVICE COMMISSION**

2<sup>nd</sup> Respondent

**THE ACCOUNTANT GENERAL**

3<sup>rd</sup> Respondent

**THE ATTORNEY GENERAL N.O**

4<sup>th</sup> Respondent

Neutral Citation: The Registrar of The Supreme Court & Another vs. The Principal Secretary-Ministry of Public Service & 3 Others (36/2022) [2022] SZIC 66 (27 May 2022)

Coram: **V.Z. Dlamini – Acting Judge**  
(Sitting with D. Mmango and M.T. E Mtetwa – Nominated Members of the Court)

**LAST HEARD** : 10 March 2022

**DATE DELIVERED** : 27 May 2022

*Summary: Applicants instituted an application on an urgent basis seeking payment of the 2<sup>nd</sup> Applicant's salary following the extension of his appointment by the appropriate authority post retirement. Consent Order granted, but issue of costs at punitive scale reserved for argument. Applicants contend that cause of litigation was Respondents' disregard of letters of demand and that Respondents' conduct caused prejudice and harm to Applicants. Respondent contends that Government regulations, which were a prerequisite for payment of salaries in the Public Service, not complied with.*

*Held: Court has discretion to award costs and will do so only where a party has acted frivolously and vexatiously. Consent Order resulted in partial success for all the parties. Further the parties were all culpable for the ensuing litigation. Consequently, the requirements of law and fairness dictate that no order for costs be made.*

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## **JUDGMENT**

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### **INTRODUCTION**

[1] The 1<sup>st</sup> Applicant, the Controlling Officer in the Judiciary of the Kingdom of Eswatini and the 2<sup>nd</sup> Applicant, a Public Officer formerly employed as Senior Accountant and posted to the Judiciary, instituted an urgent application on the 11<sup>th</sup> February 2022 against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents who are, the Controlling Officer of an Eswatini Government Ministry responsible for the Public Service, a Service Commission vested with the authority to appoint Public

Officers and the Head of the Accountancy Cadre respectively. The 4<sup>th</sup> Respondent is the principal legal representative of the other Respondents.

[2] The Applicants initially sought the following orders:-

1. *The Applicants are condoned for their non-compliance with the forms, time limits, manner of service and this matter is enrolled to be heard as one of urgency.*
2. *A rule nisi is hereby issued calling upon the Respondents to show cause on a date to be fixed by the above Honourable Court why an order in the following terms should not be made final:*
  - 2.1 *The Respondents are ordered and/or directed to honour the letter of appointment of the Second Applicant dated the 5<sup>th</sup> January 2022 by extending the appointment of the Second Applicant until its expiry;*
  - 2.2 *The Respondents are ordered and/or directed to honour the letter of appointment of the Second Applicant dated the 5<sup>th</sup> January 2022 by paying his salary whenever it falls due until its expiry;*
  - 2.3 *The Respondents are ordered to pay the Applicant's salary with effect from the 6<sup>th</sup> January 2022 until finalization of this matter;*
  - 2.4 *The Respondents are ordered to pay costs of this application at Attorney and own client scale;*
  - 2.5 *Granting the Applicant further and/or alternative relief;*

3. *Pending finalization of the matter in due course, it is ordered that prayer 2.3 operate with immediate and interim effect;*
4. *Granting the Applicant further and/or alternative relief.*

### **BACKGROUND FACTS**

- [3] Following the 2<sup>nd</sup> Applicant's attainment of the compulsory retirement age in accordance with the Public Service Regulations and General Orders, the 1<sup>st</sup> Applicant recommended to the 2<sup>nd</sup> Respondent for his appointment on a fixed-term contract. The 1<sup>st</sup> Applicant's recommendation was based on the 2<sup>nd</sup> Applicant's outstanding service and experience working in the Judiciary, particularly in the office of the Master of the High Court. In consultation with the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, the 2<sup>nd</sup> Respondent appointed the 2<sup>nd</sup> Applicant for a period of six (6) months with the *caveat* that this was to enable him to make handover notes to the newly appointed Principal Accountant.
- [4] The 2<sup>nd</sup> Applicant's appointment was effective from the 17<sup>th</sup> June 2021 and was to expire on the 17<sup>th</sup> December 2021. Meanwhile, on the 4<sup>th</sup> August 2021, the 2<sup>nd</sup> Respondent approved the promotion of another Officer to the position of Senior Accountant in the Judiciary. Upon the expiry of the 2<sup>nd</sup> Applicant's contract, the 1<sup>st</sup> Applicant recommended its renewal for two (2) years based on similar reasons as the first appointment.
- [5] The 1<sup>st</sup> and 3<sup>rd</sup> Respondents opposed the recommendation on the grounds that another Officer was appointed on the 16<sup>th</sup> November 2021 to replace the 2<sup>nd</sup> Applicant in the Judiciary and that the 2<sup>nd</sup> Applicant did not possess special skills to extend his appointment; the Principal Accountant and recently

promoted Senior Accountant were more than capable of executing the responsibilities of their office in the Judiciary.

- [6] Despite the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's objection, the 2<sup>nd</sup> Respondent extended the 2<sup>nd</sup> Applicant's contract for a period of twelve (12) months effective from the 6<sup>th</sup> January 2022. Subsequent to that development, the 1<sup>st</sup> Applicant wrote to the 1<sup>st</sup> Respondent notifying him of the 2<sup>nd</sup> Applicant's contract renewal and sought a waiver of **Circular no. 3 of 2018**; the 1<sup>st</sup> Applicant also implored the 1<sup>st</sup> Respondent to implement the 2<sup>nd</sup> Respondent's decision. When there was no response from the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Applicant wrote a follow-up memorandum urging the former to put the appointment into operation in order to mitigate the prejudice and harm suffered by the Judiciary.
- [7] The 1<sup>st</sup> Respondent never acted on the 1<sup>st</sup> Applicant's request resulting in the 2<sup>nd</sup> Applicant not being paid his salary for January 2022 and non-processing of his salary for February 2022. The 1<sup>st</sup> Respondent's reluctance to implement the 2<sup>nd</sup> Respondent's decision prompted the Applicants' filing of the present application.
- [8] The Respondents opposed the application by filing answering affidavits in which a counter-application was made. While the matter was pending hearing, the parties partially settled their dispute on the 23<sup>rd</sup> February 2022. By consent, the Court ordered that the Respondents pay the 2<sup>nd</sup> Applicant's salary from the 6<sup>th</sup> January 2022 until the 22<sup>nd</sup> March 2022.
- [9] Apparently, the partial settlement was motivated by the 2<sup>nd</sup> Respondent's variation of the 2<sup>nd</sup> Applicant's appointment following the 3<sup>rd</sup> Respondent's

appeal. The issue that stood over and could not be resolved was the 2<sup>nd</sup> Applicant's costs of litigation on the punitive scale; it was reserved for arguments.

## **ARGUMENTS**

- [10] The 2<sup>nd</sup> Applicant's counsel submitted that it was common cause that after the 2<sup>nd</sup> Applicant was appointed by the appropriate authority, he rendered services but was not paid his salary. There was no legal justification for the Respondents not to pay him. Several letters written to the Respondents were ignored. The non-payment of the 2<sup>nd</sup> Applicant resulted in the present application.
- [11] It was counsel's contention that the letter of appointment remained valid, effective and enforceable against the Respondents until lawfully set aside. By consenting to the order granted by the Court on the 23<sup>rd</sup> February 2022, it appears the Respondents had elected to honour the letter of appointment; The 2<sup>nd</sup> Applicant must therefore be deemed to have succeeded in his application.
- [12] Counsel also argued that the Respondent's conduct ought to be mulcted with costs at attorney and own client. Any misunderstanding between Government departments should not have affected the 2<sup>nd</sup> Applicant who had rendered service to the Eswatini Government. In terms of **Section 64 (a)** of the **Employment Act, 1980**, an employer who fails to pay an employee's wages when they are due is guilty of an offence. An employer who stops payment of an employee's salary without lawful justification violates **Part VI** of the **Employment Act**.

[13] The 2<sup>nd</sup> Applicant's counsel further referred the Court to the matter of **Mduduzi Zulu v The Principal Secretary in the Ministry of Natural Resources and another Case no. 193/2008 SZIC**, where the Court held that the stoppage of the Applicant's salary was reckless and malicious, hence it warranted punitive costs despite the fact that the Respondent had not delayed the resolution of the matter. Similar sentiments were expressed by the Court in the case of **Themba Dlamini v Maloma Colliery Ltd Case no. 134/2011 SZIC**.

[14] Counsel also submitted that in the case of **Sonnyboy Dlamini v The Premier League of Swaziland Case no. 173/2009 SZIC**, the Court awarded punitive costs even though the Respondent consented to the order.

[15] It was further contended by the Applicant's counsel that despite the fact that they are legally represented by competent attorneys, the Respondents' conduct was reprehensible and should not be condoned by the Court. There was no communication to the Applicant that his appointment was being contested and as such he would not be paid; the withholding of his salary was therefore reckless and malicious.

[16] Conversely, the Respondents' counsel argued that it was worth noting that in terms of **Section 13 of the Industrial Relations Act, 2000 (as amended)**, costs do not follow the event. It is in exceptional cases that costs are awarded to the successful party by the Court.

- [17] It was also contended by the Respondents' counsel that it was false to declare that several letters were written seeking payment of the 2<sup>nd</sup> Applicant's salary, but Respondents never responded. If such letters existed, they would have been exhibited in Court. Consequently, the cases cited by the 2<sup>nd</sup> Applicant's counsel were distinguishable as written demand of salary arrears was not a factor in the present matter.
- [18] Additionally, Respondents' counsel submitted that the employees in those matters were permanent and pensionable but their employers defaulted on their duty to pay the salaries with no justification advanced. In the present matter, the Respondent had pleaded insurmountable hardships such as the absence of a post number and resumption of duty forms. The 1<sup>st</sup> Applicant had failed to explain how the 2<sup>nd</sup> Applicant's salary could be processed without this information and document.
- [19] Counsel argued that, since the Applicants' counsel acknowledged that 1<sup>st</sup> Applicant and the Respondents being Government departments and or functionaries could not seek costs against each other; the 2<sup>nd</sup> Applicant should fall with his co-applicant who neglected to complete and submit his assumption of duty form. If there was any party who should pay costs, it was the 1<sup>st</sup> Applicant whose conduct hindered the processing of 2<sup>nd</sup> Applicant's salary.
- [20] The Respondents' counsel referred the Court to the case of **Jeroth Khumalo v Swaziland Government Case no. 174/1998 SZIC**, where the Court refused to award costs against the Respondent because the Applicant was in no



financial hardship as he had recently retired and received his pension; the present case was similar to the **Jeroth Khumalo** case in that respect. In any event, the Applicant in the present case will receive his arrear salary.

[21] Counsel further contended that the 1<sup>st</sup> Applicant's nebulous interest in the 2<sup>nd</sup> Applicant's salary coupled with her blameworthiness in the non-processing of the latter's salary are factors that should persuade the Court to decline costs. In the case of **NESMASA v SEB Case no. 560/2007 SZIC**, the Court also declined costs where a party had demonstrated an abstract interest in the *lis*.

[22] The Respondents' counsel urged the Court to award costs to the Respondents against the 1<sup>st</sup> Applicant. Alternatively, that 1<sup>st</sup> Applicant should be ordered to pay the 2<sup>nd</sup> Applicant's costs on the ordinary scale.

### **ANALYSIS**

[23] This Court's power to award costs is governed by **Section 13 (1) and (2)** of the **Industrial Relations Act, 2000 (as amended)** which provides as follows:

*“(1) The Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay bringing or defending a proceeding.*

*(2) Where the Court awards costs under this section, the Court may use the tariff of costs laid down under the Rules of the High Court*

*with such modifications as the Court pleases or it may award any costs which the Court believes are just.”*

[24] The above quoted section has been applied by the Court in the case of **Bhekithemba Ginindza vs. General Holdings (Pty) Ltd (195/2021) [2021] SZIC (09 August 2021)**. At **paragraph 8**, where the Court said the following:

*“The award of costs by this Court is discretionary and in exercising that discretion the Court must consider the conduct of the party against whom costs are applied for. If the conduct is frivolous and/or vexatious and /or dilatory to the extent that it is one that is deliberate or is mala fides, then costs can be awarded.”*

[25] Then at **paragraph 11** of the **Bhekithemba Ginindza** decision (supra), the Court continued to observe that:

*“This Court has consistently applied the principle that once conduct of a litigant is found to be frivolous or vexatious, costs must be granted (See: NOTHANDO HLOPHE v SWAZILAND NATIONAL TRUST COMMISSION – SZIC 308/2018, ALSO CONFIRMED ON APPEAL IN THE INDUSTRIAL COURT OFD APPEAL OF ESWATINI).”*

[26] Factors that warrant a Court to award attorney and own client costs were opined by the Supreme Court in the case of **Silence Gamedze and 2 Others v Thabiso Fakudze (14/2012) [2012] SZSC 52 (30 November 2012)**. At **paragraph 31**, the Court said the following:

*“The foregoing proposition of the Court finds jurisprudential backing in the text The Civil Practice of The Supreme Court of South Africa 4<sup>th</sup>*

*Edition page 717 by Herbstein et al, where the learned editors state that though the Court should proceed cautiously in awarding this nature of costs, attorney and client costs may however be levied on grounds of the following compelling factors- an abuse of process of Court, vexatious, unscrupulous conduct on the part of the unsuccessful litigant, absence of bona fides in conducting litigation, unworthy reprehensible and blameworthy conduct, an attitude towards the Court that is deplorable and highly contemptuous of the Court, conduct that smacks of petulance, the existing of a great defect relating to proceedings, as a mark of the Court's disapproval of some conduct that should be frowned upon, and where the conduct of the attorney acting for a party is open to censure. Attorney and client costs have also been awarded where, inter alia proceedings were brought over hastily on ill-advised grounds...The list is not exhaustive. Each case must thus be treated within the purview of its own peculiar facts and circumstances."*

[27] In the Court's view, all the parties were partially successful. Excepting **prayer 2.3** of the Notice of Motion, which was intended to be an interim relief, but was not granted, the Applicants sought orders against the Respondents for payment of the 2<sup>nd</sup> Applicant's salary effective from the 6<sup>th</sup> January 2022 until the expiry of his contract. It is common cause that the contract was to run for twelve (12) months, meaning that it would have expired on the 5<sup>th</sup> January 2023.

[28] Nevertheless, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' appeal to the 2<sup>nd</sup> Respondent culminated in the latter varying the duration of the 2<sup>nd</sup> Applicant's contract

from twelve (12) months to three (3) months inclusive of the a one month's notice period. The Applicants did not challenge the variation of the terms of 2<sup>nd</sup> Applicant's contract either by instituting a fresh application or insisting on **prayers 2.1 and 2.2** of the Notice of Motion.

[29] Although the Court is not seized with the record of proceedings of the appeal hearing before the 2<sup>nd</sup> Respondent, one of the Respondents' objections was brought to the fore in this Court. The Respondent objected to a further renewal of the 2<sup>nd</sup> Applicant's contract because another Officer had been promoted to replace him in the Judiciary. By consenting to the Order that was granted by the Court on the 23<sup>rd</sup> February 2022, the Applicants were ostensibly conceding the Respondents' objection. By the same token, the Respondents' consent to the very same Order invariably meant that they conceded that the letter of appointment executed by the 2<sup>nd</sup> Respondent was valid until rescinded or varied by that appointing authority.

[30] It appears that one of the issues that caused the misunderstanding between the 1<sup>st</sup> Applicant and 3<sup>rd</sup> Respondent is which **General Order** should be applied in the appointment of a Public Officer on temporary basis post retirement. Whereas the 3<sup>rd</sup> Respondent contended that as Head of the Accountancy Cadre, he was the only one authorized in terms of **General Order A.170 (1)** and **(2)** to recommend and/or approve the appointment of a retired Officer. Nevertheless, on a reading of **A.170**, that **General Order** falls under **Section 6** of the **General Orders**. That section applies to promotions and secondments including secondments to approved institutions in Eswatini as opposed to retirement in the Public Service.

- [31] It makes sense that the 2<sup>nd</sup> Respondent should first seek the advice and/or approval of the 3<sup>rd</sup> Respondent regarding whom to promote and/or second among Officers in the Accountancy Cadre. As Head, the 3<sup>rd</sup> Respondent is the one best suited to know the qualifications, competence and character of his subordinates.
- [32] Although the 1<sup>st</sup> Applicant heeded the 1<sup>st</sup> Respondent's advice that she should first seek the approval of the 3<sup>rd</sup> Respondent before escalating the recommendation to the 2<sup>nd</sup> Respondent, she relied on **General Order A.182**, which falls under **Section 7** of the **General Orders** regulating retirement: termination and resignation of pensionable appointments. In terms of the **General Order**, where the Head of Department considers that it is in the best interest of the service for an officer who is due to retire to continue his duties, she may make that recommendation to the 2<sup>nd</sup> Respondent.
- [33] According to the **General Order**, the duty lies with the 2<sup>nd</sup> Respondent to consider whether the continued employment of the Officer is in the best interest of the service; whether the post can be suitably filled by another Officer or whether the post can be suitably filled by normal means of recruitment. In our view, in order for the 2<sup>nd</sup> Respondent to properly exercise its discretion on whom to appoint, it ought to consult the 3<sup>rd</sup> Respondent where the Officer due for retirement is in the Accountancy Cadre. But nothing detracts from the fact that the 1<sup>st</sup> Applicant, as the Controlling Officer in the Judiciary, applied the correct **General Order** to recommend the appointment of the 2<sup>nd</sup> Applicant.

- [34] Section 2 of the **Public Service Act of 2018**, defines "*Head of Department*" as "*officer responsible for the management of a Ministry or Department*". The **Civil Service Board (General) Regulation, 1963** (saved on the coming into force of the **Public Service Act**) designates the Registrar of the High Court as Head of Department. Although we have not come across an instrument modifying the officer designated as Head of Department in the Regulations, it should follow that, as Acting Registrar of the Supreme Court and Controlling Officer, the 1<sup>st</sup> Applicant is responsible for the management of the Judiciary.
- [35] Now, the 2<sup>nd</sup> Respondent has to bear some responsibility for the misunderstanding that ensued. Having promoted another Officer to replace the 2<sup>nd</sup> Applicant in the Judiciary months before the latter's contract expired, the 2<sup>nd</sup> Respondent should have been cognizant of this fact and advise the 1<sup>st</sup> Applicant accordingly.
- [36] The 1<sup>st</sup> Applicant did not deny that she never completed the 2<sup>nd</sup> Applicant's resumption of duty forms. In exhibit "**A41**", a copy of the letter of appointment, the post number and date of resumption were written in ink and not typed like the other information on the instrument. Save for alleging that the post number appears *ex facie* the letter of appointment and that the date of resumption was inserted by the Officers who executed the document, the 1<sup>st</sup> Applicant does not take responsibility for making the entries.
- [37] The Respondents' copy of the 2<sup>nd</sup> Applicant's letter of appointment marked exhibit "**R4**" does not have the handwritten post number and date of assumption; it is blank. No explanation is offered by the Applicants for the

discrepancy; they do not allege that the 1<sup>st</sup> Respondent tempered with the document; hence, the blank spaces.

[38] **General Order A.110** reads as follows:

*“An appointment shall be effective from the date on which an officer assumes duty, and he shall be paid full salary from that date.”* “[Our emphasis].

[39] Then **General Order A.128 (2)** reads as follows:

*“The Head of Department shall complete the certification on CSB/JSC Form 5 or 6, as appropriate, as to the date of assumption of duty, and shall arrange the distribution of the copies, and issue Treasury Form TF.188.”* [Emphasis added].

[40] **General Order A.128 (1) (c)** further provides that it is the duty of the Head of Department to ensure that a candidate of an offer of appointment has signed the form of contract of service where appropriate. The Applicants have not shown that they complied with **General Orders A.110, A.128 (1) (C) and (2)** to shift the obligation to the Respondents to pay 2<sup>nd</sup> Applicant’s salary.

[41] For his part, the 1<sup>st</sup> Respondent cannot be spared. Even though the Applicants had not complied with the aforesaid **General Orders**, the 1<sup>st</sup> Respondent should have responded to the 1<sup>st</sup> Applicant’s memoranda dated 10<sup>th</sup> and 13<sup>th</sup> **January 2022** (exhibit “A13”) respectively. Had he responded and offered

the explanation that he gave in his answering affidavit, litigation might have been avoided.

[42] The Respondents' counsel denied that several memoranda were sent to the 1<sup>st</sup> Respondent demanding payment of the 2<sup>nd</sup> Applicant's salary. Firstly, in their answering affidavit, the Respondents do not dispute that two memoranda were sent to the 1<sup>st</sup> Respondent on the 10<sup>th</sup> and 13<sup>th</sup> **January 2022**. Although the **Oxford Advanced Learners Dictionary of Current English 7<sup>th</sup> Edition** defines the term "*several*" to mean "*more than two but not very many*", at common law one letter of demand suffices to place the debtor *in mora*.

[43] Secondly, the 1<sup>st</sup> Applicant's memoranda need not have said the 1<sup>st</sup> Applicant demands salary arrears, it suffices that the 1<sup>st</sup> Respondent was being urged to implement the 2<sup>nd</sup> Respondent's decision to renew 2<sup>nd</sup> Applicant's contract. The effect of 1<sup>st</sup> Respondent's implementation of the decision would have been the eventual payment of the 2<sup>nd</sup> Applicant's arrear salary.

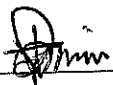
## **CONCLUSION**

[44] In our view, all the parties' culpability in the respects alluded to in the preceding paragraphs are what led to the matter finding its way to the precincts of this Court. The decisions of this Court cited by the Applicants are therefore distinguishable from the facts of this case. In the premises, the requirements of law and fairness dictate that the Court makes no order for costs.

[45] In the result, the Court makes no order for costs.



The Members agree.



**V.Z. DLAMINI**

**ACTING JUDGE OF THE INDUSTRIAL COURT**

-For Applicants : Mr. N.D. Jele  
(Robinson Bertram)

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