

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO: 492/2014**

In the matter between:

**DUMSANI NKAMBULE**

**APPLICANT**

And

**THE PRINCIPAL SECRETARY, MINISTRY OF  
AGRICULTURE AND COOPERATIVES**

**1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN OF THE CIVIL SERVICE  
COMMISSION**

**2<sup>ND</sup> RESPONDENT**

**THE ACCOUNTANT GENERAL**

**3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

Neutral citation : Dumsani Nkambule v The Principal Secretary, Ministry  
of Agriculture and Cooperatives and 3 Others (492/2014)  
[2017] SZIC 123

**CORAM**

**SIPHO L. MADZINANE : ACTING JUDGE**  
**DAN P. MMANGO : MEMBER**  
**ARTHUR S. NTIWANE : MEMBER**

DATE HEARD : 25/10/2017

DELIVERED : 01/11/2017

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**J U D G E M E N T**

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1. This is an application wherein the applicant is seeking the following reliefs.

- (i) Promoting and confirming the applicant to the position of Financial Controller in the Ministry of Agriculture and Cooperatives in that he acted on this position for more than (6) six months or alternatively, that in the event the substantive officer is on secondment, that he continues to act on such position until that officer returns from secondment.
- (ii) Declaring the purported transfer to the Ministry of Public Service to be irregular and unlawful in that it was not sanctioned by the 2<sup>nd</sup> respondent as per the dictates of the law.
- (iii) Reviewing and setting aside the unilateral revocation of my acting paid appointment for the post of Financial Controller Grade E3 for the months of June and July 2014.
- (iv) That the applicant be paid his salary for acting appointment for the months of June and July 2014.

- (v) Alternatively, that the applicant be paid on the scale of Acting Financial Controller whilst holding the post of Principal Accountant in the Ministry of Public Service as he enjoyed same whilst acting for position of Financial Controller with the Ministry of Agriculture and Cooperatives.
  - (vi) Costs of the application.
  - (vii) Further and/or alternative relief.
2. The Applicant's attorney during the hearing of the matter told the Court that they are no longer pursuing the alternative prayer to prayer one as it has been overtaken by events, and so is prayer 5. Accordingly, the Court is called upon to determine the other prayers except alternative to prayer 1 and 5.
3. The application is supported by the affidavit of the Applicant wherein he stated the following:
- 3.1. That from September 2013 to July 2014, the Applicant was appointed by the 2<sup>nd</sup> Respondent through several notices to act in the position of Financial Controller at the Ministry of Agriculture and Cooperatives on Grad E3.
  - 3.2. On the 27<sup>th</sup> May 2014, the 2<sup>nd</sup> Respondent revoked the acting appointment for the months of June and July 2014 without any

consultation and without any justifiable reason and as such, he was never paid his acting salary for June and July 2014.

- 3.3. The Applicant also stated that he has the necessary academic qualifications to hold the position of Financial Controller.
  - 3.4. Applicant also contends in his affidavit that he has been transferred to the Ministry of Public Service to the position of Principal Accountant by the Under Secretary in the Ministry of Agriculture and Cooperatives. He argues that such transfer, as it was never done by the 2<sup>nd</sup> Respondent, is unlawful and should be set aside.
  - 3.5. To the founding affidavit, applicant annexed the instruments of his acting appointment. The court will revert to them when analyzing the documentary evidence in this matter later in this judgment.
  - 3.6. Applicant contends also in his replying affidavit that he was not told that the officer for whom he was acting was on secondment.
4. The application is opposed by the respondents as fully shown in the answering affidavit. In summary the respondents have stated the following in their answering affidavit filed by the 3<sup>rd</sup> Respondent and confirmatory affidavits filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
    - 4.1. That the Accountant General controls the deployment of Finance Personnel to the Treasury and other Ministries and finance departments as well as transfers. Actually, in terms of a

Memorandum dated the 12<sup>th</sup> August 2008, the 2<sup>nd</sup> Respondent delegated and authorized the 3<sup>rd</sup>

Respondent to deal with their staff without having to go through the commission. According to the respondents counsel, this was informed by the fact that Accounting is a specialized area and certain considerations are made when dealing with their staff.

4.2. Secondly, the Applicant was consulted on the transfer from the 1<sup>st</sup> respondent Ministry to the Public Service. The Applicant made representations regarding the transfer both oral and written representations. Such representations were considered when the decision to transfer Applicant was made.

4.2.1. The Court notes that on the 10<sup>th</sup> October 2013 Applicant wrote a letter to the 3<sup>rd</sup> Respondent whereat he was objecting to his transfer on the basis that he was still grasping the work. On the 24<sup>th</sup> October 2013, the Applicant wrote another letter to Civil Service Commission objecting to the transfer on the basis that he was always being transferred from one Ministry to another.

On the 18<sup>th</sup> March 2014, the 3<sup>rd</sup> Respondent wrote the Applicant informing him of her decision to transfer the Applicant. The Court also notes that on the 11<sup>th</sup> April 2014 and 27<sup>th</sup> May 2014, Applicant wrote to the 2<sup>nd</sup> Respondent seeking confirmation to the post of Financial

Controller because he had allegedly acted for a period exceeding six (6) months.

- 4.3. Respondent also argued that the Applicant's acting appointment was revoked by the 2<sup>nd</sup> Respondent by memorandum dated the 27<sup>th</sup> May 2014.

During the hearing of the matter, Applicant's attorney conceded that the Applicant never performed the functions of being Acting Financial Controller in June and July 2014 because the acting instrument had been revoked by the Civil Service Commission. Accordingly, the claim of a salary for June and July 2014 is claimed on the basis of the unilateral revocation of the acting appointment not because he worked.

- 4.3.1. Further respondents contended that the Applicant's certificate of unresolved dispute does not include the revocation of acting appointment. As such, the Court is implored not to take cognizance of this claim as it is allegedly improperly before court.

### **AD ANALYSIS OF THE EVIDENCE AND SUBMISSIONS**

5. It is not in dispute that Applicant was appointed to act in the position of Financial Controller. According to the Applicant, as argued during the hearing of the matter, he acted from beginning of February 2014 until July 2014 uninterrupted. According to the Respondent, the Applicant only acted

for (4) four months uninterrupted from February 2014 to the 27<sup>th</sup> of May 2014 as his acting appointment was revoked for June and July 2014.

- 5.1.
- (a) According to annexure DN1, Applicant was appointed to be Acting Financial Controller at Grade E3 with effect from 2<sup>nd</sup> September 2013 to the 30<sup>th</sup> September 2013.
  - (b) Annexure DN2 – acting appointment from the 01<sup>st</sup> October 2013 to 30<sup>th</sup> November 2013.
  - (c) Annexure DN3 shows that he was appointed Acting Financial Controller from the 02<sup>nd</sup> December 2013 until the 31<sup>st</sup> January 2014.
  - (d) The Court notes that there was a break of one day in the acting period. On the 1<sup>st</sup> December 2013, the Applicant was not acting in the position of Financial Controller.
  - (e) In terms of annexure “DN4”, Applicant was appointed Acting Financial Controller with the 1<sup>st</sup> Respondent from the 01<sup>st</sup> February 2014 until the 31<sup>st</sup> July 2014.

It is a common cause fact that this appointment was revoked by the 2<sup>nd</sup> Respondent on the 27<sup>th</sup> May 2014.

- 5.2. Accordingly, it is the Court’s finding that the Applicant acted for an uninterrupted period from the 02<sup>nd</sup> December 2013 until the 27<sup>th</sup> May 2014. This translates to less than six months.

5.3. There is another aspect to the Applicant's claim for confirmation to the position of Financial Controller.

- (i) The Applicant did not disclose to the Court in his founding affidavit whether or not the post at which he was acting was vacant and/or what had become of the incumbent officer for whom he was acting in the period in issue. The Court notes from the certificate of unresolved dispute filed in support of the application that applicant was acting in a position of an officer who was on secondment and who was to return to the position. Further on the 07<sup>th</sup> November 2013, a correspondence to the 2<sup>nd</sup> respondent and copied to Applicant by the 3<sup>rd</sup> Respondent, points out that the officer was on secondment and was to return to the position.

The Court notes that in this communication, assuming that Applicant had not been informed before and was not aware that the incumbent officer for whom he was acting was on secondment, was formally informed that the officer was secondment. And this was on the second month of the acting period which was expiring on the 30<sup>th</sup> November 2013.

It is the Court's finding therefore that the Applicant's argument that he had not been informed at anytime that the officer in whose position he was acting was on secondment holds no water. It is accordingly rejected by the court.



5.4. The Applicant has referred the court to the Constitution of Swaziland, and the judgments of **Nhlanhla Hlatshwayo V Swaziland Government and Another** which made reference to **Government General Order Amendment No. A 115 of 1999 and General Order No. 243 (1)** as authorities for the relief of confirmation to the position of Financial Controller.

Government General Order No. A243 (1) provides as follows:

***“An officer shall not normally act in a vacant post for more than (6) months without being promoted. In the case where the officer acted in the same vacant post for more than (6) more continuously, the Ministry under which the vacancy falls shall take immediate action to promote the officer. If the officer does not have the pre-requisite qualifications, he/she shall revert to his/her substantive post and a suitable candidate would have to be appointed to fill the vacancy”***

This position was followed by the court in the **Nhlanhla Hlatshwayo V Swaziland Government and Another** matter.

5.4.1. The Court has already found that the applicant did not act in the position of Financial Controller continuously for a period of more than (6) six months.

5.4.2. The Applicant’s argument that he be confirmed in the position of Financial Controller is rejected. It is clear

that the Applicant, at least as of the 07<sup>th</sup> November 2013, was informed that the post in which he was acting was not vacant. Accordingly, Government General Order A243(1), and Constitution of Swaziland and the Nhlanhla Hlatshwayo judgment do not help his case as they do not apply at all.

Actually, General Order A243 (2) provides that if the officer is acting in a post not vacant, General Order A243 (1) shall not apply.

5.5. The Applicant has also argued that he had a legitimate expectation to be confirmed to the position. So by transferring him to the Ministry of Public Service as a Principal Accountant, the Respondents are taking away his chances of being confirmed to the position of Financial Controller at the 1<sup>st</sup> respondent Ministry.

5.5.1. The Respondents have argued that the Applicant has not set out basis that created his claimed legitimate expectation to be confirmed to the post in that he has not told the Court whether he was promised at any stage and whether the post is/was vacant or not.

5.5.2. The Respondent argued that the doctrine of legitimate expectation only applies to procedure and cannot confer substantive benefit.

5.5.3. In the Nhlanhla Hlatshwayo V Swaziland Government judgment, P.R. Dunseith stated as follows at paragraph 47 at page 16;

***“To be “legitimate” an expectation must have reasonable basis. It must be more than a mere hope or ambition. In the present case, there is no evidence that any promises or assurances were made to be applicant to justify a belief that he will be promoted...”***

5.5.4. This Court aligns itself with this finding. Accordingly, the applicant’s relief for confirmation to the position of financial controller with the 1<sup>st</sup> Respondent is dismissed.

5.6. The Applicant is also claiming that he be paid salary for June and July 2014 as he was removed without any hearing and/or allowed to make representation to the revocation of his acting appointment. The Applicant’s counsel conceded during the hearing of the matter that the Applicant did not perform the functions of Financial Controller in the months of June and July 2014.

The only reason he is claiming for payment, is because the revocation of his acting appointment was done without any hearing yet he had been appointed to act as Financial Controller until the end of July 2014.

5.6.1. The Respondent argued that the Applicant can only claim breach of procedure, not to be paid salary for a position

he did not perform any duties. It also argued that he did not report a dispute to CMAC regarding this claim and as such it is improperly before court.

5.6.2. The Court is called upon to determine whether the Applicant has acquired a right to be paid the acting allowance as Financial Controller for the period of June and July 2014 and determine the proprietor of the claim in as much as it was never reported to CMAC.

5.6.3. In the Nhlanhla Hlatshwayo judgment, P.R. Dunseith stated as follows regarding a claim of somewhat a similar nature at page 16 paragraph 50;

***“Such right does arise en contractu. An employee receiving an acting allowance whilst acting temporarily in a position above his normal grade cannot legitimately expect to retain the acting allowance when he ceases acting. In law it would appear no vested right to the higher remuneration is obtained.”***

5.6.4 ***(i) This Court finds and accordingly dismisses the claim for payment of salary for June and July 2014.***

5.6.5. The Court however, would like to point out that it is important for the employer to allow an employee to make representation before any adverse decision is taken that will affect him.

5.6.6. The Industrial Court has in several judgments held that a claim has to be certified by CMAC before it can be pursued before the honourable Court. In this matter it is apparent from the certificate of unresolved dispute that this claim was never certified as unresolved by CMAC. This Court need not restate the position of the Industrial Court in this regard.

5.7. The Applicant in terms of prayer 2 of his notice of motion is seeking for an order that the transfer to the Ministry of Public Service be declared as irregular and unlawful in that it was not sanctioned by the 2<sup>nd</sup> Respondent.

It being argued on behalf of the Applicant that the 1<sup>st</sup> Respondent does not have powers to transfer the applicant.

5.7.1. The Respondent has argued that the transfer of the Applicant was never certified as an unresolved dispute by CMAC and as such it is improperly before court.

Secondly, Respondents have argued that the Applicant was consulted regarding the transfer and he made representations regarding same. It has also been argued that the Civil Service Commission authorized the Accountant General to deal with her staff.

5.7.2. It is important to point out that ex-facie the certificate of unresolved dispute filed in support of the application, the reliefs sought in terms of prayer 2,3,4 and 5 were never certified as unresolved by the Conciliation, Mediation and Arbitration Commission. It is only the relief in terms of prayer one (1) that was certified as unresolved. This Court however will revert to this aspect later in this judgment.

5.7.3. The Court notes that the applicant is not clear when exactly the 1<sup>st</sup> Respondent allegedly transferred him nor does he tell the court how such transfer was communicated to him (was it verbal or in writing).

5.7.3 (i) The Court also notes that Applicant made representations regarding the transfer as it more appears in the letters dated the 24<sup>th</sup> October 2013 that he wrote to the 2<sup>nd</sup> Respondent, and 10<sup>th</sup> October 2013. Further, Respondents did respond to those representations as shown by the correspondences exchanged between the parties.

(ii) As already pointed out, Applicant contends that his transfer by 1<sup>st</sup> Respondent was unlawful and irregular in that it was not sanctioned by the 2<sup>nd</sup> Respondent.

5.7.4. The Court has not been shown any instrument of transfer of the applicant by the 1<sup>st</sup> Respondent.

The Respondent, however have not denied that such transfer instrument by 1<sup>st</sup> Respondent was issued transferring the applicant. They argued that such transfer instrument by 1<sup>st</sup> Respondent was a follow up to an earlier transfer instrument that was issued by the 3<sup>rd</sup> respondent having been authorized by the 2<sup>nd</sup> respondent. The applicant did not deny this in his replying affidavit nor clarify what happened.

4.7.4 (i) This Court notes that by memorandum dated the 12<sup>th</sup> August 2008, the 2<sup>nd</sup> Respondent authorized the 3<sup>rd</sup> Respondent to deal with transfers on its department. On the 27<sup>th</sup> September 2013, a Circular Memorandum was issued by the 3<sup>rd</sup> Respondent transferring the Applicant to the Ministry of Public Service. So if the Applicant is complaining about the alleged transfer instrument by 1<sup>st</sup> Respondent dated the 24<sup>th</sup> October 2013, then he had already been transferred by 3<sup>rd</sup> Respondent on the 27<sup>th</sup> September 2013.

5.7.5. It is the Court's finding therefore that Applicant was transferred by the Accountant General not the 1<sup>st</sup> Respondent following a consultation that

spurned a period of time. Accordingly, the relief sought cannot be factually sustained by the facts as set out in the founding affidavit. In light of this finding, it is not necessary for this court to make a finding on whether or not can the 2<sup>nd</sup> Respondent delegate its powers.

5.8. The Applicant is seeking relief that the honourable Court set aside the unilateral revocation of his acting paid appointment for the post of Financial Controller. The Applicant's argument is that he was never afforded an opportunity to make representation before the appointment was revoked.

5.8.1. The Respondents raised the point that this claim was never certified as unresolved and as such it is improperly before court. The Court has already made that finding in this respect but will address it later.

5.8.2. The Respondent has argued further that another officer is now occupying the position of Financial Controller at the 1<sup>st</sup> Respondent and as such the position is no longer available. Further, the Applicant himself is already working at Public Service Ministry for sometime as a Principal Accountant.

5.8.3. It is the Court's finding that the relief sought by the Applicant has been over taken by events. It cannot serve



any useful purpose to determine it as already the position of Financial Controller at 1<sup>st</sup> Respondent in which Applicant was acting has been filled up. This is over and above the fact that the acting period for the months of June and July 2014, have long passed.

6. The Court will now revert to the proprietor of the reliefs claimed in terms of prayer 2, 3 and 4, it being argued that they are improperly before the court in as much as they were never certified as unresolved by the Conciliation Mediation and Arbitration Commission. As such, these claims are improperly before the Court, so goes the Respondents argument.

- 6.1. The Industrial Court has pointed out in several judgments its position in this regard.

In the matter of **Swaziland Development and Savings Bank V Swaziland Union of Financial Institution and Allied Workers Union - Industrial Court Case No. 418/2005 (unreported)** His Lordship Nderi Nduma stated as follows:

***“The Court needs to see on the face of the certificate what specific dispute(s) has been certified unresolved”.***

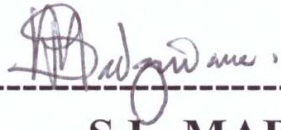
- 6.2. Clearly, in this matter, the certificate of unresolved dispute filed in support of the application does not at all ***ex facie*** reflect the reliefs claimed in terms of prayer 2,3, and 4 of the notice of motion.

- 6.3. This Court is alive to the fact that the current Rules of the Industrial Court of 2007 do not have a provision like 9 (2) of the repealed Rules of the **Industrial Court and the Industrial Relations Act 2000** as amended does not have a provision forbidding the court from hearing matters not appearing on the certificate of unresolved dispute. The Industrial Court, however, has consistently maintained the position that the certificate of unresolved dispute should reflect (*ex facie*), all the disputes certified as unresolved for the Court to take cognisance of the matter.
- 6.4. This Court has no reason to depart from the entrenched position of the Industrial Court and no reason has put forward why it should not follow that position. Accordingly, the court will not take cognizance of those claims.
7. This Court will not grant an order for costs in this matter as the parties still have the employer/employee relationship

**The Court makes the following order**

- (a) The application is dismissed.**
- (b) There is no order for costs.**

The Members agree.



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**S.L. MADZINANE**  
**ACTING JUDGE – INDUSTRIAL COURT**

For Applicant : Mr. M. Sithole  
(Sithole & Magagula Attorneys)

For Respondent : Ms. N. Nkambule  
(Attorney General's Chambers)