



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO. 45/14

HELD AT MBABANE

In the matter between:

THE PRINCIPAL SECRETARY

MINISTRY OF PUBLIC SERVICE

THE MINISTER OF PUBLIC SERVICE

THE MINISTER OF FINANCE

THE ATTORNEY GENERAL

1ST APPELLANT

2ND APPELLANT

3RD APPELLANT

4TH APPELLANT

v

XOLILE CYNTHIA SUKATI

RESPONDENT

Neutral Citation : The Principal Secretary, Ministry of Public Services and
3 Others v Xolile Sukati 5/14[2014] SZSC 76

(03 DECEMBER 2014)

Coram : EBRAHIM J.A., MOORE J.A., and DR. TWUM J.A.

Heard : 20 NOVEMBER 2014
Delivered : 3 DECEMBER 2014

Summary : Respondent promoted to the position of Senior Personal Secretary to the Honourable Chief Justice with effect from 1st November 2011 - Respondent promoted to Grade B7 pursuant to Cabinet decision – Respondent then purportedly down-graded to B6 – No cabinet decision down-grading respondent – Principal Secretary Ministry of Public Service not competent to “correct” Cabinet decision – High Court has jurisdiction to enforce compliance with Cabinet decisions – Appeal dismissed with costs on the ordinary scale – Appellants ordered to pay the respondent’s arrears of salary at Grade B7 with effect from 1st November 2011 together with interest at the rate of 9%per annum with effect from 1st November 2011 until paid in full.

JUDGMENT

MOORE J.A.

INTRODUCTION

[1] Xolile Cynthia Sukati was promoted by the Civil Service Commission to her present position as Senior Personal Secretary to the Honourable Chief

Justice of this Kingdom. She has held that position since the 1st November 2011. She first joined the Civil Service on the 25th February 1993.

[2] That promotion was evidenced by a letter dated 7 March, 2013 Ref. CSC/19237 under the hand of P.N. Mamba Chairman Civil Service Commission which informed Xolile Sukati that:

- i. The Civil Service Commission had approved of her promotion to the grade of B7 in the post of Senior Personal Secretary.
- ii. The effective date of her promotion would be 1st November 2011.
- iii. Her salary from that date would be E110,154 per annum in the scale Grade B7.
- iv. Her new incremental date would be April.

[3] The letter of the Chairman of the Civil Service Commission was forwarded through the Principal Secretary (Justice) with (5) copies to: Ministry/Department of Justice (Judiciary) P.F. No. 19237. Copies were also sent to the Accountant General, Auditor General, Principal Secretary, Ministry of Public Service, **Secretary to the Cabinet**, and the Secretary Civil Service Commission. The conditions applicable from the effective date of promotion were set out at the foot of the letter in tabular form as reproduced hereunder:

Appointment and Grade	Terms of Service (Probation/contract etc.)	Head No.	Responsibility Centre No.	Basic Salary	Allowance (Inducement Allowances)	Incremental date
SENIOR PERSONAL SECRETARY GRADE B7	PENSIONABLE	48	P/E	E110,154	-	APRIL

For good measure the officer responsible for expenditure certified under his hand that “This officer assumes duty in his new post on 2/11/2011.”

[4] Having been so formally and properly informed of her promotion and salary upgrade, Xolile Sukati undoubtedly expected to see an appreciable bump in her next pay package. She remains disappointed in that expectation up to this day. For even though a dispute existed about her eligibility for Grade B7 terms and conditions, this officer up to the date of trial, has not even been afforded Grade B6 terms and conditions which the appellants claim to be her entitlement. The respondent is rightly aggrieved with this situation.

[5] Her disappointment and dismay were aggravated by the fact that her promotion and upgrade of salary were premised and presaged by the approval, sanction and authorization of the Cabinet itself. That approval was

contained in a memorandum from the Principal Secretary, Ministry of Public Service to the Principal Secretary, Ministry of Justice and Constitutional Affairs captioned RE: FILLING OF APPROVED VACANCIES. The table which accompanied that memo disclosed that 1 Position of Senior Personal Secretary (Judiciary) Graded B7 was recommended and that a budget was available to cover the cost to Government of E153,339.85.

MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS

Post Title	Grade	No.of Positions	MOPS Comments	Ministry of Finance Consultations	Cost to Government
HRO	D2	1	Recommended	Budget Available	163,029.75
HRO (EBC)	D2	1	Recommended	Budget Available	163,029.75
HRO (JUDICIARY)	D2	1	Recommended	Budget Available	163,029.75
Snr. Personal Sec. (Judiciary)	B7	1	Recommended	Budget Available	153,339.85
Personal Secretary	B5	1	Recommended	Budget Available	108,866.60
				TOTAL	751,295.70

THE AFFIDAVITS

[6] The Notice of Motion reveals that the parties in the case before the High Court were the respondent in this appeal Xolile Cynthia Sukati, who was the applicant in the court below, and the four appellants before this court who were the four respondents in the trial court. Those four respondents/appellants are The Principal Secretary, Ministry of Public Service, The Minister of Public Service, The Minister of Finance, and the Attorney General. The Civil Service Commission is not a party. Page 61 of the record reveals that the respondent/applicant appeared in person before Acting Judge Mbuso Simelane, whereas T. Khumalo appeared for the respondents/appellants.

[7] The affidavits upon the record are:

- i. Founding Affidavit of Xolile Cynthia Sukati.
- ii. Respondents' Opposing Affidavit sworn by Evert Madlopha "The Principal Secretary in the Ministry of Public Service" who describes himself as "The First Respondent in the matter" and who averred that he was "duly authorized to depose to this affidavit."
- iii. Applicant's Replying Affidavit.

- [8] It should be noted that the 2nd, 3rd and 4th appellant did not provide any affidavit evidence for the trial court's consideration.

CHRONOLOGY

- [9] The critical dates in this case, set are in chronological order are as follows:

1st November, 2011 – Effective date of Respondent's promotion to the grade of B7 in the post of Senior Personal Secretary to the Chief Justice of the Swaziland Judiciary.

12th June 2012 – Memorandum from Principal Secretary Ministry of Public Services to Principal Secretary Ministry of Justice and Constitutional Affairs which reads in part: "please be informed that Cabinet through CM 28785 has approved the attached positions for filling." The table attached to this memo has been reproduced in paragraph [6] above.

7th March, 2013 - Letter to the respondent from the Chairman Civil Service Commission, approving her promotion to the grade of B7 in the post of SENIOR PERSONAL SECRETARY - Effective date of promotion 1st NOVEMBER, 2011. Salary from that date would be E110,154 per annum in the Scale Grade B7. New increment date would be April. The applicable conditions are set out in the table reproduced in paragraph [3] above.

15th April 2013 – Letter from the Chairman Civil Service Commission to the respondent which served “to amend our CSC Form 7 (a) dated 7th March, 2013. This letter purported to downgrade the respondent from grade B7 to grade B6 and to reduce her Basic Salary to E 91,468 per annum.

2nd May, 2013 – Memorandum from the Secretary Judicial Service Commission to The Chairman Civil Service Commission captioned RE: CORRECTION OF MS. XOLILE SUKATI’S GRADE; PERSONAL SECRETARY TO THE HONOURABLE CHIEF JUSTICE. The relevant portion of that memorandum reads:

“We have further been instructed by the Judicial Service Commission to advise that the Judicial Service commission recognizes the B7 grade for the officer as per the Cabinet directive on this matter. Kindly therefore proceed as per directive as communicated above. We hereby attach a copy of the Cabinet directive in question.”

6th June 2013 - Memorandum from Principal Secretary Ministry of Public Service to Executive Secretary Civil Service Commission captioned: GRADING OF POST OF PERSONAL SECRETARY TO THE HONOURABLE CHIEF JUSTICE. That memorandum, signed by M.E. Madlopha, Principal Secretary, purports to down grade the respondent to grade B6: but makes no reference to the memorandum from the Principal Secretary Ministry of Public Service dated 12th June 2012 Ref: MSD 600 signed by F.T. Mhlongo For: Principal Secretary which recommended that the Post Title Senior Personal

Secretary (Judiciary) be graded at B7. There is no response on record from the Executive Secretary, Civil Service Commission to the memo of 6th June 2013. Indeed, Counsel for the appellant readily conceded that the Cabinet approval through CM 28785 of Grade B7 has never been retracted, or recalled, or set aside.

JURISDICTION

[10] The appellants relied upon sections 8 (1) and 8 (3) of the Industrial Relations Act 2000 in support of their contention that “the court *a quo* had no jurisdiction to hear and determine a dispute between employer and employee arising in the course of employment.

[11] M.E. Simelane, A.J. drew attention to section 187 (1) of the Constitution of Swaziland which reads thus under the heading: ***Appointment, promotion, transfer etc. of public officers.***

“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.”

It is common cause that the respondent is a public officer as defined in Section 261 – Interpretation – of the Constitution which reads:

“Public Officer” means subject to the provisions of section 254 the holder of any public office and includes any person appointed to act in any public office.”

The terms of section 254 of the Constitution do not affect the standing of the respondent as a public officer.

[12] The trial judge also cited the relevant section 178 of the Constitution which, under the heading: ***Independence of a service commission*** provides that:

“178. In the performance of its functions under this Constitution, a service commission shall be independent of and not subject to any Ministerial or political influence and this independence shall be an aspect of the exercise of any delegated powers or functions of the Civil Service Commission or any other service commission or similar body.”

M.E.Simelane A.J. correctly pointed out at paragraphs [10] - [12] of his judgment that:

“[10] It is clear that the CIVIL SERVICE COMMISSION is the one tasked with the employment relationship between it and the

Applicant. In the matter at hand it does not feature nor is there any prayer sought against it.

[11] The cause of Applicant's argument centres around CABINET DECISION which comes from a body that does not employ public officers.

[12] It follows from the foregoing consideration that I dismiss this point."

This Court agrees with the findings of the trial judge under this Head. Those findings are reinforced by the judgment of the Court of Appeal of Lesotho in **Attorney General and Others v Makesi and Others** LAC (2000-2004) where Friedman J.A. - Gauntlett and Ramodibedi JJA concurring - found, in circumstances almost identical to those of this appeal, that:

- i. Respondents have not established that the cabinet decision was changed.
- ii. As the cabinet decision has not been changed, questions of legitimate expectation do not arise.
- iii. The court's jurisdiction to enforce compliance with the Cabinet decision and the direction that it be carried out, has not been excluded.

THE CABINET DECISION

[13] The role played by the Cabinet in this matter is best approached by reference to what the papers show that the cabinet actually did rather than by the spin which the parties have attempted to place upon the admitted actions taken by the Cabinet. By a Memorandum dated the 12th June 2012 the Principal Secretary Ministry of Public Service informed the Principal Secretary Ministry of Justice and Constitutional Affairs in this official communication:

“Please be informed that Cabinet through C.M 28785 has approved the attached vacant positions for filling.”

[14] By an attached table headed MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS the recommended grade for “Senior Personal Secretary” (JUDICIARY) was graded at B7. It was undoubtedly upon the basis of that approval by Cabinet that, on the 7th March 2013, the Chairman Civil Service Commission informed the respondent of her promotion to the B7 grade. That written information was countersigned by the officer responsible for expenditure.

[15] The appellants have not submitted that, in the context of this case, there is any authority higher than the Cabinet capable of undoing a decision of the Cabinet. Nor have they submitted that there is any evidence upon the record that the Cabinet ever rescinded or reversed the decision which grounded the respondent's promotion to the Grade of B7. What is more, the trial court found the appellants to have admitted that they did not approach Cabinet to reverse decision number CM 28785. And that decision remains valid and executable. This Court agrees.

THE LESOTHO JUDGMENTS

[16] Paragraph [31] of the judgment *a quo* reads:

*“The Applicant cited the Lesotho Appeal Court case of **Attorney General and Others v Makesi and Others** (LAC 2000/2004) 38 [2001] LSHC 41 which I find to be on all fours with the present matter.”*

This Court accepts the correctness of the judgment of the Lesotho Court of Appeal where Friedman J.A. delivered the unanimous judgment. Gauntlett and Ramodibedi concurred. The *rationes decidendi* of that case were applied by the High Court of Lesotho in **Nthako and Another v Independent**

Electrical Commission and Others (CIV/APN/213/02) [2002] LSA 68.

Judgment date 14 May 2002.

[17] The appellants' Heads of Argument contend that:

*“The facts of the case at bar are distinguishable from **Attorney-General and Others v Makesi and Others** [2000 – 2004] LAC 38. In **Makesi** the jurisdictional facts for the exercise of Cabinet’s power were present.”*

Similar arguments were advanced before the trial court who rightly rejected those submissions in this way at paragraphs [33] and [34] of the judgment.

“[33] I disagree with learned Respondents counsel argument for even if the line Ministry had created an error legitimate expectation had been made to the Applicant about her salary grade.

[34] The power to make a decision or to declare a policy includes the power to cancel it or withhold its implementation. This right can be delegated by direct implication in extreme circumstances which is not the case in the present matter.”

[18] M.E. Simelane A.J. then proceeded to incorporate, adopt, and apply segments of the judgment in **Attorney General v Makesi** *supra*, set out in paragraphs [35] – [37] which read:

“[35] In the **ATTORNEY GENERAL** case (*supra*) Cabinet approved the upgrading of salaries of judicial officers of the courts. Despite the Cabinet’s approval the Minister of Public Service upon being requested to do so by the Minister of Justice, failed to implement that decision whereupon the concerned judicial officers brought an action to compel the implementation of the decision.

[36] Friedman JA (Gauntlett JA and Ramodibedi JA concurring) in the **Attorney General** case (*supra*) held as follows:

*This appeal must accordingly be approached on the basis that the Cabinet decision remained unchanged. I interpose here to point out that had that not been the case, i.e. had the Cabinet reversed its decision, applicants would have been entitled to contend that they had a legitimate expectation that the decision would not be altered without affording them a hearing. They were not given a hearing. Consequently, had the decision been changed, applicants would have been entitled to have the decision to reverse the earlier decision set aside and an order that it be reconsidered after having given applicants a fair hearing on an issue which clearly adversely affected their rights. See **Attorney General of Hong Kong v Ng Yuen Shiu** [1983] 2 All ER 346 (PC).*

I pass on to deal with the next defence raised by respondents, namely, that this is a matter of government policy in respect of which the court’s jurisdiction is excluded.

*Respondents' counsel submitted that the power to make a decision or to declare a policy includes the power to cancel it or to withhold its implementation. There can be no dispute that a policy-maker is entitled to change policy decisions. The importance of an unfettered power to change policy had been stressed. See: **Hughes v Department of Health and Social Security** [1985] AC 778 (HL) AT 788. But this does not mean that the power of the courts to intervene in appropriate circumstances has been removed. As Sedley J stated in **R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.** [1995] 2 ALL ER 714 (QBD) at 731 C-D.*

“While policy is for the policy-maker alone the fairness of his or her decision not to accommodate reasonable expectation which the policy will thwart remains the court’s concern (as of course does the lawfulness of the policy.

The learned judge continued at 731 D-E:

‘... It is the court’s task to recognize the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court’s duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate’

Although these statements were made in the context of a legitimate expectation situation, they serve to illustrate the point that there are limitations on the power of a policy maker to change policies. This was emphasized by Lord Denning MR

in Re Liverpool Taxi Owners' Association [1972] 2 ALL ER 589 (CA) AT 594 G where he stated that a person or public body entrusted with powers for public purposes cannot divest themselves of those powers e.g. by contract. However, Lord Denning went on to point out that:

'...that principle does not mean that a [public] corporation can give an understanding and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it.'

*See also Craig: **Administrative Law**, 3 ed, 672-675*

In the present case there has not been a mere expression of policy, for example that the government intended policies. This was emphasized by Lord Denning MR in order to increase the jurisdiction of certain courts and upgrade judicial salaries. A decision was taken by the Cabinet to increase the jurisdiction of certain specified courts and to upgrade in a specified manner the salaries of the judicial officers who function in those courts. But the matter does not rest there. On 20 August 1996, pursuant to the Cabinet decision, a specific request was directed by the Department of Justice to the Principal Secretary, Public Service to give effect to the decision which was to come into operation on 1 April 1996. Save for the contention that the Cabinet decision was changed, which for the reason stated above. I have found to be devoid of substance, there is no explanation from the respondents as to why this direction was not carried out.

In these circumstances there is no reason why the aid of the court should not be invoked in order to ensure that effect is given to the Cabinet's decision and to the direction for its implementation contained in the savinggram dated 20 August 1996, provided, of course that implementation would be intra vires the person responsible therefore."

[37] *I fully align myself with this approach.*

This Court also aligns itself with the approach of the unanimous Court of Appeal of Lesotho.

CONCLUSION

[19] Section 64 (1) of the Constitution provides that:

"The executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this constitution"

Sub-section (3) declares that:

"the King may exercise the executive authority either directly or through the Cabinet or a Minister."

These provisions of the Constitution mean that any decision taken by the Cabinet is taken under the authority of the executive power residing in the King. It goes without saying that any decision taken by the Cabinet remains in full force and effect unless rescinded by the Cabinet itself or by other lawful authority. If, in the opinion of the Ministry of the Public Service, the Cabinet has made a mistake, it would be that Ministry's duty to draw the attention of Cabinet to the presumed mistake. The Cabinet would then decide what action it would take upon the information provided by the Ministry. Civil servants within a Ministry cannot take it upon themselves to "correct the mistake" supposedly made by the Cabinet.

COSTS

[20] The respondent prayed for an order as to the first respondent at "The attorney and client scale and to be paid personally from his own pocket in the event he opposes this application. This Court invited counsel for the appellants, and the lay respondent in person, to be heard on the matter of costs: particularly in relation to the prayer against the First appellant. Having done so, we have concluded that an order for costs to the respondent on the ordinary scale would be appropriate in this case.

[21] One final word. It is regrettable to say the least that over three years have passed since the effective date of the respondent's promotion. She still awaits relief. Hopefully, the procedures for giving effect to the orders of this Court will move with greater dispatch than the processes of this litigation.

ORDER

[22] The order of this court is that:

- i. The appeal be and is hereby dismissed.
- ii. It is hereby declared that the Cabinet, through CM 28785 approved the filling of the Post Title Snr. Personal Sec. (JUDICIARY) at Grade B7.
- iii. On the 7th March, 2013, the Respondent was duly promoted to the grade of B7 in the post of SENIOR PERSONAL SECRETARY.
- iv. The effective date of the respondent's promotion was 1st November, 2011.
- v. The appellants do pay all arrears of salary at Grade B7 owing to the respondent with effect from the effective date of her promotion being the 1st November 2011.

- vi. The appellants do pay interest to the respondent upon all sums accruing to the respondent under v. above with effect from the 1st November 2011 at the rate of 9% per annum until all sums owing to the respondent are paid in full.
- vii. The appellants do pay the respondent's costs in this Court and in the Court below at the ordinary scale.

**S.A. MOORE JA
JUSTICE OF APPEAL**

I agree

**A.M. EBRAHIM
JUSTICE OF APPEAL**

I agree

DR. S. TWUM
JUSTICE OF APPEAL

For the Appellant : Miss Nkambule

For the Respondent : In person.