

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 81J©7**

In the matter between:

**MOSES MATSEBULA**

**APPLICANT**

and

**CONCILIATION MEDIATION & ARBITRATION**

**COMMISSION**

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

**MINISTRY OF EDUCATION**

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

**ATTORNEY-GENERAL**

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

**CORAM:**

**P. R. DUNSEITH:                      PRESIDENT**

**JOSIAH YENDE:                      MEMBER**

**NICHOLAS MANANA:                      MEMBER**

**FOR APPLICANT:                      M. SIBANDZE**

**FOR 1<sup>st</sup> RESPONDENT:                      NO APPEARANCE**

**FOR 2<sup>nd</sup> & 3<sup>rd</sup> RESPONDENTS:                      M. MATHUNJWA**

**J U D G E M E N T - 20/09/07**

1. The Applicant and the Respondents entered into a Memorandum of Agreement

on the 5<sup>th</sup> May 2006 at the offices of the Conciliation, Mediation and Arbitration Commission, in the following terms:

*"The parties hereby agree that the Respondent will pay the Applicant any back pay resultant from being on the wrong scale from the date of confirmation as Deputy Head Teacher to date. The Applicant will not be confirmed as Head teacher but he will upgrade his studies by obtaining a Diploma in Education whereat he will then be confirmed as Head Teacher. The issue of transfer to Hlutse is an administrative matter which will be discussed between the parties. The parties agree that this is in final settlement of the matter."*

2. The Applicant applied for this agreement to be made an order of the Industrial Court and the Court made the following order on the 8<sup>th</sup> May 2007:

*"(a) The 2<sup>nd</sup> Respondent is ordered to forthwith calculate and pay to the Applicant his back pay, being the difference between his current Grade and Grade D4, from the date of his confirmation as Deputy Head Teacher to the date his salary Grade is adjusted to D4.*

*(b) The 2<sup>nd</sup> Respondent is ordered to adjust the Applicant's Grade to Grade D4 forthwith. "*

3. The Applicant's grade was duly adjusted to D4, but he did not receive payment of his backpay. He then instituted proceedings to enforce the court order, seeking an order:

*"(a) Declaring that the 1 and 4 Respondents are in contempt of the Order of this Honourable Court granted on the 8<sup>th</sup> May 2007 and/or;*

*(b) That the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are to forthwith do all that is within their power to give effect to the Order granted by this Honourable Court on the 8<sup>th</sup> May 2007 relating to payment of the Applicant's back-pay arising out of the regrading of the Applicant and to report back to the Honourable Court on a date to be appointed by the Court, failing which the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents will be committed to prison for a period as may be determined by the Honourable Court."*

4. The Respondents have filed an affidavit made by Moses V Zungu, Executive

Secretary of the Teaching Service Commission. Mr. Zungu states that the Applicant was paid an acting allowance during the period from the date of his confirmation as Deputy Head Teacher (January 1999) to the date his salary grade was adjusted to D4 (June 2007). When the amount paid as acting allowance is taken into account, the balance of back pay due to the Applicant is E76,139-20. After deduction of tax and pension contribution top-up, a sum of E45 479-46 is due to the Applicant. Payment of this amount was requisitioned on 4<sup>th</sup> July 2007. The Respondents accordingly deny that they have failed to comply with the court order granted on 8<sup>th</sup> May 2007.

5. The court directed the Respondents to furnish a breakdown of the calculations showing how it arrives at the sum of E45.479-46 in respect of the backpay payable to the Applicant. The breakdown was duly filed.

6. During legal arguments, queries arose with regard to the breakdown of calculations. In particular, counsel for the Applicant queried:

6.1. whether the Respondents had over deducted pension contributions from the Applicant's backpay; and;

6.2. whether the Respondents had used the salary grade of a headteacher when calculating the acting allowance paid to the Applicant whilst he was an acting deputy head teacher.

7. The court granted the Respondents leave to call Mr. Moses Zungu, executive secretary to the Teaching Service Commission, as a witness to clarify these issues by way of oral evidence.

8. Mr. Zungu duly testified under oath. He confirmed that there had been an over deduction of pension monies. He said that he had instructed the Accountant-General to remedy this by refunding the amount in question to the Applicant. He had been away on leave, but on the morning he testified he discovered that payment had not yet been made. He undertook to follow up this issue as a matter of priority.

9. With regard to the grade used in calculating the acting allowance to be deducted from the backpay, Mr. Zungu testified that the headteacher of a junior secondary school and the deputy headteacher of a high school are both on grade D4. Since

the Applicant had acted as deputy headteacher of Emoyeni High School and Usuthu Methodist High School and headteacher of Nkiliji Junior Secondary School during the relevant period, the acting allowance had been calculated on the basis of Grade D4 throughout the period.

10. This evidence was not challenged and it established that the acting allowance deducted from the back pay had been calculated using the correct grades.

11. The only issue which remains for determination is whether the Respondents were entitled to deduct the acting allowance in calculating the backpay due to the Applicant.

12. The memorandum of agreement entered into between the parties records the Respondent's undertaking to pay the Applicant "any backpay resultant from being paid on the wrong scale from the date of confirmation as Deputy headteacher to date."

13. The unambiguous meaning of the agreement is that the Applicant is to be placed in the same financial position he would have been in if he had been paid on the correct scale. This can only be achieved if the acting allowance paid to him is taken into account. Indeed, if the acting allowance paid to the Applicant during the period in question is not taken into account he will be unjustly enriched.

14. Mr. Zungu testified that when he entered into the agreement on behalf of the Respondents he was not aware that the Applicant had been paid an acting allowance. Fortunately for the Respondents, the terms of the agreement allow calculation of the backpay to take account of the acting allowance paid.

15. When the Applicant applied to court for enforcement of the agreement concluded at the offices of the Commission, he did not disclose to the court that he had been paid acting allowance. At his request, the court ordered the Respondents to calculate and pay the backpay, *"being the difference between his current grade and grade D4 from the date of his confirmation as Deputy Headteacher to the date his salary grade is adjusted to D4."*

16. This order was granted to give effect to the agreement of the parties. It does not confer any benefit or advantage upon the Applicant beyond what he is entitled to in terms of the memorandum of agreement

17. In the result, the court finds that the Respondents have now complied with their agreement, and the court order enforcing the agreement, by making payment of the backpay in the sum of E45.479.46 - subject to refund of the over deduction of pension contributions. We also find that this over deduction was made as a result of a bona fide error.

18. The application for an order declaring the Respondent to be in contempt of court was served on the Respondents on 3<sup>rd</sup> July 2007. On 4<sup>th</sup> July 2007 Mr. Zungu requisitioned payment of the backpay, and the cheque was issued on 11<sup>th</sup> July 2007.

19. The Applicant was obliged to institute the present proceedings to enforce compliance with the Respondent's obligations in terms of the agreement made an order of court on 8<sup>th</sup> May 2007. Even when payment of the backpay was tendered, no proper breakdown was made available so that the Applicant could confirm the correctness of the calculations. As it turned out, the calculations were incorrect due to an error regarding pension deductions. In the circumstances, an order for costs against the Respondent is fully justified.

20. No order is made on the application, save that:

20.1. the Swaziland Government shall pay the costs of the application;  
and

20.2. the Applicant may reinstate the application in the event that the over deduction of pension contributions is not refunded to him within 21 days.

**PETER R. DUNSEITH**

**PRESIDENT OF THE INDUSTRIAL COURT**