

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 390/07**

In the matter between:

**TITI NXUMALO**

**APPLICANT**

And

**CHAIRMAN OF THE SITEKI TOWN COUNCIL**

**1<sup>st</sup> RESPONDENT**

**MINISTER OF HOUSING & URBAN DEVELOPMENT** 2<sup>nd</sup> RESPONDENT

**THE ATTORNEY – GENERAL**

**3<sup>rd</sup> RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE:**

**JUDGE**

**DAN MANGO:**

**MEMBER**

**GILBERT NDZINISA:**

**MEMBER**

**FOR APPLICANT:**

**S. MNISI**

**FOR 1<sup>st</sup> RESPONDENT:**

**N. MZIZI**

**FOR 2<sup>nd</sup> RESPONDENT:**

**NO APPEARANCE**

**FOR 3<sup>rd</sup> RESPONDENT:**

**NO APPEARANCE**

## JUDGEMENT 31.08.07

[1] This application came before the court on an urgent basis on 17 August 2007.

[2] The applicant is seeking an order in the following terms:

"1. Dispensing with the rules of court in respect of form, manner of service of time limits and hearing this matter as one of urgency.

2. That the applicant's non-compliance with the above said forms of service be condoned in particular the applicant's non-compliance with the provisions of the Employment Act, & Industrial Act 2000 relating to reporting of disputes be condoned.

3. That a *rule nisi* do hereby issue and returnable oma date to be fixed by the above Honourable Court calling upon the respondents to show cause why an order in the following terms should not be final;

3.1. Directing the respondent to confirm and / or promote the applicant to the position of Town Clerk in terms of the Urban Government (STAFF) Regulation 1968 (under section 51 of the Act) with effect from 1<sup>st</sup> July 2007.

3.2. Suspending and / or staying the recruitment exercise to fill the above post pending fmalisation of this application.

3.3 . Cost of suit.

3.4. That paragraph 3.2 be operative with immediate effect pending fmalisation of this application.

3. Further and or alternative relief."

[3] The application was clearly not elegantly drafted. It was practically littered with

spelling and typographical errors. This led to the 1<sup>st</sup> respondent's attorney raising a number of points *in limine*.

[4] The applicant is employed by Siteki Town Council as the Town Treasurer on a fixed term contract of three years from 2<sup>nd</sup> November 2005 to 2<sup>nd</sup> November 2008. However in November 2006 she was appointed to act as the Town Clerk. The acting appointment was extended at her request with effect from 1<sup>st</sup> May 2007 to 1<sup>st</sup> August 2007. Although the Minister in his letter (Annexure "C" of the 1<sup>st</sup> respondent's answering affidavit) said the extension was for a period of four months, the period between 1<sup>st</sup> May 2007 and 1<sup>st</sup> August 2007 is not four months but three months. It may be assumed that the Minister wanted to write 31<sup>st</sup> August 2007. There was no evidence that this error was ever rectified by the parties. For the purposes of this application therefore the court will take it that the applicant's acting appointment came to an end on 1<sup>st</sup> August 2007.

[6] The main prayer is prayer 3.1. In prayer 3.1 the applicant is seeking an order "directing the respondent" to confirm and or promote her to the position of Town Clerk. Mr. Mzizi raised the point that it is not clear as against whom this order is sought. In response Mr. Mnisi for the applicant told the court that that was a typographical error and that the prayer should read as "directing the respondents."

[7] The respondents cited in this application are not the employers of the applicant. The applicant's employer is Siteki Town Council. The employment contract of the applicant with the council is annexed in the Answering Affidavit as 'annexure A'. It clearly states that the employment contract is between Siteki Town Council a statutory body established in terms of Section 5 of the Urban Government Act No.8 of 1969 (hereinafter referred to as 'The Employer' and Titi Patricia Nxumalo (hereinafter referred to as "Employee").

[6] Section 5 (2) of the Urban Government Act No.8 of 1969 provides that every Council shall be a body corporate with perpetual succession, and shall be capable of suing and being sued.

[7] It is clear that the court cannot make any order in terms of prayer 3.1 as the employer of the applicant has not been cited in these proceedings. Prayer 3.2 of the applicant's application is just a corollary of prayer 3.1.

[8] In support of the order sought in terms of prayer 3.1 the applicant stated as follows in paragraph 17 of the founding affidavit;

"Having so acted in this position for a period of over six (6) months, I state that in terms of the Urban Government (staff) Regulations, I must be confirmed in the position of Town Clerk. Given the period of (sic) I have acted in this position I legitimately expected to be promoted to the said position in terms of the Urban Government (staff) Regulations."

The Regulations are clear on the question of acting appointments. Regulation 15 provides that an acting appointment may be made for a period not exceeding six months at a time pending the return or the appointment of a substantive holder. It means therefore that when the applicant

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was appointed to act, she knew or ought to have known that it was for a period of not more than six months pending the return or the appointment of a substantive holder. It is therefore not clear how the legitimate expectation arose in the circumstances of this case.

This case is distinguishable from that of **Nhlanhla Hlatshwayo v. Swaziland Government and Attorney General (IC) case no.398/06** where the applicant had acted in a vacant position for about three years. His acting appointment was open-ended. In the present case the acting appointment was for a specific period. The applicant in this case was specifically told at the time of her acting appointment as to when it will end. When she started to act in that position, she knew exactly when that acting capacity was going to end. The question of legitimate expectation therefore does not arise especially because Regulation 15 makes it clear under what circumstances can an acting appointment be made at a Town Council.

[10] In paragraph 32 the applicant stated that;

*"On the belief and knowledge that I have acted in this position for more than half a year, I expected to be confirmed in this position or at least be given the chance to make representation before I am removed. "*

It is not true that the applicant was removed. She was appointed for a specific period and her appointment lapsed when that period came to an end. The applicant's averment that it ought to have been given the chance to make representation was based on Regulation 5 which provides that the Board in considering the selection of a candidate for appointment it shall give first consideration to suitably qualified persons already in the service.

[11] The recruitment exercise was carried out by a consultant. An advertisement was posted in the local newspapers stating the qualifications needed. Advertisement is provided for under Regulation 8. According to this Regulation advertisement is resorted to if the Board is of the opinion that, with all the information available to it, the vacancy can be most suitably filled by inviting applications from properly qualified persons. If therefore the applicant considered herself to be suitably qualified for the post, she should have challenged the Board as soon as she learnt that it was going to be advertised or at least soon after she saw the advertisement in the newspapers. The closing date for the applications was 11<sup>th</sup> April 2007. The applicant applied for the position. There is no averment in her papers that she was never called for interview as provided by Regulation 9. There is also no evidence that it was wrong for the Board to adopt the route of advertising the post.

[12] From the evidence before court it seems that the main motivation behind this application is that the Councillors have since exhibited conduct that clearly shows that they are not happy about her at Siteki Town Council. She therefore feels that they may do or they have done something that will prejudice her in the recruitment exercise.

[13] The 1<sup>st</sup> respondent also argued that the application is fatally defective for non-compliance with **SECTION 116 OF THE URBAN GOVERNMENT ACT. SECTION 116 (2)** provides that a party must give thirty days' written notice of the intention to bring legal proceedings against a Council. **SUBSECTION 3** provides that if a party wants this requirement to be waived he shall apply to the High Court to be granted special leave to institute such proceedings.

[14] In response to this point Mr Mnisi submitted that the applicant did comply with this requirement by writing-annexure "TN4". This document is a letter written by the applicant to the Siteki Town Council Chairman that she has a legitimate expectation to be given first preference to the post of Town Clerk because she has the necessary qualifications required for the post. There is nowhere in that letter where the applicant says that she intends to take legal action against the Council.

[15] Taking into account all the above observations and all the circumstances of the case court will make the following order;

1. that the application is dismissed.
2. no order for costs is made.

The members agree.

**NKOSINATHI NKONYANE**  
**JUDGE - INDUSTRIAL COURT**

**V.**