

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 97/09

In the matter between:

MASIZA MAMBA

APPLICANT

And

RALEIGH FITKIN MEMORIAL HOSPITAL

1st RESPONDENT 2nd

MICHAEL MABUZA NDUMISO DLAMINI

RESPONDENT 3rd

RESPONDENT

CORAM:

NKOSINATHI NKONYANE DAN

JUDGE MEMBER

MANGO GILBERT NDZINISA

MEMBER

**FOR APPLICANT FOR
RESPONDENT**

**P. MAMBA
W. MKHATSHWA**

JUDGEMENT 19.05.09

[1] The applicant is an employee of the 1 respondent. He was first employed in 1994 as a grounds man. He stated in his papers that in June 1998 he was appointed to the position of painter/glazier when the position became vacant after the incumbent passed away.

[2] The applicant stated that he was appointed to the position of painter/glazier after he had successfully attended a course at the Swaziland College of Technology ("SCOT") in 2005. The applicant stated that in January 2009, the 1st respondent demoted him and appointed 3rd respondent to his position. He averred that this conduct by the 1st respondent was unlawful and amounted to unfair labour practice hence the present application where the applicant is claiming a relief as follows;

"1. Declaring the demotion or transfer of applicant unlawful and

therefore a nullity.

- a) Directing the 1st respondent to confirm or promote the applicant to the position of painter/glazier and that the confirmation or promotion be reduced into writing.
- b) Declaring the appointment of the 3rd respondent to the position of painter/glazier unfair labour practice or unlawful therefore a nullity.
- c) Directing the 1st respondent to adjust the applicant's salary in accordance with the position of painter/glazier within 14 days of the court order.
- d) Directing the 2nd respondent to show cause or state explicit why he failed to assign the applicant to work at the 1st respondent's undertaking or declare or state the present status of the applicant before this Honourable Court.
- e) Ordering the 1st respondent to pay costs of application at attorney and own client scale.
- f) Granting further and or / alternative relief as the court may deem appropriate."

[3] The application is opposed by the 1st respondent. The 1st respondent denied that the applicant was ever appointed to the position of painter/glazier. The 1st respondent also denied that the applicant was presently carrying out duties as a painter/glazier.

[4] The applicant did not attach his letter of appointment to the position of painter/glazier, instead he attached a name tag in which he is designated as painter/glazier.

[5] There is therefore clearly a serious dispute of facts whether the applicant was ever appointed to the position of painter/glazier and whether he did carry out any duties as such after he returned from SCOT in 2005. The disputed facts cannot be resolved on the papers. The disputed facts are however comparatively simple and are clearly defined, that is, was the applicant ever appointed to the position of painter/glazier and secondly, did he ever perform those duties after he returned from SCOT in 2005.

[6] The court has the power *ex mero motu* to order that oral evidence be led to resolve a dispute that has arisen in application proceedings:

See: **Joh - Air (Pty) Ltd v. Rudman 1980 (2)**
S.A. 420 (T)

[7] Taking into account all the foregoing observations the court will make the following order;

- g) ***Viva voce* evidence is to be led to resolve the dispute of facts whether the applicant was appointed to the position of painter/glazier and whether he did perform any duties as such.**

- h) **No order for costs is made.**

The members agree.



**NKOSphiATHI NKONYANE JUDGE OF
THE INDUSTRIAL COURT**