



IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE

CASE NO. 19/2017

In the matter between:

ABEL M. SIMELANE

Appellant

And

SWAZILAND TELEVISION AUTHORITY

Respondent

Neutral citation: *Abel M. Simelane v Swaziland Television Authority (19/2017) [2018] SZICA 03 (03 May 2018)*

CORAM:

J.S. MAGAGULA AJA

C. MAPHANGA AJA

N. MASEKO AJA

FOR THE APPELLANT: M.P. SIMELANE (MP SIMELANE ATTORNEYS)

FOR THE RESPONDENT: S. SIMELANE (SIMELANE MTSHALI ATTORNEYS)

HEARD: 09 APRIL 2018

DELIVERED: 03 MAY 2018

Preamble: *Secondment of Civil Servant to serve as Director Finance and Administration at Government parastatal – Whether Civil Service Commission has such powers to backdate instrument of secondment – whether the officer on secondment entitled to be paid on salary scale of prescribed salaries of officers holding those executive and senior management positions at public enterprises.*

Held: *that the Civil Service Commission is the ultimate authority whose powers and duties are vested on it by the Constitution and has the authority to backdate any secondment where the circumstances dictate.*

Held further: *that Appellant entitled to be remunerated on the category A PEU Circular on the basis of such secondment being in terms of Section 8 (2) of the Public Enterprise (Control and Monitoring) Act 8/1989.*

[1] This is an appeal against a judgment of the Court *a quo* delivered on the 6th October 2017, dismissing motion proceedings brought by the Appellant (the Applicant in the Court *a quo*) against the Respondent (the Respondent in the Court *a quo*) respectively for an Order in the following terms:

- (1) Directing the Respondent to forthwith pay the Applicant the sum of **E765, 942.42 (Seven Hundred and Sixty Five Thousand Nine Hundred and Forty Two Emalangenzi Forty Two Cents)** in respect of arrears from April 2016 to June 2017.
- (2) That the Court grant costs of suit at attorney and own client scale.
- (3) Further and / alternative relief.

HISTORY OF THE MATTER:

- [2] It is important to outline the history of this matter so that the outcome and arguments thereof can be appreciated.
- [3] The Appellant is a Civil Servant based in the Ministry of Finance in the Accountancy cadre.
- [4] The Respondent is a Category Public Enterprise whose operations are governed by the Public Enterprise (Control and Monitoring) Act No. 8 of 1989. As a government parastatal and by virtue of its functions, it is based in the Ministry of Information, Communication and Technology.
- [5] Early in the year 2016, the Finance and Administration Director – also known as the Chief Financial Officer – (CFO) left the Respondent when his contract expired. It became necessary that someone be appointed on an acting basis until the substantive Finance and Administration Director was appointed.
- [6] Owing to negotiations and consultations amongst the Respondent's Board of Directors and Ministry of Information and Technology, the Appellant was on the 6th April 2016 appointed by the Respondent's

Board of Directors to act as Acting Chief Financial Officer for the Respondent for two (2) months. The letter was duly signed by the Chairperson of the Board.

- [7] The Appellant duly assumed his duties as per the instrument from the Board. Again, on the 6th June 2016 the Respondent's Board of Directors again re-appointed the Appellant on acting basis in the same post for a further period of not more than two (2) months. And again, on the 7th September 2016 the Respondent's Board of Directors again re-appointed the Appellant on acting basis until further notice. All these instruments of acting appointments were duly signed by the Chairperson of the Respondent's Board of Directors.
- [8] On the 23rd March 2017, the Civil Service Commission issued an instrument approving the secondment of the Appellant as Director – Finance and Administration for the Respondent for a period of seventeen (17) months with effect from 6th April 2016 to 30th September 2017.
- [9] Upon receipt of the instrument from the Civil Service Board, the Appellant dispatched a copy of the said instrument to the Chief

Executive Officer of the Respondent for information and appropriate action.

[10] It appears from the evidence that ever since the Appellant was appointed to the acting position of Director Finance and Administration he was not remunerated in accordance with salary structures as prescribed by the Public Enterprises Act. According to the Respondent's Chief Executive Officer, the Respondent was paying Applicant 30% of his substantive salary. Appellant confirmed the 30% payments but maintained that such payments were made inconsistently as and when the Respondent felt like. There is no instrument and / or legal basis as to why the Appellant was paid in this manner when he should have been paid his full salary on the basis of the salary scale as prescribed by the Public Enterprises Act.

[11] It is on these basis that on the 26th April 2017, Appellant's Attorneys sent correspondence to the Respondent's Chief Executive Officer requesting that the Appellant be paid his salary arrears. There being no positive response to this correspondence the Appellant escalated the matter to the Conciliation Mediation and Arbitration Commission (CMAC) and there being no consensus between the parties, the Commission issued a Certificate of Unresolved Dispute on the 5th June 2017. On the 22nd June 2017, the Appellant launched

these proceedings which are the subject matter of appeal before this Court.

ISSUES IN DISPUTE

The issues in dispute in this matter are two (2) fold, namely;

1. Whether the Appellant who was appointed Acting Director Finance and Administration by the Respondent's Board of Directors in terms of Section 8 (2) of the Public Enterprises (Control and Monitoring) Act No. 8 of 1989 deserved to be paid this salary in terms of the salary structures as prescribed by the Public Enterprise Unit Circulars issued by Government to cater for salaries of executive and senior management of Government parastatals.

2. Whether the instrument issued by the Civil Service Commission on the 23rd March 2017 seconding the Appellant to the Respondent and actually backdating the secondment to the 6th April 2017 is valid and enforceable at law.

[12] As regards the first point, the facts are not in dispute that Appellant was appointed by the Respondent's Board of Directors on the 6th

April 2016 through an instrument that was issued and signed by the Chairperson of the Board. The said appointment was on the basis of Section 8 (2) of the Public Enterprise Act. This was an acting appointment to the Director Finance and Administration position which was vacant at the time. This acting appointment was for a period not exceeding two (2) months. Indeed, after the expiry of the two (2) months period on the 6th June 2016 another acting appointment instrument into the same position was likewise issued by the Board and signed by the Chairperson.

[13] Again on the 7th September 2016, another acting appointment instrument into the same position was issued by the Board and duly signed by the Chairperson of the Board. This instrument directed the Appellant to act in the same position until further notice pending negotiations with the line Ministry (ICT).

[14] At all material times during the period 6th April 2016 until the last acting appointment on 7th September 2016, the Appellant duly performed his duties, in fact until the period when his services were terminated by correspondence from the Respondent's Chief Executive Officer dated the 9th June 2017.

[15] At all material times thereto during this period, the Respondent's Board of Directors never had any complaints about the presence of Appellant as Acting Director Finance and Administration of the Respondent. After all the Board had duly appointed him to this position. I must mention that the Board of Directors is the ultimate and / or superior authority of the Respondent and had all the powers and duties in the diligent discharge of its functions to appoint an acting or substantive Director Finance and Administration of the Respondent.

[16] Even on the 23rd March 2017 when the Civil Service Commission issued the secondment instrument and backdating same to the 6th April 2016, there was no complaint from the Respondent's Board of Directors. In fact there is nothing on record suggesting that there was any complaint regarding the competency and performance of the Appellant in the execution of his acting appointment. In fact on the 9th June 2017 when the Respondent's Chief Executive Officer terminated the secondment, he wrote in paragraph 5 (annexure I) as follows:

“The Authority appreciates the services you have rendered whilst on deployment and we wish you all the best with your future endeavours”.

[17] This is an indictment on the Chief Executive Officer and by necessary extension to the Respondent. At all material times it was the duty of the Chief Executive Officer to attend to the remuneration of the Appellant and align it with the Public Enterprise Unit Circulars - Annexures **"G1"** and **"G2"** respectively. This should have been done as at 6th April 2017 when the Board issued the first acting appointment, because this appointment was expressly stated by the Board as being in terms of Section 8 (2) of the Public Enterprises Act which provides as follows:

'8 (2) The Chief Financial Officer of each Category A Public Enterprise shall be appointed, and may be dismissed, by the governing body in consultation with the Ministry responsible, the Public Enterprise Unit and the Standing Committee'.

[18] Salary remuneration and the relevant allowances of the Senior Executive and Top Management of the Category A Public Enterprises are payable through these Circulars annexures **"G1"** and **"G2"**, in fact these are addressed specifically to *"All Chief Executive Officers of Category A Public Enterprises and Boards of Category A Public Enterprises"*.

[19] These Circulars contain the following heading;

“PEU CIRCULAR NO. 4/2013: CONTROLS ON PAY PACKAGES OF CATEGORY A PUBLIC ENTERPRISES (ANNEXURE G1 DATED AUGUST 2013).

PEU CIRCULAR NO. 3/2016: CONTROLS ON PAY PACKAGES OF CATEGORY A PUBLIC ENTERPRISES (ANNEXURE G2 DATED 17TH NOVEMBER 2016.

[20] There is no doubt in my mind that any Chief Executive Officer and Chief Financial Officer - Director Finance and Administration whether acting in that position or substantive, must be remunerated on the scales as structured in terms of the Circulars as issued by the Public Enterprise Unit.

[21] It therefore defeats logic why the Chief Executive Officer of the Respondent did not carry out his duty as directed by the Public Enterprise Unit to have the Appellant remunerated on the appropriate scales per the Circulars Annexures **“G1”** and **“G2”** respectively.

[22] In its pleadings the Respondent, in particular the Chief Executive Officer, refers to the Appellant's tenure of Acting Chief Finance Officer - Director Finance and Administration as a deployment. Whether Appellant's tenure as acting Chief Financial Officer is

regarded by the Chief Executive Officer as a deployment or appointment is immaterial. The fact of the matter is that he was duly appointed by the Board and performed his duties, and therefore he is entitled to his remuneration based on the Circulars Annexures “G1” and “G2” respectively. The issue of deployment in this situation is more of semantics than substance.

[23] I now address the second issue of the validity of the instrument issued by the Civil Service Commission, wherein the Appellant was seconded to the Respondent as Director - Finance and Administration - Annexure “D” dated the 23rd March 2017.

[24] The Civil Service Commission is established by Section 186 of the Constitution of the Kingdom of Swaziland Act 1 of 2005.

[25] Section 186 (1) provides as follows:

“Subject to any other provision of this Constitution, the Civil Service Commission is established and constituted in terms of Part 1 of this Chapter.

(2) The Civil Service Commission may, amongst other things-

a) Initiate or cause to be initiated appropriate procedures or process leading to the selection or short listing of candidates for appointment to public office;

- b) Enquire or cause to be enquired into any grievance or complaint whether or not leading to disciplinary actions;**
- c) Exercise appellate functions, with power to vary, in respect of certain decisions by persons or authorities exercising delegated powers;**
- d) Do or cause to be done any act or thing reasonably necessary for the due and prompt execution of any function prescribed in this Constitution or any other law; and**
- e) Delegate upon the Chairman or any of its members any of its functions”.**

[26] Section 187 (1) provides as follows:

“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 appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission”.

[27] I have deliberately captured the two (2) above Sections (186 and 187) in full to demonstrate the extent of powers and authority that the Civil Service Commission is vested with.

[28] When the Civil Service Commission issued the secondment instrument to the Appellant it acted within its powers and authority as prescribed in the Constitution. The correspondence of the 23rd March 2017 -Annexure D was never a contract but an instrument harmonising the already existing acting appointment of the Appellant by the Board of Directors of the Respondent.

[29] Annexure D is backdated to the 6th April 2016, this being the date wherein the Appellant was appointed by the Board to act in the position of Chief Financial Officer. In the letter of the 7th September 2016, (Annexure **“C”**) appointing the Appellant to the acting position, the Board clearly mentions that he will act until further notice since the Minister (ICT) was working on the issue. It comes as no surprise therefore that on the 23rd March 2017 the Civil Service Commission issued the Secondment letter Annexure **“D”**. There is consistency between the actions of the Board of Directors, the Minister and the Civil Service Commission in the manner in which they dealt with the Secondment of the Appellant to the position of Chief Financial Officer during the period in question.

[30] There is no merit in the suggestion that the Appellant ought to have signed a contract and comply with the Government General Orders.

[31] The Appellant is a Civil Servant who has at all material times been governed by the General Orders. The Secondment to the Respondent was for a short period of time and most importantly the Civil Service Commission is the custodian of the General Orders, and the conduct of the Commission in the manner in which it Seconded Appellant is not unlawful and *ultra vires* its powers and duties. The Commission is established by the Constitution - the Supreme law and therefore its actions, in particular as regards the Appellant's matter, cannot be said to be *void ab initio* simply because there is a perception that there was no compliance with the General Orders. The functions and powers of the Commission are clearly spelt out in Section 187 (2).

[32] If there is a perception that there is a conflict between the conduct of the Commission and General Orders then Section 2 (1) of the Constitution immediately comes into operation. It provides as follows:

“This Constitution is the Supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”.

[33] Since the Civil Service Commission derives its powers from the Constitution, its functions cannot therefore be limited by the General Orders. It has the powers to second any public officer like

the Appellant and nobody and not even the Courts can question such authority when exercised lawfully. In fact at paragraph 3 of Annexure “D”, the Commission clearly states that the Appellant “*shall continue to be governed by the General Orders and other regulations in force or as may be amended from time to time*”. This clearly demonstrates that the Civil Service Commission did not violate its own regulations.

[34] In the case of ***Cyprian Vusumuzi Kunene v Attorney General & Others 74/2007 at page 16, Dunseith P*** (as he then) stated the following:

“The elements and characteristics of a contract of service (locatio conductio operarum) are:

- ***An agreement to make personal services available:***
- ***Remuneration, and***
- ***Subordination and control***

Rycroft & Jordaan: A guide to SA Labor Law (2nd ED) PAGE 35)

All these elements were present in the applicant’s relationship with the Swaziland National Treasury. Even if his secondment was not a common law contract of service, he was certainly a person who worked for pay under an arrangement involving control by another person.” In our view the relationship between the applicant and the Swazi National Treasury was that of employer and employee”.

[35] In *casu* I have no doubt that these characteristics of a contract of service are present. When the Appellant was appointed to act in the position of Chief Financial Officer on 6th April 2016, 6th June 2016,

and 7th September 2016 he reported for duty at the Respondent and in fact diligently performed his duties. The secondment instrument issued by the Civil Service Commission on the 23rd March 2017 was the ultimate authority and most importantly it was consistent and *ad idem* with the appointments by the Board of Directors.

[36] I have no doubt in my mind that the Appellant is entitled to be remunerated accordingly as per the Circulars referred to herein above. He performed his duties until his secondment was terminated by the Chief Executive Officer on the instruction of the Board by the letter dated 9th June 2017 Annexure “1”.

[37] At all material times during the secondment the Appellant was under the control of the Respondent. He reported for duty and performed such duties diligently, hence there was no complaint from Board of Directors and even from the Chief Executive Officer.

[38] It is *trite* law that the Industrial Relations Act 1/2000 (as amended) defines employee.

“as a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by or sustained dependence for the provision of work upon another person”.

[39] During the subsistence of his secondment, the Appellant was not remunerated in accordance with the Circulars from the Public Enterprise Unit, and such conduct amounts to unfair labour practice on the part of the Respondent.

[40] **JOHN GROGAN in his book WORKPLACE LAW 9th EDITION at page 261** states that –

“To constitute an unfair labour practice, the act or omission complained of must be between an employee and his or her own employer. The onus of proving the facts on which such allegations rest falls on the employee”

At page 66, **Grogan** states as follows:

“As long as employees tender service, they are entitled to be paid their earnings and other benefits as and when they are due under the applicable contract, determination or collective agreement”.

[41] In the premises the appeal is upheld and the following orders are granted:

1. The Appeal succeeds with costs.
2. The Respondent is hereby directed to forthwith pay the Appellant the salary arrears and other benefits as from the 6th June 2016 to 9th June 2017 calculated on the PEU Circular No. 4/2013 dated August 2013 and PEU Circular No. 3/2016 dated 17th November 2016.



N. MASEKO

AJA

I agree



J. MAGAGULA

AJA

I also agree



C. MAPHANGA

AJA