



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGEMENT

CASE NO. 114/2014

In the matter between:-

**SANDILE C. MAHLALELA
NTOMBIKAYISE MBULI
SIBONGILE MALINDZISA
MESHACK VILAKATI
SIPHO MABUZA
LINDIWE M. MANZINI
ISAAC C. GAMA
VIRGINIA MABUZA**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT**

and

**THE MINISTRY OF JUSTICE &
CONSTITUTIONAL AFFAIRS**

1ST RESPONDENT

**THE MINISTRY OF PUBLIC SERVICE
& INFORMATION**

2ND RESPONDENT

THE CIVIL SERVICE COMMISSION

3RD RESPONDENT

**THE PRINCIPAL SECRETARY
MINISTRY OF NATURAL RESOURCES**

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

Neutral citation : *Sandile C. Mahlalela & 7 Others v Ministry of Justice & Constitutional Affairs and Others (114/2014) [2015] SZIC 11 (19 March 2015)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heard : **21 NOVEMBER 2014**

Delivered : **19 MARCH 2015**

*Summary: Labour Relations – Applicants seeking order compelling Respondents to comply with agreement of the parties. **Held:** Evidence before the Court indicating that Respondents have already complied with the agreement of the parties. Applicants’ prayer in this regard therefore overtaken by events. **Held:** Parties though ordered to engage with one another with a view of negotiating the period and amount, if any, due to those of the Applicants whose positions attracted a positive change in their grade level.*

1. In March of the year 2013, the 8 Applicants to this present application approached this Court by way of Notice of Motion principally for an order as follows;

➤ *Directing and ordering the Respondents to comply with the Memorandum of Agreement dated the 5th November 2008 made an Order within a period of thirty (30) days or such other reasonable period as this Honourable Court may deem appropriate. (Sic).*

2. In the alternative, the Applicants’ prayers are as follows;

- *Directing and ordering the Respondents to consult, grade and categorise the staff at the Deeds Office using the Schemes of Services as established by the Ministry of Public Service.*

- *Directing and ordering the removal of category 'B' from the Examiner of Deeds and category same as category 'C' as they perform technical work.*
(Sic)
- *Directing and ordering the Respondents to remove category 'D' at the Deeds Office and re-categorising the Assistant Registrar to category 'E'.*
- *Directing the Respondents to pay the Applicants their backpay which they are entitled in terms of Circular No. 1/2001 and the law.*
- *Ordering the Respondents to pay costs of this application.*
- *Granting such further and/or alternative relief as this Court may deem fit.*
(Sic).

3. The case of the Applicants is founded on the affidavit of Sandile Mahlalela. He states that he and the rest of his colleagues are employees of the Swaziland Government under the Registrar of Deeds as Deeds Examiners and Assistant Registrars. According to Mahlalela, the Applicants were previously under the Ministry of Justice but were later to be transferred to the Ministry of Natural Resources and Energy. Apparently in 2004 the Swaziland Government commenced a salary restructuring exercise concerning all its employees in all Ministries and/or departments.

4. On completion of this exercise there was apparently discontentment amongst the rank and file of the Applicants. They felt disadvantaged by the whole exercise. The Applicants contend that in categorising them, those that were classified as Examiner of Deeds II were disadvantaged in that some of the support staff in their department, these being Clerical Officers and Typist, were remunerated on a scale similar to theirs and in some instances even higher. The discontentment of the Applicants in this regard emanates from the fact that they consider their positions to be technical coupled with the other fact that they play a supervisory role to the support staff. Another complaint in relation to the restructuring exercise relates to the office of Examiner of Deeds I. The complaint here being that the disadvantage arising from the improper categorization of Examiner of Deeds II inevitably extends to Examiner of Deeds I by virtue of being the next in line. The Senior Examiners of Deeds, Registrar of Deeds and Assistant Registrars were apparently not spared from the disadvantageous categorization.

5. Subsequent to this, the Applicants raised a dispute with the Respondents. The dispute went through the formal structures of Government but remained unresolved. A third party was then engaged by the Applicants in a bid to have their concern resolved through the conciliation process under the

auspices of the Conciliation, Mediation and Arbitration Commission (CMAC). At CMAC the parties were able to reach an agreement after conciliation. This agreement was reduced into writing and further endorsed by both parties as resolving their dispute. This was in November 2008. About two and a half years later, in May of 2011 to be precise, the agreement of the parties was made an Order of this Court, per Mazibuko J, in his capacity as the acting Judge President at the time.

6. Despite the agreement of the parties, so the Applicants contend, the Respondents failed, despite numerous requests from the employees of the Deeds office, to comply with the settlement agreement, hence the present application. Attorney Lukhele on behalf of the Applicants pointed out that his clients were principally before Court seeking to achieve 3 objectives, these being; *a) to compel the Respondents to comply with the settlement agreement that was made at CMAC and subsequently made an order of this Court, b) to compel the Respondents to negotiate the Applicants' back pay and c) to address the concerns of the 5th to the 8th Applicants – these Applicants complain that the differences of their remuneration is so drastic whereas the Registrar and Assistant Registrars perform similar functions and duties.*

7. The application of the Applicants is opposed by the Respondents. In opposition thereto, the Principal Secretary in the Ministry of Public Service, Evert Madlopha, has filed the requisite affidavit in answer to the Applicants' founding and supporting affidavits. He starts off by denying that the Swaziland Government has not complied with the CMAC agreement, which was subsequently endorsed as an order of this Court. He points out that in terms of this agreement of the parties, the obligation on the Government of Swaziland is to develop schemes of service for the Deeds Registry cadre in collaboration with all the officers of that department. This exercise was to also include a review of the organisational structure of that department. Madlopha submits that the schemes of service of the Deeds Registry office were developed jointly with officers of that department, the present Applicants. As proof of this fact he referred the Court to annexure 'SM6' – a document titled 'DEEDS REGISTRY SCHEME OF SERVICE'. Further to this, Madlopha further contends, the Ministry of Public Service undertook a review of the organisational structure of the Deeds Registry at the behest of the present Applicants for a re-grading based on an expanded scope of work.
8. This organisational review was intended to give effect to the same schemes of service he refers to above. And it resulted in the issuance of Circular No.3

of 2013. Madlopha goes on to clarify that the positions of Examiners of Deeds I and II have been merged resulting in a new job title of Examiner of Deeds, with an improved grade level of C3 whereas previously they were on grades B2 and B3 respectively. He submits as well that Senior Examiners of Deeds have also been upgraded from grade B5 to C4. In support of these assertions above, Madlopha referred the Court to annexure 'EM1' which is a copy of establishment Circular No.3 of 2013

9. Further, the Principal Secretary goes on to state that the alternative prayer 2 in the Applicants' Notice of Motion is now of no practical significance because there has now been a review of the whole organisational structure at the Deeds Registry Office. And in respect of alternative prayer 3, he contends that it is now academic since the position of Examiner of Deeds has been re-categorised to grade C.
10. In respect of the position of Assistant Registrar of Deeds, Madlopha contends that they were not wrongly graded in the 'D' category. He explains that this position is in the managerial category whereas the 'E' category is a professional one. In considering the category of this position, by determining

its job description and evaluation, it was found that it was managerial in nature as opposed to professional hence the 'D' categorisation.

11. In relation to the claim of the Applicants for back-pay, Madlopha denies that they are entitled to any such back-pay in terms of Establishment Circular No.1 of 2007. He points out that Circular No.1 of 2007 concerned the implementation of the KPMG Consultancy Report on the Job Evaluation Appeals process. He states that since the Applicants were not re-graded by the KPMG Consultancy Report, Circular No.1 of 2007 is therefore not applicable to them. He further clarifies that the 1st to 6th Applicants were re-graded in consequence of an organisational review of the Deeds Registry Office. This in effect means that their situation is regulated by Establishment Circular No.3 of 2013, whose effective date is the beginning of June 2013, and that this 2013 Circular takes precedence over all circulars on the grades structure.

12. In their replies, the Applicants, through Sandile Mahlalela, confirm the Swaziland Government's compliance with the parties' agreement in respect of developing schemes of service for the Deeds Registry cadre. Mahlalela though points out that that such compliance was only after they had lodged

this present application in this Court. He also confirms that the organisational review at the Deeds Registry department resulted in the issuance of Establishment Circular No.3 of 2013. In relation to the Assistant Registrars though, the Applicants still complain that their position remains unchanged as the review exercise did not result in the betterment of their status since they are still on grade 'D'.

13. As a starting point and in respect of the main prayer in the Applicants' Notice of Motion, the Court notes that this prayer has now been overtaken by events. Indeed the Swaziland Government has complied with the memorandum of agreement of the parties in so far as the development of the schemes of service of the Deeds Registry is concerned. Further to that, there was an organisational review of this department. This was done through Circular No.3 of 2013, which was published in the month of May in the same year. Even though their agreement had a time frame within which this exercise had to be accomplished, the parties failed to adhere to it. The Court notes though that the parties inserted a rider to the time frame, this being the phrase that '*everything being equal*'. This phrase means that the parties had intended to have completed this exercise by January 2009, should there be no complications and/or hindrances. The Court assumes that there were

hindrances which prevented the parties from adhering to the deadline they had set, hence the exercise was only completed in May of 2013, four and a half years after signing their agreement of settlement.

14. There is then the issue of back-pay. The agreement of the parties in this regard is that back-pay shall be negotiated between the parties. It would seem the parties though have not met to negotiate such payment of back-pay, if any. The Applicants contend that the back-pay is to be negotiated from the year 2004. For this contention they rely on paragraph 6 of Circular No.1 of 2007. The Respondents though in their arguments *contra* forcefully argue that the import of this paragraph 6 in Circular NO.1 of 2007 is that the right to back-pay is reserved for those employees whose positive change in grade level was brought about by this 2007 Circular. In the Applicants' case, the positive change to their grade level was not as a result of the 2007 Circular, but the 2013 Circular.

15. Indeed there is credence in the Respondents' contention that the issue of back-pay cannot be regulated by paragraph 6 of the 2007 Circular. Paragraph 6 of Circular No1 of 2007 provides as follows;

‘No Officer will be deprived of an advantage to which he/she is entitled, nor will any Officer be allowed to gain an advantage to which he/she is not entitled as a result of an unintentional mistake, whether the mistake transpires in this circular or in the process of its implementation’ (Court’s underlining and emphasis).

16. The finding of the Court in relation to the above quoted provision in the 2007 Circular is this: that it was meant not to deprive Officers of advantages, to which they were entitled, as a result of mistakes in the Circular itself or in the ultimate process of its implementation. For all intents and purposes, the Circular being referred to is Circular No.1 of 2007 and none other. It is further a finding of this Court that it would therefore have been an anomaly for the parties to have intended that the issue of back-pay be regulated by the 2007 Circular. The Court makes this finding based on the fact that the Applicants were not re-graded by the KPMG consultancy report, as such it cannot be said that they have been deprived of an advantage as a result of an unintentional mistake in Circular N0.1 of 2007 or in the process of its implementation.

17. Having said this, the Court cannot, nonetheless, ignore the fact that the intention of the parties was to settle their dispute by agreeing that schemes of service for the entire Deeds Registry Office be developed. This in turn was to inform the grading structure of the cadre. Over and above that, the parties were alive to the fact that the re-grading of the cadre might bring about positive changes to some of the employees' grade levels. The finding of the Court in this respect therefore is that the intention of the parties was that where there was a positive change in the grading, the payment of back-pay was to be negotiable. The word '*negotiable*' according to the ninth edition of the Concise Oxford Dictionary means '*open to discussion or modification...able to be negotiated.*' And to negotiate means '*to confer with others in order to reach a compromise or agreement.*' Effectively therefore, according to the agreement of the parties, on the issue of back-pay, the parties are supposed to consult with each other with the aim of reaching a consensus on whether there is any such back-pay accruing to the employees with a positive change to their grade and such amount payable, if any. They are to also confer on the period to which such back-pay is to be backdated. In this regard both parties should be open to persuasion through compromise. Both should give some ground for the negotiation to yield positive results.

18. The last issue is that of the Assistant Registrars of Deeds. They want to be removed from current grade they have been categorised in, grade D, and re-categorised to grade E. Attorney Vilakati for the Respondents argued, correctly in the Court's view, that the Applicants in respect of this issue are not seeking to enforce an existing right but rather seek to enforce an interest they have in being graded in category E. The Court points out that the difference between a dispute of right and one of interest is this: '*...disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest concern the creation of fresh rights such as higher wages (or a higher/better grade)...*' (Court's addition) **(Rycroft & Jordaan 'A Guide to SA Labour Law, Juta 1992 at page 169)**

19. The finding of the Court in this regard therefore is that the 7th and 8th Applicants, Isaac Gama and Virginia Mabuza, are seeking to enforce a dispute of interest through adjudication, which they cannot do. Adjudication is normally regarded as an appropriate method of resolving disputes of right. Their dispute, one of interest, can best be resolved through collective bargaining, mediation and as a last resort, peaceful industrial action. (See

HOSPERSA & Another v Northern Cape Provincial Administration
(2000) 21 ILJ 1066 at 1070 per Mogoeng AJA as he then was).

20. The Court therefore fully agrees with the Respondents' representative that it is institutionally incompetent to order the re-grading of Applicants Isaac Gama and Virginia Mabuza from grade D to E. Sitting here we are not experts in management. As such we cannot be seen to be telling the Respondents how to categorise and grade posts in the civil service where there are no allegations of unreasonableness and irrationality in the process complained of. That is the prerogative of the Government as Employer. And in this matter before us, the Employer states that it engaged consultants to do an organisational review of the Applicants' cadre and the finding was that the duties Assistant Registrars and Senior Assistants of Deeds are managerial in nature, not professional, hence the grade D categorisation. The Applicants therefore have failed to make out a case for this Court to intervene in their favour in this respect.

21. In ***Dumisa Zwane v Ezulwini Town Board and 2 Others, Unreported Case No. 40/2014*** this Court had this to say;

‘It is a well known fact that there are various laws imposing all kinds of burdens and obligations upon employers in relation to their employees. And yet as a rule, this Court has always, and consistently so, upheld the employers’ inherent prerogative to regulate their workplace. Under the doctrine of management prerogative every employer has the inherent right to regulate, according to their own discretion and judgement, all aspects of employment relating to employees’ work, including hiring, work assignments, working methods, time, place and manner of work, supervision, transfer of employees, lay-off of employees, discipline and dismissal of employees.[This would also include the categorisation and grading of posts in that particular undertaking]. The only limitations to the exercise of prerogative by employers are those imposed by labour laws and the principles of equity and substantial (natural) justice. (Court’s addition).

22. Taking into account the circumstances of this case, coupled with all the evidence and submissions of Counsel, the Court accordingly makes the following orders;

a) Prayer 1 and alternative prayers 2 and 3 of the Applicants’ Notice of Motion be and are hereby dismissed as having been overtaken by events.

b) Alternative prayer 4 be and is hereby dismissed.

c) In respect of alternative prayer 5, the parties are hereby ordered to engage each other with a view of jointly negotiating the period and the amount due in respect of back-pay due, if any, to those of the Applicants whose positions attracted a positive change in their grade level.

d) No order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 19th DAY OF MARCH 2015.

For the Applicant : Attorney A. Lukhele (Dunseith Attorneys)

For the Respondent : Attorney M. Vilakati with K. Nxumalo (Attorney General's Chambers)