



CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE

MB 091/06

In the matter between:-

NOMSA SIMELANE & 277 OTHERS Applicant

And

**THE PRINCIPAL SECRETARY OF
MINISTRY OF PUBLIC SERVICE &
INFORMATION AND TWO OTHERS** Respondent

CORAM:

Arbitrator : Ms K. Manzini
For the Applicant : Mr. M. Mkwanzazi
For the Respondent : Mr. P. Dlamini
Venue : CMAC Offices, 1st Floor Mbabane
Date of Arbitration :

ARBITRATION AWARD

1. PARTIES AND HEARING:

The Applicant in this matter is Ms Nomsa Simelane, together with 277 others who are part of the secretarial cadre of employees of the Swaziland Government.

The Respondent in this matter is the Ministry of Public Service, together with the Civil Service Board and the Attorney General, who is the official legal representative of the Swaziland Government.

The Applicants in this matter are represented by Mr. Mandla Mkhwanazi, an attorney from the offices of Mandla Z. Mkhwanazi & Associates, situated at Lilunga House, Ground Floor, Mbabane.

The Respondents are represented by Mr. Phesheya Dlamini, an attorney from the Attorney General's chambers, 4th Floor, Justice Building, Usuthu Link Road, Mbabane.

2. NATURE OF DISPUTE

The alleged unfair terms and conditions of employment. The main issue in dispute being the correction of an anomaly caused by Circular No. 3 of 2004 in respect of the grading of the secretarial cadre.

3. BACKGROUND INFORMATION

The dispute was reported by the Applicant to the Commission on the 9th of February, 2006. The report was made in terms of Section 76 and Section 77 of the Industrial Relations Act, 2005 (as amended).

The Commission appointed a conciliator who brought the opposing parties together in an attempt to resolve the dispute amicably, however these efforts

proved futile, hence a certificate of unresolved dispute was issued, under certificate number 092/06.

The parties, by mutual consent referred the matter to arbitration and signed CMAC Form 8, in terms of Section 85 (2) and (3) of the Industrial Relations Act, 2005 (as amended), on or about the 20th of March, 2006. I was duly appointed as arbitrator, in terms of the said Act, on the 19th of April, 2006. A pre - arbitration meeting was scheduled to take place on the 7th of June, 2006, however not all the parties attended, hence the meeting was re - scheduled to the 14th of June, 2006. The matter was set down for the 4th and 5th of July, 2006. After the oral and documentary evidence had been adduced, written closing arguments were to be submitted by the parties by the 14th of July, 2006. There were however delays, and the written submissions were not received by the arbitrator at the appointed time.

SURVEY OF EVIDENCE

The Testimony of Ms Nomsa Simelane

Ms Simelane was the only witness who was called upon to give testimony on oath in support of the Applicants' case. Ms Simelane gave evidence in her capacity as chairperson of a committee of the secretarial cadre. She stated that the Applicants in fact constituted not only herself and 277 other secretaries employed by the Swaziland Government, in various ministries, but the secretarial cadre as a whole.

Ms Simelane stated that she and the other Applicants are presently employed by the Swaziland Government, and had reported the dispute at hand to the Commission in their personal capacities, and not as members of the Swaziland National Association of Civil Servants (SNACS). Ms Simelane further testified that it was the Applicants' position

that they were to be dealt with by the Commission in their individual capacities and, not as members of SNACS. The witness stressed that she herself was not even a member of SNACS, and she stated that she was not aware of whether some of the other Applicants were or were not members of the said union. The gist of her evidence was that she, together with the other Applicants were not all members of SNACS, and sought to have their dispute dealt with in their individual capacities.

Ms Simelane explained the historical developments that led to the dispute at hand. According to the witness, the secretarial cadre was initially divided into various categories, which were then placed in a hierarchy in accordance with what is known as a "scheme of service". The objective of this scheme of service is to rationalize the arrangements for recruiting and administering the secretarial cadre, as well as informing presently employed officers, and potential recruits about the structure, in-service training opportunities and career prospects of the cadre. The scheme of service, accordingly categorized the various members of the cadre, in a hierarchical form, depending on their qualifications and duties. According to the scheme, the grades of the secretarial cadre stood as follows:-

- (i) Typist 11 - Grade 7
- (ii) Typist 1 and Hansard Typist - Grade 9
- (iii) Shorthand Typist 11 - Grade 11
- (iv) Shorthand Typist 1 - Grade 13
- (v) Personal Secretary - Grade 15
- (vi) Senior Personal Secretary - Grade 17
- (vii) Personal Assistant to the Prime Minister - Grade 19

The witness testified that this scheme of service had been in operation, and had effectively regulated the grading and salaries of the secretarial cadre. The

witness submitted the document as part of her evidence and it was labeled "exhibit B".

According to Ms Simelane, the employer had then engaged the services of an independent consultant, KPMG Management Services (Swaziland) (PTY) LTD, to conduct a salary restructuring, which entailed a scientific job evaluation of all existing jobs. The outcome of this endeavour was the issuance of Establishment Circular No. 3 of 2004, which had introduced a new grading structure. The effect of this circular was that the post of the Hansard Transcriber, which had previously been at par with the post of Typist 1, on Grade 9, was elevated to Grade B6. This strangely also had the effect of placing the post of Hansard Transcriber at a par with the post of Senior Personal Secretary 11 (also on Grade B6), and leaving the post Typist 1 at Grade B2 yet they had shared the same grade previously. What was further distorted was the fact that this junior post of Hansard Transcriber was elevated way above other posts in the cadre, yet the position's duties and required qualifications remained as they are, yet the position of Senior Personal Secretary 11 required higher qualifications, and entailed more involved duties. This meant that the Hansard Transcriber, whilst his or her duties and qualifications were of a lesser calibre, still earned more than those who were senior to this position in terms of duties and qualifications. The effective date of this regarding according to Circular No. 3 was the 1st of April, 2004.

The witness further testified that the employer had then invited the Applicants, as members of the secretarial cadre, and in their individual capacities to file any appeals that they may have concerning the contents of Circular No. 3. Ms Simelane stated that the members of the secretarial cadre had indeed done so, and voiced their dissatisfaction regarding the distortion of the grading hierarchy, and pleaded

with the powers - that - be, to rectify the anomaly as soon as possible. Ms Simelane stated that this appeal's process involved the filing of a document, which contained their grievance and was signed by the Chairperson, the secretary, and a member of the committee representing the secretarial cadre. This document was admitted as part of the witnesses' evidence and labeled 'Exhibit A'.

According to the witness the employer had not done anything to rectify the anomaly, and the Hansard Transcriber was continuing to earn a salary based on Grade B6, irregularly and undeservedly. Ms Simelane stated that this greatly disadvantaged the Applicants as a whole, because the Hansard Transcriber was junior to most of all the other sectors of secretaries, and was meant to be supervised by those holding higher designations, and yet the people in this position were earning more than those who were in possession of higher qualifications. The witness stated that this was, therefore, a mere mockery because how can one who earns less than another supervise the person who earns more than themselves?.

The witness stated that despite their appeals, the hierarchy to date remains distorted, and the Hansard Transcriber, earns the same salary as the Senior Personal Secretary 11.

The witness then stated that their fervent prayer to the Commission, was that the arbitrator issue an award compelling the employer to rectify the anomaly in the hierarchy and that the categorization of the secretaries should revert to that reflected in the scheme of service. The witness stated that it was also the Applicants alternative prayer, that in the event the employer was not able to restore the hierarchy to that which is indicated in the scheme of service, then the Respondents should leave the

Hansard Transcriber on Grade B6, but elevate the secretarial positions which are higher than the Hansard Transcriber according to the scheme of service, to positions or grades higher than the B6 Grade. This would mean that Shorthand Typist 11 would be elevated to Grade B7, the shorthand elevated to Grade B8, the personal secretary elevated to Grade B10, the senior personal secretary 11 elevated to Grade B10, and senior personal secretary 1 would be placed on Grade B11. The witness stated that it was the Applicant's contention that all secretaries of a higher rank than the Hansard Transcriber ought to be paid on a grade above Grade B6, and it was their prayer that these corrections to the hierarchy should have a retrospective effect as from the 1st of April, 2004.

In cross - examination the witness was asked if she was certain that nothing had been done by the employer subsequent to the lodging of the appeals. Ms Simelane stated that the fact that she, as one of the affected people knew nothing about a means to correct the distorted hierarchy, meant to her that nothing had been done.

THE TESTIMONY OF MR. TITUS KHUMALO

Mr. Khumalo was called as the sole witness in the case of the Respondent. The witness stated that he is currently employed in the Ministry of Public Service and information, in the Department of Management Services. According to the witness, his job entailed the organisation of the re - grading systems within the Swaziland Government. Mr. Khumalo stated that Circular No. 3 of 2004 was the product of an exercise by the employer to effect a change to the job and grading system within the Swaziland Government. It

was the witnesses evidence that a series of consultants were engaged to perform this re- grading exercise, under the Ministry of Public Service & Information's supervision. Mr. Khumalo acknowledged that the said circular had in fact distorted the grades, in that the Hansard Typist, Transcriber, who is at a par with Typist 1, was graded at Grade B6.

Mr. Khumalo stated that the effective date of the circular was indeed the 1st of April, 2004, and a provision was made for the filing of appeals, so that post - holders in the Swaziland Government's employ, could lodge appeals individually, collectively or otherwise. The witness acknowledged that the Applicants had lodged their appeal individually, and the consultant, KPMG Management Services (Swaziland) (PTY) LTD, had dealt with those appeal that were filed, including the one from the Applicants. It was the evidence of the witness that over and above the written submissions, the consultants had also invited the various appellants, the Applicants inclusive, to make verbal submissions.

According to the witness, the consultant had duly processed the various appeals and finally issued a "Final Report On Consultancy for The Appeals Process". This report is dated June 2005, and was admitted as evidence by the arbitrator and labelled 'Exhibit C'.

Mr. Khumalo stated that on page 59 of the said report, it is indicated that the scheme of service had been taken cognisance of by the consultant, and the hierachy had been restored accordingly. The witness stated that the following amendments had been effected in order to restore the hierachy:-

- i) Typist 11 had been re-graded from Grade B1 to Grade B2.
- ii) Typist ... which is at par with the Hansard Transcriber, was re- graded from Grade B2 to Grade B3.
- iii) The Hansard Transcriber was also re - graded and no longer occupies Grade B6, but has been placed at Grade B3.
- iv) Shorthand Typist 11 retained its Grade B3.
- v) Shorthand Typist 1 retained its Grade B4.
- vi) The Personal Secretary remained in Grade B5.
- vii) The Senior Personal Secretary 11 remains in Grade B6.
- viii) The Senior Personal Secretary 1 remains in Grade B7.

According to Mr. Khumalo the corrections made in the report, effectively restored the hieranchy, and the effective date of the changes is the 1st of April, 2004, as it was correcting Circular No.3 whose effective date was also the 1st of April, 2004.

Mr. Khumalo stated that the processing of the consultants report had been put through the collective bargaining system, which he believed was binding on all civil servants, as per the recognition agreement between the Swaziland National Association of Civil Servants (SNACS) and the Swaziland Government. The witness testified that the implementation of the report had been put on hold because a dispute had arisen between SNACS and the employer, and the bone of contention there was the salary scales, and not the grading scales. According to the witness, this dispute was pending before the Commission.

Under cross - examination the witness was asked about a provision in the report which had the effect of allowing the Hansard Transcriber to revert to Grade B3, but with their personal right. The Applicant's attorney asked the witness whether this meant that the Hansard Transcriber would revert to Grade B3, but would earn a salary on Grade B6?. Mr. Khumalo explained that the offending Circular No. 3 had contained a provision that had envisaged that errors would be made in the re-grading process, and provision had been made for the appeals to be lodged to rectify these. Mr. Khumalo further stated that Section 56 (1) (e) of the Employment Act, 1980 permitted the employer to deduct wages paid to an employee in error, and in excess of the amount that was actually due to them. The witness stated further that the effective date of the report was the 1st of April, 2004, and as soon as it was implemented the Hansard Transcriber would then earn a salary of Grade B3, and the employer could recover all monies paid to these individuals in error.

The Applicant's representative put it to the witness that the Hansard Transcriber had not been paid on Grade B6 in error, but on the strength of Circular No. 3, and if this had been an error, then the employer, through the relevant Principal Secretaries, would have made a report to the Principal Secretary of the Ministry of Public Service and Information, as is provided in Section 6.2 of the Circular No. 3. The witness maintained that the Hansard Transcriber had been paid on Grade B6 in error, and that is why the appeals lodged by the Applicants were considered by the Consultant, and the hierarchy rectified through the report. Mr. Khumalo stated that the possibility of errors, had been envisaged and provided for in Circular No. 3, and as a result the appeals process had been set in motion, in an effort to correct any

errors, including the recall of any monies paid erroneously.

Mr. Mkhwanazi put it to the witness that his instructions were that some of the Hansard Typist had already retired, and therefore it would be difficult for the employer to effect the corrections as stipulated in the KPMG Report. Mr. Khumalo reiterated that the employer would be able to correct the error once the report was implemented.

Mr. Mkhwanazi proceeded to ask the witness about the collective bargaining process which was allegedly holding back the implementation of the report? Mr. Dlamini stated that it was the employer's position that in the spirit of collective bargaining, and on the basis of the Recognition Agreement between the employer and SNACS, the Applicants were bound by these and their grievance could not be attended to because the Industrial Court had ruled that matters pertaining to the implementation of the KPMG report be referred back to the roundtable.

Mr. Khumalo stated that this Court Order, being; **Ministry of Public Service and Information & Another vs Swaziland National Association of Civil Servants,, Industrial Court Case No. 126/06**, was binding on the employer, and on the Applicants as they were Civil Servants.

Mr. Mkhwanazi asked the witness if all Applicants were bound by the recognition agreement between the Swaziland Government and SNACS even though some of them were not even members of the union, and had been invited by the employer to file their appeals concerning Circular No. 3 of 2004 as individuals, and not under the auspices of SNACS? Mr. Khumalo stated that he believed that this was the case.

Mr. Mkhwanazi put it to the witness that the Applicants had responded to the employers invitation and had indeed filed their appeals in individual capacities, without any influence or input of the union. Mr. Khumalo acknowledged that this was so, but insisted that the Applicants were bound, and pointed out that the appeals were not dealt with by the employer, but by the consultant; KPMG.

Mr. Mkhwanazi then asked how then if the consultant dealt with the Applicants as individuals, the outcome of their appeals could be held back by a dispute between the Swaziland Government and SNACS. Mr. Khumalo reiterated that this was occasioned by the spirit of collective bargaining , and the recognition agreement that subsists between the employer and SNACS. The witness maintained that every Civil Servant, whether or not they are members of the union, is bound by the agreement.

Mr. Mkhwanazi also argued that the Court Order that the witness alluded to, only referred to a particular list of disputes which referred to the KPGM Report and not all disputes, and that the dispute at hand was not amongst those covered by the Court Order.

Mr. Mkhwanazi further asked the witness if pending the ultimate implementation of the KPMG, the employer would suffer any prejudice by elevating the Applicants who deserved to be above the Hansard Transcriber, above Grade B6? Mr. Khumalo responded that he did not think this was practicable as they could not correct a wrong with another wrong. The witness stated that the fact that the Hansard Transcriber had been placed on Grade B6 was an error which had been acknowledged, and an attempt made to rectify it. The witness also stated that the re-grading system was an intricate and scientific based process that could not be used to

arbitrarily shift the Applicants to those grades higher than Grade B6 just so as to satisfy the disgruntled Applicants.

In the course of re - examination, the witness stated that there were only three Hansard Typists in the employ of the Swaziland Government, and hence it would not be very difficult for the employer to re - categorise the position as per the KPGM Report, and correct the error done in Circular No. 3 of 2004.

ANALYSIS OF EVIDENCE AND ARGUMENTS

The main argument advanced by the Applicants is that they are being discriminated against by the employer on the basis of social status.

The Applicants contend that the elevation of the Hansard Typist to Grade B6 was an act of discrimination by the employer, because there had been a distortion of the hierarchy of salary scales, and as a result the Hansard Typist earned a salary that exceeded that which is earned by other secretaries who were better qualified than the Hansard Typist. It was argued that this is against the provisions of Section 29 of the Constitution of Swaziland, 2005 which seeks to protect workers against unfair treatment and victimization, and also recognize the Applicants' right to be paid equally for equal work performed.

On this point I find that I cannot agree with the Applicant's assertion that the elevation of the Hansard Transcriber to Grade B6 was an act of discrimination on the part of the employer. I find that from the evidence of both witnesses, and the

documents submitted, the distortion of the hierarchy was as a result of an inadvertent wrong classification of this position. It is clear that the Hansard Typist is junior to most of the positions on the hierarchy in terms of duties performed, and qualifications, and does not deserve to be placed at Grade B6, let alone, at an equal grade with the high-ranking senior personal secretary 11. It is also clear that the offending Circular No. 3 of 2004 which was the product of the consultant hired by the employer contained a provision in Section 6.2 of the document, had envisaged that errors or omissions of any kind could have occurred, and provided further a method in which the Principal Secretaries of the relevant ministries which experienced these anomalies could report these to the Ministry of Public Service and Information.

The fact that the very Circular which created the problem allowed for a method in which reports could be made, is in my opinion, an indication that it was envisaged that an error, or omission of any kind could possibly occur. Even this method of reporting did not close the door on other methods of reporting the anomalies, such as that which was employed by the consultant, in inviting the Applicants in their individual capacities to file appeals. Hence, I am persuaded to make a conclusion that the wrong classification of the Hansard Typist was not as a result of a discriminatory act by the employer, but was occasioned by an error. Even though this error was not dealt with in the mode provided in Section 6.2 of the Circular, this does not make it any the less, an error.

The Respondent's witness testified that the consultant invited the affected Applicants, in their individual capacities, to file appeals against the contents of the offending Circular, and went as far as

the correct the error which as made, pursuant to those appeals. This in my mind, means that the consultant acknowledged the error in the secretarial cadre's hierachy and made the corrections to be effective with effect from the 1st of April, 2004. The fact that this was done means that the Applicants second prayer that the Hansard Typist be left in Grade B6, and all the secretaries senior to that position elevated above it, should necessarily fall away, as after all, the Applicants had prayed that this be done only in the event that the employer is not be able to re - arrange the hierachy such that it be restored to that which appears in the original scheme of service.

The only problem that remains is that the KPMG Report which contains this corrected hierachy, and which will restore order to the grading system, is alleged by the Respondent's representative to be incapable of implementation on account of a Court Order which referred all disputes between SNACS and the Swaziland Government back to the negotiation table, which disputes pertain to the KPGM Report.

It was contended by the Applicants' representative that this Court Order does not cover the dispute at hand but only those listed in the order. The Applicants also contended that the Applicants had been invited by the KPMG Consultant to file appeals against Circular No. 3 of 2004 in their individual capacities, and had processed these on that basis. Furthermore, the Applicants had filed their dispute with the Commission in their personal capacities, and not under the auspices of SNACS. The Applicants representative contended therefore that the outcome of the appeals by the Applicants should not be delayed or held back on account of a dispute between the employer and SNACS. The Applicants

representative further argued that the bargaining process, presently underway between the employer and the union should not hold back his client's claim, as the Applicants were not bound by the recognition agreement between SNACS and the Swaziland Government, and more so as some of the Applicants were not even members of the union.

On this argument, I find that on a proper construction of what is contained in the order of Court in case no. 126/06, this order related to one particular dispute. The order called upon the unions to withdraw this dispute from CMAC and allow negotiations to proceed.

This dispute involved the Swaziland National Association of Teachers and the Swaziland Nurses Association as the Applicants. The Government Negotiation Team, the Swaziland National Association of Civil Servants, the Ministry of Public Service and Information and the Attorney General, were joined as Respondents in the matter.

It is common cause that the following matters also were withdrawn from the Commission's roll on account of their also being the subject of negotiations which are covered by the Court Order as they involved the Joint Negotiations Team, and these disputes were;

- a) MB 097/06
- b) MB 098/06
- c) MB 099/06
- d) MB 100/06

It is noted that the dispute at hand is not mentioned in this list, and can therefore not be said to be one which is covered by the order of Court. Further more, the Respondents' own witness admitted that the matters that were withdrawn from CMAC and that

had caused the delay in implementing the KPMG report were concerned with salary scales, and not grading scales. In light of these facts, it clear that the dispute at hand cannot be said to one of those that the order of Court in Case No. 126/06 referred to, and therefore the grievance of the Applicants cannot be denied on this basis alone.

It was further the Respondent's arguments that the Applicants', being bound by the recognition agreement between the employer and SNACS, have to await the ultimate completion of bargaining process that is underway, before the KPMG Report can be implemented, and the grading system put to right. This argument in my view is quite distorted as the consultant in question invited the Applicants to lodge their appeals against circular no. 3/2004 in their individual capacities, and processed them as such. The Applicants themselves filed those appeals in their individual capacities and further filed the dispute at hand individually to the Commission. SNACS did not play a part or feature at all through these various stages. The Applicant's witness testified that not all of the Applicants were even affiliated to the union, and in particular she herself was not a member.

The law as found in Section 76 (1) of the Industrial Relations Act, 2005 (as amended) is clear on the parties who can report a dispute to the Commission. Section 76 (1)(b) allows an employee to lodge a dispute with CMAC, and Section 76 (i) (c), provides for reporting by an organisation which has been recognized in terms of Section 42. In the premises if the law permits employees to report disputes as

individuals, and also recognizes that disputes can alternatively report the disputes, then I do not see how it can be said that the Applicants in casu cannot be given relief by the Commission as individuals. It seems quite odd that the employer could allow the Applicants to deal with the consultant on an individual basis, and file appeals against Circular No. 3 of 2004 individually, and then seek to hide under the canopy of "Collective Bargaining" when the time comes for the Applicants to know the outcome of their appeals, and to have the error in the hierarchy rectified. This is more so, as the Applicants who are presently being prejudiced by this improper grading, are continuing to be disadvantaged whilst the report is held in abeyance. Whilst I have little doubt that the Hansard Typist is continuing to enjoy the benefits of the wrong - grading, but the rest of the secretarial cadre is being prejudiced.

I have also had occasion to look at the recognition agreement between the employer and SNACS, dated March 1992, which is on file. This agreement on page 6, part 13, make provision for how individual grievances are to be dealt with. The provision states that these are to be dealt with in accordance with the terms of Chapter A, Part 10, Section 9 of the Swaziland Government General Orders. It is therefore clear that even though this recognition agreement does regulate collective grievances (in part 12), the same agreement provides a manner by which individual grievances should be dealt with, and thereby indicates that it was always envisaged that employees, as individuals could bring up their grievances with the employer, and not under the auspices of SNACS.

Whilst the Respondent's witness provided a reason which would preclude the employer from elevating the secretaries who are senior to the Hansard Typist

