



**IN THE CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MBABANE

MB 131/06

In the matter between:-

SIFISO MANANA

APPLICANT

And

THE SECRETARY

MINISTRY OF EDUCATION

1st RESPONDENT

THE PRINCIPAL -

SWAZILAND COLLEGE OF

TECHNOLOGY

2nd RESPONDENT

THE SECRETARY

CIVIL SERVICE BOARD

3rd RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF PUBLIC SERVICE &

INFORMATION

4th RESPONDENT

THE ATTORNEY - GENERAL

5th RESPONDENT

CORAM:

Arbitrator

: Ms K. Manzini

For Applicant

: Mr. M. Dube

For Respondent

: Ms Khulile Sikhondze

ARBITRATION AWARD

DATE OF ARBITRATION : 19th September 2006

VENUE : CMAC Offices, 1st Floor,
Mbabane House

1. PARTIES AND HEARING:

The Applicant in this matter is Mr. Sifiso Manana of P.O. Box 1378, Mbabane. He shall be referred to herein as the Applicant, the employee, or simply as Mr. Manana.

The Respondents are the Principal Secretary of the Ministry of Education, The Swaziland College of Technology, The Civil Service Board, The Principal Secretary of the Ministry of Public Service & Information and the Attorney General. These shall be referred to collectively as the Respondents, or the employer.

2. REPRESENTATION

The Applicant was represented by Mr. Mbuso Dube a labour consultant, whilst Ms Khulile Sikhondze, an attorney from the Attorney General's chambers, appeared on behalf of the Respondents.

3. BACKGROUND INFORMATION

The dispute between the parties was reported to the Commission (C.M.A.C.) on the 23rd of February, 2006 in terms of Sections 76 and 77 of the Industrial Relations Act, 2005 (as amended).

The matter was conciliated, however, the dispute remained unresolved, and the Commission issued a certificate of unresolved dispute; being certificate number 260/06.

The parties, by mutual consent referred the matter to arbitration, and I was appointed to act as arbitrator, on the 30th of May, 2006.

4. SUMMARY OF EVIDENCE

It is not my intention to summarise all of the evidence that was adduced at the hearing, however, I have merely highlighted the key issues that pertain to my ultimate award. A number of documents were submitted by the parties, and admitted as part of their evidence.

The Applicant's representative called two witnesses to support his case, there were Mr. Sifiso Manana (the Applicant) and Mr. Thabo Mgadlela Dlamini.

The Respondent's representative called Mr. Siphila Sifundza and Mr. Musa Dlamini to testify in support of the Respondent's case.

THE TESTIMONY OF MR SIFISO MANANA

Mr. Manana testified under oath that he was employed as a General Labourer, at the Swaziland College of Technology (SCOT) in July, 1999. He stated that his duties were assigned to him by his supervisor, Mr. Sifundza, and in they year 2001, he had been told by the foreman, Mr. Musa Dlamini that he should go and assist the painters at the college, and was also engaged in driving duties, as he had a drivers licence, and ultimately secured the relevant authority to drive Government vehicles.

According to the witness he had not received a formal letter appointing him as a painter, but was assured by his supervisors that he should stick to painting and he would be formally employed as a painter when a post became available. Mr. Manana testified that he would be assigned painting tasks by the foreman, who wrote job cards for him, and he would take the paint from the stores department.

The witness testified that in the year 2001, two vacant posts had become available for painters at the college and he had been approached by the foreman to fill out an appraisal form. Mr. Manana stated that at this time he had already acquired a qualification as a painter and

glazier from the Directorate of Industrial and Vocational Training (D.I.V.T.), which was in the form of a certificate, issued on the 16th of October, 2000. Mr. Manana stated that the foreman had returned his appraisal form to him, and told him that the Vice Principal had told him that so long as he was working at the college, Mr. Manana would never be employed, and had not advanced reasons as to why not. Mr. Manana stated that he was shocked at this, as he had ensured that his superiors had a copy of his painting certificate in his file, and had also painted a number of structures at the college, including the principal's house. According to the witness, he had performed these tasks well.

Mr. Manana stated that he had approached the executive officer, Mrs Mabuza and had asked her to apologise to the Vice Principal on his behalf, if he had ever crossed his path, but these efforts proved futile, as he refused to give them a hearing.

Mr. Manana also stated that he had become aware of the two vacancies when they were advertised internally, and that is when he had completed the appraisal form, and that later the posts were advertised by the Civil Service Board, publicly.

Mr. Manana submitted copies of his painting certificate, the appraisal form, and some of the job cards as part of his evidence.

Under cross - examination, the witness stated that he had been employed as a labourer, after an interview, and his duties had been explained to him. According to the witness, who after looking at a copy of a labourers job description, acknowledged that his duties entailed being assigned various tasks by his supervisor. Mr. Manana stated that he was, as part of his duties engaged in cleaning the grounds, and cutting grass. He stated that he had started painting in December, 1999, when he helped the painters by carrying the paint and tools.

It was put to the witness that he had not been assigned these tools by the supervisor, but had infact told the supervisor that he would do the painting jobs, rather than the tasks that were assigned to him.

The witness insisted that he had not asked to paint, but had done the job so well that he had been told that he would no longer be supervised by Mr. Sifundza, and would receive his instructions directly from the foreman. Mr. Manana stated that the foreman had even suggested to

him that he go for the test at the D.I.V.T. which would qualify him as a painter.

Mr. Manana stated that this had been informal, and that no formal letter was issued to him instructing him to go for the test.

Mr. Manana testified that before he qualified as a painter, he worked with the technicians, but afterwards, he would work alone, but the paint would be collected by the technicians from the stores department for him. It was put to the witness that this evidence was contradictory as he had earlier stated that he fetched his own paint from the stores department. It was further put to the witness that the only significance of the job cards was to assist in stock - taking, and did not mean that he was recognized as a fully - fledged painter by his employer.

Mr. Manana was asked why he had the original copy of the appraisal form which he filled in? The witness testified that this was so because it had been returned to him by the foreman, after Mr. Dube, the vice principal, had refused to employ him.

Mr. Manana was asked if he had ever approached Mr. Dube about this matter? The witness stated that he had told them that the form had not been brought through the

correct channels, and was not meant to be brought to his office.

According to Mr. Manana, Mr. Dube had been very abrupt with them, and had not explained where the form should be taken instead. Mr. Manana also stated that he had asked Mrs. Mabuza to accompany him to Mr. Dube to apologise to him if he had ever done something wrong, but he had not received a positive outcome.

Mr. Manana was asked what duties he is presently doing at the college? Mr. Manana stated that he is currently assisting the welder at the college, and was assigned these duties by the supervisor, Mr. Sifundza. Ms Skhondze put it to the witness that her instructions were that, he had been defying his supervisor's instructions, and was refusing to perform any of the duties that were assigned to him. Mr. Manana refuted these claims and stated that he had complied with Mr. Sifundza's directions, and had gone to assist the welder.

Mr. Manana was asked if he had seen the advertisement of the painter's posts, by the Civil Service Board?

The Applicant stated that he had in fact attended the interview, and that he had been one of five candidates who had applied for the posts, but had not been employed as a painter.

Under cross examination, the witness reiterated that he had been assigned painting tasks by his employer, and had been issued with job cards, which to his knowledge were not just meant for stock - taking, but also for assigning him to do the painting job.

THE TESTIMONY OF MGADLELA DLAMINI

This witness testified under oath that he is employed at SCOT in the catering department, and has known the Applicant since meeting him at the interview they attended together at the college, after which they were both employed. It was Mr. Dlamini's testimony that he knew the Applicant to be a painter as he had seen him painting several of the buildings at the college. Mr. Dlamini stated that in all the times he had seen Mr. Manana paint, it had always been in the company of other people such as one Simelane, and a certain Baloyi.

It was the witnesses' testimony that he had always seen the Applicant working together with either both these gentleman, or with just one of them, and had never seen him working alone.

THE TESTIMONY OF SIPHILA SIFUNDZA

The witness testified under oath that he is employed at SCOT as the groundsman supervisor, and knew the

Applicant from the college, where he had been employed as a labourer in the year 1999. According to Mr. Sifundza, all the labourers at SCOT fell under his supervision, and when Mr. Manana was first employed, he informed him of his duties, and the time for reporting for work and also the time for knocking off. Mr. Sifundza testified that he had explained to the Applicant, that as a labourer, his job entailed the performance of various tasks which include cleaning the grounds, moving furniture, and offloading various goods such as cement from delivery trucks.

According to Mr. Sifundza, the Applicant had in or about the year 2000 or 2001, approached the foreman and expressed an interest in assisting the painters at the college so that he could learn this skill.

Mr. Sifundza stated that the foreman had requested that Mr. Manana should seek Mr. Sifundza's permission first before he could allow him to assist the painters as this was not part of his duties as a labourer.

Mr. Sifundza stated that he had allowed the Applicant to assist the painters as this would help him learn a skill which would help him in the future, in that he would qualify for a job as a painter, either at the college or any where else where such an opportunity arose. Mr. Sifundza

stated that the culture at SCOT was that people ought to be allowed to learn a vocation which may assist them in the future, and the Applicant had been afforded the opportunity in that spirit. Mr. Sifundza stated that the Applicant had then told him that he would like to take the test that would qualify him as a painter, and had thereafter told him that he had been successful and had been awarded a certificate.

Mr. Sifundza stated that after the Applicant had qualified as a painter, the foreman had insisted that he return to performing his duties as a labourer, as he had now accomplished what he had initially set out to do, and was now an accredited painter.

Mr. Sifundza also added that it was important that the Applicant return to his official duties, as he was now a qualified painter, and would begin to think that was his substantive job, and expect to be remunerated accordingly. The witness stated that subsequent to his returning to labouring duties, the Applicant had asked the foreman to allow him to practice his painting skills, as he was afraid that he would forget how to paint if he did not do it often.

The witness stated that this occurred at a time when there was a shortage of painters at the college as some of them had retired, and the foreman allowed the Applicant to paint on account of the shortage. The witness stated that despite this, both he and the foreman had sternly warned the Applicant not to become problematic and start thinking that he was in fact employed as a painter, and not a labourer. According to the witness, Mr. Manana had assured them that he understood that he was only being allowed to practice his painting skills, and would not entertain any undue hopes of being viewed by his employers as a painter by profession; and was prepared to undertake his labouring duties if his supervisor required him to do any tasks.

Mr. Sifundza explained that after a while, they had experienced a shortage of staff, and had re - assigned the Applicant to assisting the welder at the college. According to the witness, the Applicant had told him he appreciated the opportunity to help with welding, and to learn this skill and asked to be allowed to stay on with the welder.

Mr. Sifundza stated that the exigencies of their work had demanded that he re - deploy Mr. Manana once again, and on the 18th of May, 2006 he had tried to get the Applicant to do other work besides welding. According to the witness, Mr. Manana had refused to budge from this

position and told him that he was taking legal action against the employer; as he wanted to be formally appointed as a painter.

Mr. Sifundza stated that Mr. Manana told him that he should write him a formal letter removing him from the position of welder's assistant, but he had not seen a need to do this as he had not written a letter to place him with the welder in the first place. Mr. Sifundza stated that he had reminded the Applicant that he was merely a labourer, and this meant that he could be assigned various tasks.

Mr. Sifundza stated that the Applicant had been adamant, despite being requested by even the foreman to return to labouring, but to no avail. Mr. Sifundza stated that Mr. Manana was refusing to attend to his duties, and stubbornly insisted on assisting the welder even when the welder was not there to assign him work. Mr. Sifundza stated that as far as he was concerned, the Applicant was infact idle, as he refused to take on his labouring duties.

Mr. Sifundza was asked if the Applicant had indeed driven government vehicles? The witness stated that indeed this had occurred, but this had been shortlived, as Mr. Manana had been arrested by the police for driving government

vehicles under the influence of alcohol, and also for taking unauthorized passengers on board the car.

Mr. Sifundza stated that he was aware that some vacancies for painters had become available at SCOT. According to the witness these vacancies had been advertised by the Civil Service Board, in the usual way, and the Applicant had been one of the candidates interviewed for the openings, but he had not been successful. Applicant had obtained the painters certificate for no other reason, other than to equip him with skills to improve his chances on the job market not only at the college, but also wherever else the opportunity arose.

Mr. Sifundza admitted that the procedure at SCOT was that workers were assigned tasks, but pointed out that in the Applicant's case, Mr. Manana had specifically asked to be allowed to paint as he had a special interest in learning the skill.

Mr. Sifundza also maintained that the mere fact that the Applicant had acquired a qualification in painting did not entitle him to believe that his appointment as a painter was a foregone conclusion. The witness stated that the witness had no right to entertain any expectations, moreso as he had been told by not only himself, but also by the foreman that he was still only a labourer, and appointments could only be made by the Civil Service

Board, as the college fell under the management of the Ministry of Education, and its workers were civil servants.

The witness also maintained that even though the Applicant had reported this dispute to CMAC, this did not mean that his employers were no longer entitled to issue him with instructions as he was still only a general labourer, but the Applicant was refusing to do his duties. Mr. Sifundza stated that when he had approached the Applicant to redeploy him on the 18th of May, 2006, he had refused, so as far as he was concerned, the Applicant was not working. The supervisor stated that he had reported the Applicant's defiance to his own superiors, and had been told that they would look into the matter.

THE TESTIMONY OF MR. MUSA SIMON

MFANAWEMPHI DLAMINI

Mr. Dlamini testified under oath that he is presently employed at the Swaziland College of Technology as the general foreman in the maintenance department. The witness stated that he knew the Applicant who had been employed at the college as a labourer in 1999. Mr. Dlamini explained that when Mr. Manana was first employed, the duties of his position as a labourer had been clearly explained to him, and painting was not a part of those duties.

Mr. Dlamini stated that despite the assertions made on behalf of the Applicant that he was employed as a painter, or even an assistant painter were not true. Mr. Dlamini explained that because painting was outside the scope of the labouring duties, Mr. Manana had had to seek special permission from him to assist the painters at SCOT so that he could learn the skill. Mr. Dlamini explained that he had told the Applicant that he could only allow him to paint if his supervisor did not object, and Mr. Sifundza had in fact allowed the Applicant to go and assist the painters.

According to the witness there were three other assistants, who worked with the painters besides the Applicant, and these all helped the painters by holding ladders and other related tasks.

Mr. Dlamini explained that after the Applicant had earned his painter's certificate, he had told him that he could no longer allow him to work with the painters as he would now believe himself to be a painter. According to the witness, the Applicant had seemed to understand, and had thanked him for the opportunity to learn, and stated that the foreman should not hesitate to ask him to help if there was a shortage of painters. According to the witness when some of the painters had retired, and the other assistant painters had also stopped working, Mr. Manana had offered to help out as there was a need to paint some of the lecturer's houses. Mr. Dlamini stated that he had

told one of the lecturers whose house needed to be painted to ask the Applicant, because he could not ask Mr. Manana as it would appear as though he were assigning him a painting job.

Mr. Dlamini explained that the purpose of jobcards was to assist in knowing how much material was going to be needed, and also to keep a record of the material that had been removed from the stores department.

Mr. Dlamini stated that in 2003, vacancies had become available for painters at SCOT, he had been instructed by his superiors to have the labourers fill in appraisal forms. According to the witness, several of the other labourers, apart from Mr. Manana were in possession of certificates obtained from the D.I.V.T. Mr. Dlamini stated that Mr. Manana had filled in his own appraisal form, and the form had been brought to him for signature. Mr. Dlamini stated that some of the forms had been turned away by the employer as they were improperly filled, and the Applicant's form was one of those as he had stated that he currently held the posts of "assistant painter" in the space that required his service history. Mr. Dlamini stated that the first defect in the form was that Mr. Manana was a labourer and not an assistant painter, also the post of "Assistant Painter" did not exist in SCOT.

According to the witness, a further defect appeared on page three of the document as the duties listed there did not co-relate with the position of assistant painter which was listed as the Applicant's designation. The said duties included replacing broken windows, fixing leaking roofs, etcetera. Mr. Dlamini stated that the defects in the form were the reason it was sent back to the Applicant, and for no other reason. Mr. Dlamini denied ever hearing the Vice Principal saying that as long as he was at SCOT, the Applicant would never be employed, and stated that he had never told the Applicant such a thing.

As regards the appraisal forms, even under cross - examination, the witness remained steadfast and stated that he had not filled in the position of assist painter in Applicant's form. The witness stated that he was not aware of who had helped the Applicant fill in the form, but thought that he might have had the help of his co - workers. The Applicant's representative argued that the form was "fatally defective" and that Mr. Dlamini ought to have known that it would not be accepted by the employer. It was stated by Mr. Dlamini that indeed the form was defective as there was no such post as "assistant painter" at SCOT, and that the Applicant had been engaged as a labourer.

The Applicant's representative enquired of the witness if it had ever occurred to him that he approach the management at the college, and prevail upon them that they employ the Applicant as a painter, as he was well aware that the Applicant had this ambition?

The witness explained clearly that this had never occurred to him, as he knew full well that posts are advertised by the Civil Service Board, and only this body had the power to hire and fire civil servants.

The witness further explained that after the Applicant had obtained the painting qualification he had been taken back to work with the other labourers and was only asked to go and assist the painters if there was a need. Mr. Dlamini explained that the job cards that had been submitted by the Applicant were not signed by him as the Applicant had failed to return these to him. Mr. Dlamini stated that Mr. Manana had known the importance of returning these, as they had to be signed by him after he had inspected the work done and approved it.

ANALYSIS OF EVIDENCE AND ARGUMENTS.

In his opening address, the Applicant's representative stated that the Applicant had been employed by the Swaziland Government in 1999, as a painter. It was argued on the Applicant's behalf that he was not confirmed into this position in all the time that he had

worked at SCOT, and it was his prayer that he be confirmed into the position of painter.

The certificate of unresolved dispute that was issued, pertaining to this matter, also clearly stated that the Applicant complained that he was not remunerated for painting, and yet he was engaged to perform duties of a painter.

On the other hand the Respondent maintained that the Applicant had been employed as a labourer, and had asked to assist the resident painters at the college so he could learn the skill, and was therefore not entitled to his claims. The evidence as adduced by the witnesses was such that it is clear that Mr. Manana was employed at the college as a labourer, and was therefore there to perform what ever tasks that were assigned to him by his supervisor.

Mr. Manana himself stated in his evidence - in - chief that he was employed as a labourer and had been under the supervision of Mr. Sifundza. This was further corroborated by the evidence of both Mr. Sifundza and Mr. Dlamini (the foreman). Not much weight can be attached to Mr. Mgadlela Dlamini's evidence which was to the effect that Mr. Manana was a painter, as the only way he could substantiate the claim was by saying that he had seen him painting. Of the various other tasks that were

performed by the Applicant, which included off - loading material from trucks and moving furniture, Mr. Mgadlela Dlamini could have seen him performing these tasks and could not logically therefore claim that the Applicant was employed solely to off - load goods or to move furniture.

The case of the Applicant is basically that he wishes to be confirmed into the post of painter because he holds a certificate in painting. The Applicant also wishes to be paid arrear wages, leave pay and also wishes to be transferred to another work station as he does not get along with his superiors at SCOT. The Applicant relied on the cases of ***NIKIWE NYONI vs THE SWAZILAND GOVERNMENT INDUSTRIAL COURT CASE NO. 103/05*** and also ***VUSUMUZI SHONGWE vs THE SWAZILAND GOVERNMENT INDUSTRIAL COURT CASE NO. 216/2000.***

I have had occasion to peruse these two cases, and can distinguish these from the Applicant's own set of circumstances. The findings of the two cases cannot be used to support the Applicant's claims as first of all the Nikiwe Nyoni case was a case involving a permanent government employee who sought to be paid arrear acting allowance. In the instant case, Mr. Manana has not shown that he was ever appointed to act as a painter, and

neither has he produced an instrument appointing him to such a position.

Furthermore, Mr. Manana, has not shown that the position of painter is one which is designated as attracting acting - paid allowance in terms of the law - (see Establishment Circular No. 5/1997).

In the present case Mr. Manana simply wishes to be confirmed as a painter, and yet he was never appointed or employed as a painter in the first place. The evidence pertaining to the fact that Mr. Manana drove Government vehicles was therefore, simply irrelevant to the matter at hand, and has been totally disregarded.

The case of Vusumuzi Shongwe is further distinguishable, as the Applicant in that case was a qualified electric wireman, and had on the 21st of July, 1998, been appointed by the Civil Service Board as an electrician 111, under the Ministry of Public Works and Transport. Mr. Shongwe's prayers was that the employer treat him as a permanent employee, and that he be accorded all benefits that accrue to permanent government employees. Mr. Shongwe's contention was that it was wrongful and unfair to treat him as a temporary employee after having served the employer for twenty - eight years.

Again, this case cannot be lend credence to Mr. Manana's claims, because in casu the evidence clearly shows that Mr. Manana was not appointed by the Civil Service Board as a painter, and had attended the interview for the position but had been unsuccessful.

Instead, the Applicant, in casu, was appointed on a temporary basis as a labourer, and was eventually confirmed into this position, so he is a permanent government employee.

It stands to reason that Mr. Manana cannot be confirmed into a post that he never substantively held in the first place. Mr. Manana cannot even complain that he is being unfairly treated as he was confirmed as a labourer, and is a permanent government employee. The mere fact that he holds a painting qualification does not entitle him, in my view, to expect that he automatically be placed in the position of painter. Mr. Manana attended an interview for the post of painter, and was not successful, and it would defeat logic to expect that he be confirmed as such.

The Applicant's own representative described the appraisal form which was completed by the Applicant as being "fatally defective" which thing was quite interesting, as this is a document which the Applicant himself had produced as part of his evidence to substantiate his claim of being a painter. This "fatally defective" document

cannot hold water because it describes Mr. Manana's substantive post to be "assistant painter" and it came to light that no such position exists at SCOT.

This just shows that even the Applicant himself is not too clear about his designation as he stated in his evidence - in - chief that he was a "labourer", in the appraisal form he describes himself as an "assistant painter", and yet he wishes to be confirmed into the position of "painter".

The Applicant further introduced new prayers and stated that he wishes to be awarded leave pay and also to be transferred from SCOT. Not only has the Applicant not adduced evidence to substantiate these claims, but these claims were totally new in that they are not included in the certificate of unresolved dispute. As such I cannot make a finding on these claims.

AWARD

Having heard the evidence of both parties, I hereby dismiss the Applicant's case in its entirety.

THUS DONE AND SIGNED BY ME ON THE 29TH DAY OF JANUARY, 2007.

KHONTAPHI MANZINI
ARBITRATOR