

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 17/03

In the matter between:

BEN M. ZWANE

APPLICANT

And

SWAZILAND GOVERNMENT

RESPONDENT

CORAM

N.NKONYANE - :

ACTING JUDGE

D. MANGO :

MEMBER

G.NDZINISA :

MEMBER

P. R. DUNSEITH :

FOR APPLICANT

ADV. J. M. VAN DER WALT:

FOR RESPONDENT

JUDGEMENT- 04/05/04

This is an application in which the Applicant is seeking an order in the following terms:

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1. Declaring that the purported transfer of the Applicant from his position as Clerk to Parliament to the position of Principal Assistant Secretary in the Ministry of Agriculture and Co-operatives is null and void.
2. Directing and ordering the Respondent to re-instate the Applicant into the position of Controlling Officer in the House of Parliament.
3. Costs.
4. Further and/or alternative relief.

The Applicant's claim is based mainly on paragraphs 7.1,7.2,7.3 and 11 of the Founding Affidavit. The Applicant makes the following averments in those paragraphs; in paraphrase:-

7.1 That his transfer is null and void because he was not afforded an opportunity to present his case or make representations to the Civil Service Board when the matter of his transfer was deliberated upon by the Board.

7.2 That his transfer is an unfair labour practice in that it purports to demote him to a position of lower status and responsibility albeit at the same grade level.

7.3 That the transfer is a mala fide act of victimization carried out with malicious motives and calculated to frustrate him in his employment with the Swaziland Government.

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11, That he was not afforded an opportunity to make representations to the Prime Minister and Minister for Finance regarding his transfer and revocation of his powers as the Controlling Officer,

The application was opposed by the Respondent. In its Answering Affidavit the Respondent raised two points of law in limine. The parties agreed that the Respondent was no longer going to pursue the

second point and that it was going to argue the first point during its arguments on the merits. The first point was that the Applicant's papers did not disclose a cause of action because the Civil Service Board (General) Regulations Under Regulation 55 expressly and specifically excluded representations by a civil servant.

The facts which are not in dispute before the court are the following:

On the 25th October 2002 the Prime Minister wrote a letter to the Applicant transferring him from the position of Clerk to Parliament to the post of Principal Assistant Secretary in the Ministry of Agriculture and Cooperatives with effect from 1st November 2002. On the 24th October 2002, the Minister of Finance wrote a letter to the Applicant revoking his powers of Controlling Officer in the House of Parliament.

It is these two letters therefore that prompted the Applicant to institute legal proceedings to resist the transfer and revocation of his powers as Controlling Officer. The Applicant says the transfer should be declared a nullity as it was done without him being given an opportunity to make representations to

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the Civil Service Board or the Prime Minister. He also says the transfer amounted to unfair labour practice and an act of victimization. He also says that the revocation of his powers as Controlling Officer was not proper because he was not given a chance to make representations to the Minister of Finance before the revocation was made. The first question that the court must decide is whether the Applicant had the right to be heard by the Civil Service Board or the Prime Minister before effecting the transfer. It was argued on behalf of the Applicant that the failure by the Civil Service Board and the Prime Minister to afford him a chance was contrary to the audi alteram partem principle. It was argued that failure to abide by the dictates of this principle rendered the decision to transfer null and void. The Respondent's counsel argued to the contrary and said the principle did not apply as it was expressly excluded by Regulation 55 of the Civil Service (General) Regulations of 1963. Regulation 55 reads as follows:

"The Board shall not consider representations made by individuals (including serving officers) except when required to do so by the Minister to whom all representations shall be sent, who either may require the Board to advise on representations made by a person in respect of his candidature for appointment to the service or for selection for a scholarship or training course, and on any representations made in respect of any matter which it is considered may be appropriately referred to the Board or in respect of a decision made by a head of department in the exercise of any delegated powers of appointment or disciplinary control."

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It is clear from this regulation that the Board is expressly excluded. In terms of this regulation representations should be made only to the Minister. The regulation also spells out the instances where the representations should be made. These are: candidature for appointment to the service; selection for a scholarship or training course; any matter which it is considered may be appropriately referred to the Board and; a decision made by a head of department. It was not suggested by Respondent's counsel that the reference to "any representations made in respect of any matter" did not include a transfer.

It is clear therefore that the Applicant had the right to make representations to the Prime Minister. It is also clear from the papers before the court that that was not done. The court comes to the conclusion that there was a violation of the audi alteram partem principle when the transfer was carried out.

It was also clear that the transfer was irregular because the Prime Minister did not act on the advice of the Civil Service Board when effecting the transfer. It was argued on behalf of the Respondent that such advice was made by the Civil Service Board. The court was referred to the Minutes of the Board's meeting on the 13th September 2002, being annexure "SG2" and to page 5 thereof and item 8. Item 8 is entitled "transfer of Clerk to Parliament Mr. Ben Zwane". It contains the following:

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"The Board considered the above transfer and decided as follows:

- (a) That the Board's Memorandum of advice to the Prime Minister's office referenced CSB/14909 dated 4th September 2000 be withdrawn and;
- (b) That a memorandum be addressed to the Principal Secretary in the Private and Cabinet Offices advising that His Excellency, the Prime Minister transfer the Clerk to Parliament Mr. Ben Zwane from Parliament."

It was argued on behalf of the Applicant that the advice was not properly done as it did not spell out the office to which the Applicant was being transferred to. The Respondent's counsel argued that it was clear that the new office was that of Principal Assistant Secretary, Ministry for Agriculture and Cooperatives, regard being had to the history of the matter. In order to determine this point the court must find out the meaning of transfer. In the interpretation section of the Regulations transfer:

"means the conferment permanently or otherwise upon a person in the service of some office other than that to which he was last substantively appointed which does not involve promotion, but does not include the posting of an officer between one office and another in the same grade or cadre, or the posting of an officer holding a legal appointment to the judicial department or vice versa. "

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The operative words from this definition are; "conferment upon a person of some office other than that to which he was last substantively appointed. The other relevant regulation in this regard is Regulation 9 which talks about delegation of powers by the Board. It reads thus in as far as it is necessary for this point:

"P. the Board may by resolution delegate to the Chairman or other member or members any of the powers and duties of the Board except the tendering of advice on the following matters-

- (a) appointments (excluding acting appointments);
- (b) transfer of officers from one post to another not involving promotion,
- (c) "

It is clear therefore that transfer means moving an officer from one post to another. The minutes of the Board do not show that the Prime Minister was advised on the movement of the Applicant from one post to another. They only show that the members advised on that movement of the Applicant from Parliament, but not to another post. The letter by the Prime Minister to the Applicant however states that the Applicant was being transferred from Parliament to the Ministry of Agriculture and Cooperatives. The Prime Minister's letter also does not say that he has been advised by the Board. The advice of the Board was therefore so defective as to amount to no advice at all. It cannot therefore be said that the requirements of Regulation 22 (1) were met in light of the defect that the court has pointed out.

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Regulation 22 (1) deals with the function of the Board and it states the following;

"The Board shall advise on any question relating to the appointment (including promotion or transfer) or termination of appointment or to the dismissal or other disciplinary control of officers of any offices."

Annexure "SG2" page 5 item 8 is therefore merely evidence that the Civil Service Board never advised the Prime Minister to transfer the Applicant from Parliament to the Ministry of Agriculture and Co-operatives. The court will therefore find that the Prime Minister exercised his powers irregularly and unlawfully. This finding was also made by the Judge President of this court in the case between the same parties under Case No. 20/2002 in which the Applicant was seeking a similar relief.

The court will now address the issue of unfair labour practice. It was argued on behalf of the

Respondent that unfair labour practice is not part of our law. The court was referred to the case of Ubombo Ranches vs Pan Attendants, Civil Case No. 6/1990 by the High Court of Swaziland. The court will agree that the Industrial Relations Act does not have any reference to "unfair labour practice". The Honourable Court found in the case cited above that the Industrial Court is not vested with any jurisdiction to hear a dispute described as an unfair labour practice. That was however with reference to the 1980 Act. The 2000 Act does not also specifically mention unfair labour practice. There are however sections that vest this court with powers to address issues of unfairness in labour matters. The court will in this regard

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refer to section 4 (a) and (b) of the Industrial Relations Act No.1 of 2000. it states the following purposes of the Act:

" (1) the purpose and objectives of this Act is to:-

- (a) promote harmonious industrial relations.
- (b) Promote fairness and equity in labour relations."

The court will again refer to Section 8 (1) of the same Act where it is stated:

"(1) the court shall subject to Sections 17 and 65 have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workman's Compensations Act, or any other Regulation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff association or between an employee's association, a trade union, a staff association a federation and a member thereof "

This court therefore clearly does have the power to address a claim or complaint by an employee against an employer arising from the course of employment.

The court will now proceed to consider the complaint by the Applicant that it was not fair on him to be transferred from the position of Clerk to

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Parliament to be Principal Assistant Secretary in the Ministry of Agriculture and Co-operatives. The court will have to look into the job description of these two offices. As Clerk to Parliament the Applicant was reporting to the Prime Minister's office. At the Ministry of Agriculture and Co-operatives he will be reporting to the Under Secretary. As Clerk to Parliament he was the overall Administrator and Controlling Officer, He was in control of Parliaments budget which during Financial Year 2001/2002 amounted to E1 3,474,721.00. At his new position he will not be the overall administrator and he will not be the Controlling Officer. The job descriptions were annexed on the Founding Affidavit. On perusal and comparison of the two posts no other conclusion can be arrived at except that the transfer of the Applicant to the Ministry of Agriculture & Co-operatives to be Principal Assistant Secretary will result in diminution in status and responsibilities and will be tantamount to a demotion. In the case of Nhlanhla M. K. Vilakati vs Attorney General, Industrial Court Case no. 88/96. where a Senior Magistrate was transferred to the office of Assistant Judicial Commissioner, it was pointed out at page 7 after the court had referred to numerous authorities that:

"An employer who employs a servant for a particular work, and gives him a particular status is not entitled without the sanction of the employee to alter the character of the contract....."

The court in that case found as a fact that the Applicant was never consulted before the variation of his appointment. In this present case there was also no evidence that the Applicant was consulted before the variation of his appointment. The decision of the Industrial Court in the Nhlanhla case was

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confirmed by the Industrial Court of Appeal of Swaziland in Case no. 8/98, In the Court of Appeal hearing the case of Smith vs Cycle and Motor Trade Supply Company 1922 TPD 324 was cited with approval. In that case the Plaintiff was employed as a Manager of the Defendant's business and was held justified in treating as a wrongful dismissal a direction to confine himself in the nature to the duties of bookkeeper at the same salary. The Industrial Court of Appeal held on page 5 per Browde AJ that:

"this appears to me to be a recognition in the common law that the test is whether the work to which the Plaintiff has been assigned by a unilateral decision of the employer is one of a nature which was not contemplated in the contract or if it involves a reduction in salary or status."

In the case of Thulile Doris Msane vs Family Life Association of Swaziland, Industrial Court Case No. 31/96 the Applicant was transferred to a new department of the Respondent, She was made to report to someone of equal rank to her, prior to her transfer. She instituted legal proceedings for constructive dismissal and was successful. In casu, the Applicant is to report to the Under Secretary an office that is below that of the Prime Minister's.

in the case of Francis M. Zwane vs Central Bank of Swaziland, Industrial Court Case No. 65/1988, the Applicant was transferred from the position of Purchasing Officer and Supervisor to the position of supervisor of the office cleaners. Mr, Dodds for the Respondent argued that the Applicant's transfer did not amount to demotion as he did not suffer any reduction in salary and grade. The court held however that status was equally important as salary and grade and that there was no doubt that the Applicant suffered drastic change in his status as the result of his transfer to posts which were

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fundamentally inferior and also suffered job satisfaction. The court had no doubt on looking into the job description of the two posts that the Applicant in the present case will also suffer drastic change in status and will suffer job satisfaction. The court will therefore hold that the transfer amounted to diminution of status, will result in lack of job satisfaction, and it amounted to a demotion and was not fair and equitable. It cannot therefore be sanctioned by any court of law. The Applicant will again succeed on this ground. The court will now deal with the allegation of victimization and mala fides. On the pleadings before the court by both parties there is no mention of the reasons behind the transfer of the Applicant. In the case of Ceylon Mercantile Union vs Millers Ltd referred to in the case of Francis M. Zwane vs Central Bank of Swaziland that this court has already referred to above the following observation was made on page 622 :

"transfers are a matter of internal administration and as such, fall within the purview of the employer's prerogative. However, one would generally expect that this prerogative would be exercised in an just and fair manner and not according to the whims and fancies of individuals."

There being no reason or explanation by the Respondent necessitating the transfer of the Applicant without being allowed to make representations, the court can come to no other conclusion than that this was a mala fide conduct on the part of the Respondent.

The Applicant however did not suggest in its pleadings any reason why it is being victimized. These are therefore no facts before the court upon which it can conclude that the Applicant is being victimized. Under paragraph 9 of

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