

**IN THE INDUSTRIAL COURT OF SWAZILAND  
HELD AT MBABANE**

**CASE NO.261/2010**

In the matter between:

**MASWATI S. DLAMINI**

**APPLICANT**

**AND**

**SWAZILAND DEVELOPMENT AND SAVINGS BANK    RESPONDENT**

**CORAM:**

**D. MAZIBUKO**

**JUDGE**

**A. M. NKAMBULE**

**MEMBER**

**M.T.E. MTETWA**

**MEMBER**

**Z.D. JELE**

**: FOR APPLICANT**

**ADV. KENNEDY**

**: FOR RESPONDENT**

**JUDGEMENT -11 FEBRUARY 2011**

*Employment Act No.5/1980 Section 26. Labour Commissioner empowered by the Act to examine changes in terms and conditions of employment contract. Commissioner's opinion decisive of the changes in the employment contract. Labour Commissioner may set aside unfavourable changes in the employment contract and restore status quo ante. Commissioner's opinion legally binding.*

1. The Applicant is Mr. Maswati Dlamini an adult male of Mbabane. The Respondent is Swaziland Development and Savings Bank, a body corporate established under the Kings-Order-In-Council No. 49/1973

with its head quarters in Mbabane. The Respondent operates business as a bank with various branches spread through out the Kingdom of Swaziland.

2. At all times material to this case the Applicant was an employee of the Respondent. The Applicant was already working for the Respondent in the year 2002. Before April 2002 the Applicant occupied the position of Financial Controller. This position was remunerated on a scale known as grade M4.

3. In April 2002 the Applicant was transferred from the position of Financial Controller to that of Operations Officer. The new position appeared to the Applicant to be lower in status than that of Financial Controller. The Respondent assured the Applicant that the transfer would not affect his grade namely M4. That meant that the Applicant would continue to be remunerated on grade M4 though working as Operations Officer. In August 2002 the Applicant took a study leave. It was the common understanding of the parties that the Applicant was pursuing a Bachelor of Commerce (B. comm.) degree.

4. While the Applicant was away on study leave the Respondent underwent a restructuring exercise. A new programme was introduced which resulted in a change in the business and reporting structure of the Respondent. Some positions were abolished while others were re-evaluated.

5. The Applicant returned from study leave after four (4) years. The Applicant had not been successful in getting the anticipated B.Comm degree or any other qualification from the university or college he had attended.

6. About the 6<sup>th</sup> December 2006, the Applicant reported to the Respondent his intention to resume work. The Applicant was appointed Operations Officer based at Mbabane Commercial Branch. This position is graded C4. The letter of appointment is attached to the replying affidavit marked **MSD 12**. The Applicant's position required him to report to the Assistant Manager as his immediate supervisor.

7. The Applicant was not pleased with the new appointment. He felt that the new grade namely C4 was less favourable than his previous grade M4. Thereafter the Applicant complained to the Respondent by letter dated 8<sup>th</sup> December 2006 about his recent appointment to grade C4. The Applicant perceived the recent appointment to grade C4 as a demotion. He desired to be restored to grade M4 which he enjoyed before the April 2002 transfer. The Applicant's letter to the Respondent is attached to the replying affidavit marked **MSD13**. The Applicant further filed a complaint with the Labour Commissioner (Commissioner) concerning the alleged demotion from grade M4 to C4. The complaint was filed in terms of section 26 of the Employment Act No. 5 of 1980 as amended (Act).

8. The Act gives the Commissioner power to examine the complaint and give his opinion. In particular, the Commissioner must indicate whether or not the changes to the employment contract introduce terms and conditions that are less favourable to the employee (Applicant) than those he previously enjoyed. If the answer is in the affirmative then the changes are declared void and of no effect by operation of law.

In May 2007 the Commissioner gave his opinion to the effect that the change in the Applicant's contract of employment from grade M4 to C4 was "**not exercised in a just and Jdir manner.**" The Commissioner noted that the Applicant had been promised that he would retain his grade M4 even though transferred from Financial Controller to Operations Officer.

9. In addition to giving his opinion aforementioned, the Commissioner went further and gave a ruling which reads thus;

*"In my opinion the Complainant's grade should be restored so that it is equivalent to that of a managerial post Should there be any unavoidable need to change the statuesque, [status quo] the Complainant should be engaged in meaningful and participatory consultations."*

The Commissioner's written report is attached to the Applicant's founding affidavit marked **MSD3**.

10. After the Commissioner had issued his opinion and ruling (annexure **MSD3**) the parties held various meetings and exchanged correspondence regarding the implementation of the Commissioner's opinion and ruling. The parties failed to reach an agreement.

11. The Applicant felt that the Respondent is refusing to comply with the Commissioner's ruling. Thereupon the Applicant filed an application in Court under Case No. 187/09 for an order *inter alia* to compel the Respondent to comply with the Commissioner's ruling. The Respondent thereupon filed a counter-claim in which she prayed for a stay of implementation of the Commissioner's ruling pending a review of that ruling. The counter-claim was dismissed on the 6<sup>th</sup> October 2009. The matter was to proceed on another day to hear the Applicant's claim.

12. While case 187/2009 awaited a date for argument, the Respondent filed her own application in Court under case no. 435/2009. The Respondent sought an order *inter alia* to set aside the opinion and ruling of the Commissioner. The Court has since delivered its judgment under case 435/2009. The application was dismissed with costs on the 3<sup>rd</sup> November 2010.

The dismissal of the Respondent's application under case no. 435/2009 meant that the opinion and the ruling of the Commissioner subsists.

13. On the 31<sup>st</sup> May 2010, the Respondent dismissed the Applicant from work on the grounds of redundancy. The dismissal was communicated to the Applicant by letter dated 31<sup>st</sup> May 2010 annexed to the founding affidavit marked **MSD 10**. The dismissal has resulted in the Applicant moving the present application before Court under case no. 261/2010 on an urgent basis. The Applicant has asked for an order as follows;

- (1) *'That non compliance with the rules of the above Honourable Court with relation to the launching of applications and the non compliance with the rules of the above Honourable Court as well as procedures, be condoned and that this application be heard on an urgent basis.*
- (2) *That an order be and is hereby issued declaring the Applicant's purported dismissal and/ or retrenchment as being unlawful, invalid and void ab initio.*
- (3). *Alternatively to prayer 2 above, that the Respondent be and is hereby interdicted from terminating the services of the Applicant on the grounds of redundancy pending finalisation of the two applications currently pending before the Industrial Court under case No. 187/2009 and case No. 435/2009.*
- (4) *That the Respondent be directed to comply with the ruling of the Industrial Court of Swaziland handed down on the 5<sup>th</sup> October 2009, including payment of the arrear salary with effect from 5<sup>th</sup> December 2006.*

- (5) *Alternatively and in the event that the Honourable Court is unable to grant prayers 2 and 3 above, directing that the Respondent pays the Applicant's terminal benefits in accordance with the Order of Court dated 5<sup>th</sup> October 2009 by computing such terminal benefits on the scale of grade D2.*
- (6) *Costs of suit on the scale as between attorney and own client.*
- (7) *Further and /or alternative relief.*

14. The application is opposed. The Respondent has raised points of law and has further pleaded over on the merits. The Court is satisfied that there is some element of urgency in this matter and proceeded to hear the matter as such.

15. The gist of the Applicant's argument is that he is not redundant. He therefore cannot be dismissed for being redundant. The Respondent has declared a fictitious redundancy in order to avoid implementing the Commissioner's ruling and opinion as contained in annexure **MSD 3**.

16. The Commissioner's opinion was that the change of the Applicant's grade from M4 to C4, "*was not exercised in a just and fair manner.*" The effect of the Commissioner's opinion and ruling meant that the status quo ante should be restored. That practically meant that the Respondent should re-instate the Applicant's former grade M4 or its equivalent in terms of the new grading structure. It is common cause

that due to job evaluation exercise the grades have changed. According to the Applicant grade M4 in the previous structure is equivalent to the current D2. Instead of paying on grade D2 the Respondent has declared the Applicant redundant in order to avoid complying with the ruling and opinion.

17. The Applicant states further that the position of Financial Controller has been abolished by the Respondent. Instead the Respondent has established a new position being that of Manager Finance. The duties and responsibilities of these two (2) positions are the same.

It is only the job title that has changed. The Applicant feels that he is fit to perform the function of Manager Finance. There is therefore no reason for the Respondent to deny him that position. Under normal circumstances he should have been re-instated in the position of Financial Controller. That position has since been abolished and replaced by that of Manager Finance.

18. The Applicant denies that he is redundant. He argues that he made himself available for the position of Manager Finance. The position of Manager Finance carries a managerial grade. The Respondent therefore had an opportunity to comply with the Commissioner's opinion and ruling by appointing the Applicant into the position of Manager Finance.



19. As an alternative, the Applicant avers that the Respondent could have temporarily placed him in the Manager Finance position pending availability of a suitable position. When a suitable position becomes available the Applicant could be transferred to that position and continue to be paid on a managerial grade. That proposition was also in compliance with the Commissioner's opinion and ruling.

20. A second alternative according to the Applicant was for the Respondent to deploy the Applicant in a suitable yet junior position but pay him at a managerial scale pending availability of a position in the managerial cadre. Upon the availability of a vacancy the Applicant would then be appointed into that position.

21. On the contrary, the Respondent denies that the position of the Manager Finance is the same as that of Financial Controller. The job content is not the same. The position of Manager Finance requires a degree in accounting plus relevant post qualification experience. The nature of the work as Manager Finance requires training and experience at a level much higher than that of the position of Financial Controller. The Applicant does not meet this requirement. The Applicant therefore fails to qualify for the position of the Manager Finance. The Respondent denies that the Applicant is fit to serve as Manager Finance even on a temporary basis.

22. The Respondent argues further that they invited the Applicant to apply for the post of Manager Finance but he declined. By his conduct

the Applicant denied the Respondent the opportunity even to consider the Applicant for the position of Manager Finance.

23. The Respondent argues that the Commissioner's opinion does not require the Respondent to appoint the Applicant in a position in which the Applicant does not qualify. Furthermore, the Commissioner's opinion and the legal effect thereof, does not re-instate the Applicant to the position of Financial Controller. That position was abolished long before the Commissioner's ruling and opinion were made. This fact was brought to the Commissioner's attention at the time of the hearing. As a consequence of that, the status quo ante regarding the position of Financial Controller is impossible to restore. It is for that reason that the Commissioner in his ruling does not mention that the Applicant should be restored to the position of Financial Controller.

24. Instead the Commissioner's ruling confined itself to a managerial grade. It left the matter in the hands of parties to negotiate and agree on a suitable position for the Applicant. The Commissioner left the door open for the parties to engage in a meaningful and participatory consultation should they encounter difficulty when implementing the ruling.

25. The Respondent argues further that the Applicant's submission is self contradictory. The Applicant appears to suggest that he was prepared to accept an appointment into a junior position provided he was paid at a managerial scale. However, when that opportunity came

the Applicant turned it down. The Applicant states the following in paragraph 44.2 of his replying affidavit;

*"However, since the ruling of the Commissioner spoke to an appointment into the managerial grade, the proper course for the Respondent was to place me in a position that was suitable even if it was not a managerial position, as long as I was remunerated on the managerial grade on a personal to holder basis, until such time that a position could be found."*

26. The Respondent argued further that the Applicant was deployed in the position of Operations Officer which was a suitable position and was paid a salary at a managerial grade. It was the Applicant who refused the position of Operations Officer. The Respondent states as follows in paragraph 21 of its affidavit;

*"I must stress that the bank was willing to keep Applicant in the position of Operations Officer, however he approached the court for compliance with the Labour Commissioner's opinion"*

27. According to the Respondent the position of Financial Controller was paid at the same remuneration as that of Operations Officer. In Paragraph 47.4 of the answering affidavit the Respondent states as follows;

*"...the transfer from Financial Controller to Operation's Officer had not resulted in any decrease of the Applicant's remuneration".*

28. The Applicant denies that the remuneration payable under grade C4 is equal to that payable in grade M4 of the previous structure. According to the Applicant the previous grade M4 is equivalent to the current D2.

29. According to the Applicant a restoration of his grade as directed by the Commissioner meant that he should be paid a salary and benefits at the grade which he enjoyed before he was demoted namely M4. The Applicant has according to his analysis, concluded that the previous grade M4 is equal to the current grade D2.

30. The position of Operations Officer is payable at grade C4. The Applicant has concluded that as Operations Officer he was offered a grade that is lower than that which he is entitled to. The Applicant submits further that the Commissioner's ruling has not been complied with. The Applicant accordingly challenges the redundancy as being irregular. It is intended to circumvent the ruling of the Commissioner and an order of the Industrial Court dated 5<sup>th</sup> October 2009 issued under case No. 187/2009. The Industrial Court gave the following order which the Applicant introduced as annexure **MSD 1** in the founding affidavit;

*"1 That the Application staying and/or suspending the implementation or operation of the Labour Commissioner's opinion is hereby dismissed.*

2. *Directing that the Respondent complies with the Opinion/Ruling of the Labour Commissioner made in terms of Section 26 (3) of the Employment Act of 1980 with effect from the 28<sup>th</sup> May 2007.*

3. *Directing that the Respondent pay the costs of the counter application."*

31. The Respondent denies that the redundancy is irregular and intended to circumvent the Commissioner's ruling and the Order of Court. The Respondent states that available alternative positions were proposed to the Applicant. The Respondent's intention in so doing was to implement the ruling. The positions are listed in paragraph 35 below. The Applicant turned down that proposal. The Applicant allegedly insisted on the position of the Manager Finance. At paragraph 75.8 of the answering affidavit the Respondent states as follows:

*"All of these alternatives were discussed with the Applicant and it became clear that there was no position available in the Banking Institution which the Applicant was willing to accept except that of Finance Manager which he declined to apply for and in any event did not qualify for."*

32. The Respondent states further that at an earlier consultation with the Applicant the Respondent had suggested that the Applicant be deployed at Piggs Peak branch where there was a vacancy. That suggestion was rejected by the Applicant by letter dated 4<sup>th</sup> February 2008. The letter is attached to the Applicant's founding Affidavit marked **MSD4**. In annexure **MSD4** the Applicant states as follows:

*"You are well aware of my traditional appointment as Acting Chief of Velezizweni which is in the Manzini Region and it is my respectful submission that an appointment to Piggs Peak would hamper my ability to discharge my traditional duties. For this reason, I request that this appointment be reversed."*

33. The Applicant complained further that the Respondent failed to do a proper consultation before she could conclude that the Applicant is redundant. The consultation that took place was flawed in that it was based on a misunderstanding of the Commissioner's ruling. The Commissioner did not rule that the Applicant be restored to the position of financial Controller. Instead the Commissioner ruled that the Applicant's grade should be restored in order that it be equivalent to that of a managerial post.

The Respondent avers that all its efforts to accommodate the Applicant at work failed. The redundancy was unavoidable. The Applicant insisted on a managerial position yet he did not have the requisite qualification. The Applicant refused to accept

appointment in any of the alternative positions that were available. Various consultations were held on the matter. In the year 2010 the parties met on three (3) occasions specifically to discuss the implementation of the ruling.

35. By letter dated 16<sup>th</sup> March 2010 the Respondent invited the Applicant to a consultative meeting scheduled for the 25<sup>th</sup> March 2010. The meeting proceeded as scheduled. The Applicant was given a list of eight (8) positions which were vacant as at the 12<sup>th</sup> April 2010 together with their requirements regarding qualification and experience. Annexure **SB5** contains positions that were vacant as at the 12<sup>th</sup> April 2010 which are listed below;

<b>"Title</b>	<b>Requirements</b>
1. Driver - Head Office	<ul style="list-style-type: none"><li>- GCEO'level education</li><li>- Valid drivers license (at least 3 years old)</li><li>- At least 3 years driving experience in South Africa and neighbouring countries</li><li>- Ability to communicate in English.</li></ul>
2. Clearing Clerk - OPC	<ul style="list-style-type: none"><li>- GCE O'level/IGCSE</li><li>- Tertiary qualification at Degree level in a business studies major</li><li>- A valid light duty drivers license</li><li>- Computer literacy basic Level.</li></ul>
3. - Capturing Clerk	<ul style="list-style-type: none"><li>- GCE O'level/IGCSE</li></ul>

- Tertiary qualification at Degree level in business studies major. Computer literacy-basic level
4. Loan Reviews Clerk - Nhlangano - GCE O'level/IGCSE  
Tertiary qualification at Degree level in a business studies major. Basic knowledge of Globus/Banking system in operation. Computer literacy basic level i.e Word, Excel, email
- LLB degree  
Admitted attorney in the High Court of Swaziland At least 5 years practice as an attorney or presiding officer; At least 5 years relevant experience
7. Training & Development Officer - GCE O'level /IGCSE  
Secretarial studies qualification Intermediate level knowledge of Ms Word, excel and Power Point  
Bachelor's degree in Human Resources Management /Development or equivalent qualification At least 3 years relevant experience Banking Operations experience an added advantage.
8. Manager Finance - Bachelor's degree in Accounting or an equivalent qualification;  
Completed articles with a professional accounting firm will stand as an added advantage,  
Chartered Accountant designation will stand as an added advantage; At least 3



years experience in a management reporting function; Good working knowledge of globus; Advanced knowledge in Ms Excel and Intermediate knowledge in Ms Word; Excellent analytical skills with a high orientation for detail; "

36. About six (6) of the vacant positions required a degree as a minimum entry qualification. The Applicant does not have a degree. The Applicant therefore did not qualify for any of the six (6) vacant positions aforementioned.
37. About two (2) of the vacant positions required a general certificate in education - ordinary level training (O'level). The Applicant has the required ordinary level training (O'level). The Applicant however was not interested in any of these positions.
38. The Respondent states further that the Applicant was interested only in the Manager Finance position. The Applicant was invited to apply so that he may also be considered though he does not have the required qualification. The Applicant refused to apply. The Applicant argued that if he were to apply he would forgo his right in terms of the Commissioner's ruling.
- The Respondent avers that they failed to find a suitable position for the Applicant within their business structure. This was due to the Applicant's conduct. The Applicant insisted on the position of Manager Finance. The Applicant did not qualify for that position. The Applicant refused other proposals which the Respondent made available so that the Applicant can have work. The

Commissioner's ruling could not be implemented because the parties could not agree on a suitable position. When all the proposals to implement the ruling failed redundancy became imminent. As a result the Respondent commenced negotiations with the Applicant to find ways to avoid redundancy.

40. According to the Respondent they had notified the Applicant at a meeting of the 25<sup>th</sup> March 2010 that if the parties fail to agree on a suitable position for the Applicant, he (Applicant) would face retrenchment. The Respondent states as follows in paragraph 33 of its affidavit.

*"I specifically informed Mr. Dlamini the purpose of the consultation was to try to find Applicant suitable employment within the Bank but that if all else failed, he would face retrenchment."*

The possibility of redundancy was mentioned in the Respondent's letter to the Applicant dated 16<sup>th</sup> March 2010. That letter is attached to Respondent's affidavit marked **SB3**.

41. Further consultations between the parties took place on the 15<sup>th</sup> April 2010 and in May 2010. The parties failed to reach an agreement on the implementation of the ruling. Further, they failed to find means to avert the redundancy. As a result, on the

31<sup>st</sup> May 2010 the Respondent terminated the Applicant's contract of employment on the basis of redundancy.

42. The matter before Court hinges on the understanding, interpretation and implementation of the Commissioner's opinion and ruling. The parties clearly differ on the interpretation of the ruling.

43. It is common cause that in April 2002 the Respondent (as employer) changed the Applicant's position at work from Financial Controller to Operations Officer. The Commissioner examined the effect of the change in accordance with the powers given him under section 26 (3) of the Act. The Commissioner concluded that the change has introduced new terms and conditions that are less favorable to the Applicant than previously enjoyed by the Applicant in the position of Financial Controller.

44. In particular, the Commissioner noted that the position of Financial Controller was on grade M4. The position of Operations Officer is on grade C4. The Commissioner concluded that grade C4 has less advantages than M4.

Further the Commissioner concluded that the changes in the Applicant's position at work were done in a manner which is not just and fair. A relevant portion of the Commissioner's report reads as follows:

*"In my view the prerogative to move the Complainant to a grade that is now less in status than the one he occupied and promised to retain was not exercised in a just and fair manner."*

The Commissioner has therefore concluded that grade C4 is not equal to grade M4 as it contains less benefits than C4.

45. In terms of section 26 (3) of the Act the opinion of the Commissioner as stated above renders the change in the Applicant's employment contract void and of no effect. The opinion of the Commissioner given in terms of section 26 (3) of the Act is legally binding on the parties. Under the normal circumstances the Applicant should have reverted to Financial Controller. The difficulty which the Commissioner and the parties encountered was that the position of Financial Controller had since been abolished. A job evaluation exercise which took place at the Respondent's workplace abolished some positions and created new ones. The position of Financial Controller was among those positions that were abolished. It was therefore not possible for the Applicant to return to the position of Financial Controller.

46. In order to address the difficulty which had presented itself, the Commissioner extended his opinion in the form of a ruling which can be paraphrased as follows:

(a) The Applicant's grade should be restored so that it is equivalent to that of a managerial post.

(b) Should there be any unavoidable need to change the status quo the Applicant should be engaged in meaningful and participatory consultation.

47. The legal consequence of the Commissioner's opinion (annexure **MSD 3**) is to restore the Applicant's previous grade M4. The Commissioner's ruling also confirms this legal position. That means that with effect from May 2007 the Applicant's salary and benefits should be paid on the scale of grade M4. The Court has noted that the Respondent has not succeeded in challenging the Commissioner's ruling and opinion.

48. The Court has noted further that in his ruling the Commissioner regulated only the Applicant's salary grade but not the position at work. The Commissioner did not state in which position should the Applicant work. The Commissioner restored only the grade M4 but not the previous position (Financial Controller). The Commissioner could not restore the Applicant to a non-existing position as aforementioned. This fact was brought to the attention of the Commissioner. This explains the reason the Commissioner included the latter part of his ruling.

49. The appointment of the Applicant in the position of Operations Officer (annexure **MSD 12**) was declared void and of no effect by operation of law in terms of section 26 (3) of the Act. This event took place in May 2007 when the Commissioner's ruling was delivered. That meant that with effect from May 2007 the Applicant was no longer Operations Officer. At the same time the Applicant could not revert to the position of Financial Controller because it no longer existed. That position was abolished in the restructuring and job evaluation exercise that took place at the Respondent's undertaking prior to May 2007. Immediately after the Commissioner's ruling in May 2007, the Applicant was neither Operations Officer nor Financial Controller. The Applicant had a grade (M4) without a position.

50. The parties found themselves in an unavoidable need to change the status quo. The Commissioner had foresight of the anomaly that eventually presented itself to the parties. The Commissioner left the door open to the parties to engage in a meaningful and participatory consultation should they find an unavoidable need to change the status quo. The parties therefore had to consult each other and come to an agreement regarding a suitable position for the Applicant to work, in which the Applicant would carry his previous grade M4.

51. Several options were explored to find a new position for the Applicant but the parties failed to reach consensus. The Applicant had an interest in the position of Manager Finance, but he did not have the qualification and experience required for the position.

50. The Applicant states that he was prepared to accept a suitable position provided he carried with him grade M4. About three (3) consultative meetings were held by the parties between the period 25<sup>th</sup> March 2010 and May 2010. The purpose of those meetings was mainly to identify a suitable position for the Applicant. The parties went through a list of about eight (8) vacant positions that were available. A list of those positions appears in annexure **SB5** which is reproduced in paragraph 35 above. The parties failed to reach an agreement. That means that the parties failed to identify and agree on a suitable position for the Applicant to work in.

53. The question that needs to be answered is whether the Respondent has complied with the Commissioner's opinion and ruling or not. By order dated 5<sup>th</sup> October 2009 (annexure **MSD 1**) the Court affirmed the obligation on the Respondent to comply. The onus is therefore on the Respondent to prove compliance with the ruling and the Court Order.

54. The position of Manager Finance is admittedly at a managerial grade. There is no evidence as to what was the grade of each of the remaining vacant positions that were offered to the Applicant by the Respondent.

55. In terms of the Commissioner's opinion the Respondent was to restore the Applicant's grade namely M4. The Respondent therefore

had a legal duty to consult with the Applicant on a suitable position which was remunerated at grade M4 or its equivalent in the current grading structure.

56. The Applicant was entitled to refuse an offer of a vacant position which was remunerated below grade M4. The Respondent has therefore failed to show in her affidavit that she offered the Applicant alternative positions as contained in annexure **SB5** together with a grade M4 remuneration. The Respondent is silent regarding the grade or grades at which she offered each of the positions in annexure **SB5**. An offer of a position to the Applicant without a corresponding remuneration grade is incomplete. The Applicant was entitled to refuse an incomplete offer.

57. The Court is not satisfied that a full consultation between the parties on a suitable position for the Applicant failed. The Court is of the view that a proper consultation has not taken place yet. A proper consultation should involve a full disclosure on the Respondent's part of the remuneration payable in each of the vacant positions to be considered.

58. In the absence of a proper consultation, the Respondent cannot declare the Applicant redundant. There is a possibility that the Applicant can accept one of the listed vacant positions for which the Applicant qualifies provided it is offered on grade M4. The Court is not



satisfied that the Applicant is redundant. The information on which the redundancy allegation is based is inconclusive.

59. The Court is inclined to grant prayer 2 of the Notice of Motion with some qualification. The Court agrees that the letter of dismissal (annexure **MSD 10**) should be set aside. The parties should be given a chance to consult further on the implementation of the Commissioner's opinion and ruling as aforementioned. Prayer 3 is alternative to prayer 2. There will be no order in prayer 3.

60. In prayer 4 the Applicant has asked that inter alia the Respondent be directed to comply with a ruling of the Court dated 5<sup>th</sup> October 2009. The ruling of the Court dated 5<sup>th</sup> October 2009 (annexure **MSD 1**) does not introduce a new obligation on the Respondent. The order simply affirms that the Respondent should comply with the Commissioner's ruling as contained in annexure **MSD 3**. That obligation has already been dealt with in the preceding paragraphs. There will be no order regarding this prayer.

61. The Applicant further claims payment of arrear salary with effect from 5<sup>th</sup> December 2006. In both the founding and replying affidavits the Applicant has failed to show how he calculates the alleged arrear salary. Furthermore, the Applicant has failed to disclose how much does he allege is owed to him for arrear salary. There is no evidence before Court to support the claim for arrear salary. The claim for arrear

salary should be brought to Court by way of a trial as opposed to an urgent application

62. Prayer 5 is alternative to prayer 2 and 3. Since prayer 2 has been dealt with there will be no order regarding prayer 5.

63. In prayer 6 the Applicant has asked for costs. The Applicant is to some extent successful in getting prayer 2 granted albeit with some qualification. On the other hand the Respondent is to some extent successful in defending prayer 4. It is in the interest of justice that each party pay his/her costs.

64. For the reasons stated above the Court makes the following order;

(a) The letter of dismissal dated 31<sup>st</sup> May 2010 (annexure **MSD 10**) is hereby set aside.

(b) The Respondent is ordered to take the necessary steps to implement the Commissioner's ruling (annexure **MSD 3**) within 30 court days from the date of this judgment. In the event that the parties fail to agree on a suitable position for the Applicant within the time limit stipulated, either party may take the necessary legal steps available. The time limit imposed in this order may be extended by Court at the request of either of the parties.

(c) No order is granted regarding prayers 3, 4, and 5 of the notice of motion.

(d) Each party is to pay his/her costs.

The Members agree.

**D. MAZIBUKO**  
**INDUSTRIAL COURT JUDGE**

**D. MAZIBUKO**

**INDUSTRIAL COURT JUDGE**