**IN THE HIGH COURT OF SWAZILAND**

**JUDGEMENT**

Civil Appeal Case No. 449/15

In the matter between:

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| **HLOB'SILE NDZIMANDZE** | APPLICANT |
| AND | |
| **CIVIL SERVICE COMMISSION** | 1ST RESPONDENT |
| **SWAZILAND GOVERNMENT** | 2ND RESPONDENT |
| **ACCOUNTANT GENERAL N.O.** | 3RD RESPONDENT |
| **ATTORNEY GENERAL N.O.** | 4TH RESPONDENT |
| **PRESIDING JUDGE OF THE INDUSTRIAL COURT** | 5TH RESPONDENT |

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| **Neutral Citation:** | Hlob'sile Ndzimandze v Civil Service Commission, Swaziland Government, Accountant General, Attorney General, The Presiding Judge of the Industrial Court. *(449/15)* [2016] SZHC (13) (2016) |
| **Coram:** | MLANGENI J. |
| **Heard:** | November 2015 |
| **Delivered:** | February 2016 |
| **Summary:** | ***Administrative Law – review of decision of Industrial Court.*** |
| | ***Respondents argued that matter is appealable and not reviewable, court held that some aspects of matter appealable and others reviewable, hence review competent.*** |
| | ***Transfer of Civil Servant from one Ministry to another – need for employee to be consulted in a meaningful way – on the facts purported consultation found to be nothing more than a formality.*** |
| | ***Other issues canvassed by the Applicant include the following: - position to which employee sought to be transferred said to be non-existent; transfer said to be malicious since no performance enquiry was conducted;*** |
| | ***Court found that the court-a-quo did not apply its mind properly to the factual issues at hand.*** |
| | ***Judgment set aside with costs.*** |

## JUDGMENT

**BACKGROUND**

[1] By application dated 5th May 2014 the Applicant sought before the Industrial Court orders of a wide-ranging nature. The orders sought were a combination of interdict and declarator.

[2] In its judgment dated 28th January 2015 the industrial Court dismissed the application **"in its entirety"**, each party paying its costs. The present application before this court, dated 23rd March 2015, is a sequel to the judgment of the Industrial Court aforesaid. The Applicant seeks the review, correction or setting aside of the decision of Honourable Mazibuko J. It is accepted that this court has jurisdiction, per Section 152 of the Constitution of Swaziland, read together with Section 19 (5) of The Industrial Relations Act 2000 as amended.

[3] Before I deal with the pertinent issues that arise in this application I hereby set out the background to the matter.

[4] The Applicant was employed at the chambers of the Attorney-General. On or about 2007 she was transferred from the chambers to the Ministry of Finance where she assumed the position of **"Legal Officer at Grade E2".** It appears that she was reporting to the Legal Advisor to the said Ministry, at the time the incumbent being one Fitzgerald Graham. Mr. Graham then left the Ministry of Finance, and the Applicant was made to act as legal advisor for a period **"in excess of 6 months until I was confirmed as Legal Advisor at Grade E4 by the Civil Service Commission."** The letter of confirmation is dated 6th October 2010 and is found at page 25 of the record of proceedings.

[5] It is important to note that the promotion and/or confirmation in the higher post was unconditional and it followed upon a substantial period of time when the applicant was acting in the higher capacity. It is therefore reasonable to inter that the employer was, at that stage, satisfied with the delivery of the Applicant. A contrary conclusion would be quite preposterous. Applicant avers that she worked as Legal Advisor for about two (2) years **"without any complaints as to my performance."**

[6] According to the Applicant, on the 31st March 2012 she went on maternity leave and came back to work on the16th August 2012. During her absence her duties were done by one Mrs. Zandile Dlamini. Upon her return there was no handover by Mrs. Dlamini and the Principal Secretary **"did not resume assigning me work as she used to do prior to my going on maternity leave.**" At paragraph 15 of her founding affidavit filed at the Industrial Court she describes the unpleasant state of affairs that obtained and prevailed –

> ***"The state of affairs continued to the extent that I had virtually no work to do and even the little work that I was assigned directly by the minister ---- I would ultimately find that Mrs. Zandile Dlamini had been assigned the same work----".***

[7] At this stage the Applicant adopted the view that she was being constructively dismissed and she raised this issue with the Civil Service Commission, the employer. She was advised that the proper route for her complaint was through the Principal Secretary of the Ministry of Finance, as immediate supervisor. The battle lines may have been drawn at this stage. At this point in time the substantive Principal Secretary was on leave.

[8] As stated above, when the Applicant returned from maternity leave Mrs. Zandile Dlamini did not leave the Ministry of Finance to return to the Chambers of the Attorney-General where she held a substantive post. As

seen from a memorandum of the Attorney-General to the Principal Secretary of the Ministry of Finance dated 16th August 2013, the Attorney-General found it undesirable to have **"two legal advisors in your Ministry"** and went on to suggest that **"you let us have one of Ms. Dlamini and Ms. Ndzimandze, ideally with effect from 1st of next month,"** per annexure 'HN3' at page 27 of the Book of Pleadings.

[9] A response from the Principal Secretary of Finance is dated 22nd August 2013. This letter acknowledges that Mrs. Dlamini **"was loaned to the Ministry----"** and that she **"will be disengaged from the Ministry of Finance with effect from the 1st September 2013 and we apologise for any inconvenience caused----".** So clearly, as at the 22nd August 2013 the position of the Ministry of Finance was that Mrs. Dlamini would go back to the chambers of the Attorney-General whence she had come from, for purposes of relieving the Applicant.

[10] It does appear that upon her arrival at the Ministry of Finance Mrs. Dlamini was assigned specific tasks that were of some urgency, but the general scheme of things is that she went there not to replace the Applicant, who was substantive legal advisor, but to relieve her during the maternity leave period.

[11] Given the above scenario, one could well ask the question: what exactly changed, to create the confrontation that has culminated in this litigation?

[12] Much of the general factual background which is laid out by the Applicant is not denied by the Respondents. The point of departure is in regard to details and the interpretation of the said details. One such issue is that according to the Attorney-General no legal advisor is permanently attached to any one Ministry, as they are all answerable to the Attorney-General. That may be so, but this would defy the purpose of a formal appointment by the employer, the Civil Service Commission

which, on the 8th October 2010, promoted the Applicant to the position of Legal Advisor and this was done without reference to the Attorney-General who, on the face of it, was not even favoured with a copy of this important document, HN1. Copies of this document were to be sent to various high-ranking officials of The State, except the Attorney-General. This suggests to me that the Attorney-General had no influence or control over the promotion of the Applicant to replace **"a senior legislative draftsman who held a master's degree in Legislative drafting with a vast experience ----".**

[13] The real reason for the unfortunate events that happened to the Applicant may be gleaned from the affidavit of the Attorney-General, Majahenkhaba Dlamini who, at paragraph 28 of the opposing affidavit, boldly points out that **"it was an error to appoint or confirm Applicant who was substantively a Crown Counsel (E2) to the position of Legal Advisor ----".** Indeed it may have been an error, but such errors still need to be corrected in a dignified manner that takes into account the important tenets of fair labour practices. To systematically starve an employee of work is not one of such of ways. If the employee is not responsible for the error, that is all the more reason why there must be bona fide engagement to find a mutually acceptable solution. There is no doubt that subsequent to the memorandum from the Principal Secretary of Finance to the Attorney-General dated 22nd August 2013, which encompassed willingness to let Mrs. Dlamini go back, there was a turnaround based on the new belief that Mrs. Dlamini was a better worker than the Applicant. This comes out, for instance, in the Attorney-General's memorandum to the Secretary Civil Service Commission dated 29th October 2013, paragraph 4 thereof, which is at page 38 of the Record of Proceedings.

[14] The Applicant, having made an allegation of constructive dismissal, would have expected that this issue would be tackled by the employer and hopefully resolved. It appears, however, that the ministry of Finance had something else in mind, which was to release the Applicant back to the chambers of the Attorney-General, in preference to Mrs. Dlamini. This position is contained in a memorandum dated 10th September 2013 from the Principal Secretary Finance to the Attorney-General. So, as at the 10th September 2013 the Ministry of Finance had taken the firm decision to release the Applicant. The memorandum, at page 30 of the record reads in part –

> ***"--- we have decided to release Ms. Ndzimandze and keep Ms. Dlamini as the Ministry's Legal Advisor."***

[15] On the same date that the choice between the two Legal Professionals was made, being the 10th September 2013, the Principal Secretary called the Applicant and, according to the Applicant, **"--- verbally informed me that she together with the Attorney-General has decided that I be returned to the office of Attorney-General"** and that a swap be made to appoint Mrs. Zandile Dlamini as the Ministry's legal advisor.

[16] Assuming that there was meaningful consultation between the Principal Secretary Finance and the Applicant on this major issue, is there a chance that the decision could have been re-considered and revised or changed? I will come back to this issue later.

[17] The future of the Applicant was probably defined in a memorandum from the Principal Secretary Finance to the Applicant, dated the 10th September 2013, the same date that a meeting between the two was held, where the Applicant was informed of the swap. Significantly, at paragraph 3 of the memorandum, the Principal Secretary concludes with these words –

**"I hope this development will not be viewed as victimization on your part because it is not----".**

[18] These words are despite the fact that the Applicant had already complained of constructive dismissal. This again suggests that a decision was already taken, period. One may also refer to the Attorney-General's memorandum dated 29th October 2013 addressed to the Civil Service Commission. This item of correspondence leaves nothing to doubt regarding the fate of the Applicant. This memorandum is at page 39 of the Book where, at paragraph 7 line 7, the Attorney-General remarks: "**I personally do not believe that there is anything much to talk about regarding this matter of return",** and he concludes by referring to the issue as **"a little storm in a tea cup."**

[19] Ultimately the Applicant, upon invitation, appeared before her employer, the Civil Service Commission, on the 16th April 2014. As noted above, at this stage a firm decision had been taken to recall the Applicant to the chambers of the Attorney-General, way back on the 10th September 2013.

[20] According to the Applicant at that meeting she was informed that the Attorney-General had directed that she goes back to the chambers. When she raised the issue of her complaint of victimization/constructive dismissal, she was advised to ***"discuss the matter with the Attorney-General."*** One might observe, in passing, that if a worker complains of constructive dismissal, the matter is so serious that it requires the immediate intervention of the employer. The further allegation by the Applicant at paragraph 51 of her founding affidavit (page 20) that she was harshly told that **"they say that Zandile is better than you"** can only resonate the position of the Principal Secretary as well as the Attorney-General.

[21] The Applicant perceived that the exercise was futile, and that she was required to comply with the directive to return to the chambers of the Attorney-General. The Respondents have a different version of what transpired in the said meeting. It is reflected at paragraphs 47.2, 47.3 and 47.4 of the affidavit of Majahenkhaba Dlamini at pages 81-82, as supported by Allen C. Mc Fadden. I will come back to this issue when I assess the value of the so-called consultation exercise.

[22] The climax of this round was that by letter dated 22nd April 2014 the employer, the First Respondent, formally and conclusively transferred the Applicant to the chambers of the Attorney-General. As we now know this became the springboard for this litigation.

**APPLICANT'S CASE AT THE INDUSTRIAL COURT**

[23] The case that the Applicant advanced at the Industrial Court is that her transfer to the chambers of the Attorney-General was **"procedurally and substantively unfair and it amounts to an unfair labour practice."** In a wide range of prayers the Applicant sought, in the application, relief whose effect would be to interdict the purported transfer, declare it irregular and prevent the engagement of another person as Legal Advisor at the Ministry of Finance.

[24] The legal and factual basis of the application can be summed up as follows.

24.1 The position to which Applicant was transferred is non-existent;

24.2 The main reason behind the transfer was that the Principal Secretary **"simply prefers to work with Zandile Dlamini";**

24.3 The transfer is malicious in that no performance enquiry was ever embarked upon in order to determine the issue of competence;

24.4 There was no consultation; she was merely instructed to move over;

24.5 First Respondent did not apply its mind at all to the merits of the transfer **"and merely abdicated its authority and discretion in favour of the Attorney-General ----",** who has no authority to take that decision.

**RESPONDENTS' CASE AT THE INDUSTRIAL COURT**

[25] The Respondents raised preliminary points of law relating to lack of urgency and failure to meet the requirements of an interdict. The argument regarding urgency has clearly been overtaken by events. The alleged failure to meet the requirements of an interdict is so often raised as a point of law in limine. I daresay that this is a relatively new development born of an anxiety to curtail litigation. I respectfully think that in the strict sense the question whether an Applicant satisfies the requirements of an interdict – interim or final, is one to be determined on the basis of the merits. It is, for instance, a question of fact and law whether the Applicant has alternative relief or not. One cannot come to this conclusion without assessing the evidence and the law applicable thereon. Again, whether the Applicant has a clear right or not is a matter that is predicated upon the facts and the law applicable thereupon. If my understanding of the position is correct, then litigants would do well to avoid prolixity and delay by getting to the merits straightaway, unless there are issues of locus standi, jurisdiction and other special pleas or objections that are capable of resolving the matter in a shorter and cheaper route.

[26] Respondent's defence is summed up as follows:

26.1 Applicant was consulted on the intended transfer, both by the Principal Secretary and by the First Respondent, the employer.

26.2 The transfer was a mere variation which occasioned the Applicant no prejudice in terms of remuneration, work-station, etc, hence there was no need to consult her before the variation.

26.3 It was an error to appoint the Applicant as Legal Advisor in the Ministry of Finance.

26.4 Applicant was being variated to a substantive and existing post at the Attorney-General's Chambers. It does not matter what tag it used on the post.

**FINDINGS BY THE INDUSTRIAL COURT**

[27] In my respectful view, the summary of judgment in the **court-a-quo** succinctly captures the legal position in such matters. I quote from page 173 of the record (page 2 of the judgment):

> ***"Consultation with the affected employee necessary before variation is granted. Requirements of consultation considred; employee must be given full opportunity to express her views and employer must bona fide consider the views expressed when deciding the matter. Agreement with employee is not a requirement in a consultation. Parties in consultation may express themselves orally, in writing or both."***

[28] I do, however, have difficulty with the manner in which the above-captioned summary has been applied to the facts and the result which it produced. I will come back to this aspect later.

[29] The events that unfolded at the Ministry of Finance after the Applicant came back from maternity leave led the Applicant to believe that she was being constructively dismissed. This is because she was not being assigned work in the normal way. Some work that was assigned to her was also assigned to Mrs. Dlamini. Reacting to this scenario, on the 12th August 2013 she wrote a letter to the First Respondent in which she

raised and canvassed the issue of constructive dismissal. The First Respondent did not entertain this very serious complaint, on the basis that procedure required that it should be taken up with the Principal Secretary Finance who would, if need be, pass it on to the First Respondent. At this point in time the Principal Secretary Finance was on leave, so the issue was not immediately addressed. As things turned out later, it was never addressed. The only documented mention of the issue is in a memorandum by the Principal Secretary to the Applicant dated 10th September 2013. In this letter the Principal Secretary was officially informing the Applicant of the decision which had been taken to swap the Applicant with Mrs. Dlamini, so that Mrs. Dlamini would be appointed Legal Advisor in the Ministry and Applicant would go back to the Chambers of the Attorney-General. In the last paragraph of this momentous correspondence the Principal Secretary wrote –

> ***"I hope this development will not be viewed as victimization on your part because it is not ---".***

[30] This appears to be the only thing that was ever said regarding a sensitive complaint such as this. The failure by the Principal Secretary and the employer to interrogate and ventilate the complaint gives a hint of the pre-determined fate of the Applicant, that she was going to be moved at whatever cost.

[31] I have no doubt in my mind that if this complaint had been given the attention that it deserved, at the propitious moment, this saga might have unfolded in a different manner, possibly in a manner that might have been acceptable to both sides.

[32] The **court-a-quo** found that there was meaningful consultation with the Applicant prior to the swap. I respectfully disagree. The purpose of consultation is to give both sides an opportunity to engage and exchange views on the subject matter. The employee is given an opportunity to

make representations on relevant matters such as prejudice that is likely to result from the intended action. At the meeting with the Principal Secretary dated 10th September 2013 the Applicant was told of a decision **that had already been taken** "--- **to make a swap and appoint Mrs. Dlamini as the Ministry's Legal Advisor and for you to return to the AG's office---".** Many of us would be stunned by such communication and would find it futile to attempt to make any input. This memorandum tells it all, and the attitude that the Applicant subsequently countenanced at the Civil Service Commission confirmed that the writing was on the wall; that her transfer was a ***"fait accompli"***.

[33] The Applicant says the following about her experience at the Civil Service Commission meeting:-

> ***"I asked whether the 1st Respondent was going to entertain my complaint, however the Chairman --- said that the 1st Respondent would not entertain my complaint and that I should discuss the matter with the Attorney-General."***

At that stage the Attorney-General was not a supervisor of the Applicant and is not her employer. Effectively, the Civil Service Commission abdicated its duties to the Attorney General. Applicant further says of the same meeting that she was told to **"go to the Attorney-General's Chambers, 'they say that Zandile is better than you' "**. It is my view that humiliation cannot come in any worse form than to be told that your colleague does better than you, especially when this is uttered in a conflict situation.

[34] Unavoidably, the Respondents' account of the **'consultations'** is different. For instance the Principal Secretary says of the meeting of the 10th September 2013 that to her surprise "when I asked the Applicant to make an input regarding the contemplated action or decision, she did

not oblige other than to say in vernacular that **'NGITOBONA KUTSI NGIYISEBENTA NJANI' – 'I WILL SEE HOW I HANDLE THE MATTER."** This suggests that the Applicant failed to use the opportunity to make an input. Respondents' deponent, Allen Mc Fadden, says of the meeting with the Applicant at the Civil Service Commission on the 16th April 2014 the purpose was to **"hear the Applicant's side of the story and to consider her representations".** But how could this be when a decision was taken by the Principal Secretary in the previous year, on the 10th September 2013? In my view this meeting was nothing more than window-dressing; a mere formality, a farce.

[35] The **court-a-quo** describes the two meetings of the Applicant with the Principal Secretary and the Civil Service Commission as **"Consultative"** (per Judgment of Mazibuko J. at paragraph 38) and proceeds to say that in these meetings the Applicant should have raised certain issues. I have already expressed my view that those meetings were a farce, and that there is nothing the Applicant could have done to change the direction of things. The court-a-quo found that the consultations with the Applicant were bona find; I find that they were unmistakably mala fide.

[36] Respondents allege that part of the plan was that the Applicant was to receive further training at the Chambers of the Attorney-General, on the face of it a noble thing indeed. The court-a-quo observes that this idea **"was communicated to the Applicant in the Consultative meeting of the 10th September 2013"**. See paragraph [40] of the judgment. This is against a background in which the employer had not previously raised the issue of Applicant's inadequate capacity. And the Principal Secretary, who was the immediate supervisor of the Applicant at all material times, says at paragraph (5) of her minute dated 13th September:-

> ***"I am sorry that I cannot scientifically substantiate your competency levels due to the fact that we have not at any given***

***period sat down to set objectives which you were going to be measured against. This would have given us key performance indicators which we would use as a yard stick for measuring your performance on competence on the drafting of bills. Unfortunately, this did not take place and my judgment might be purely based on comparison basis which is wrong of me" (my emphasis)***

[37] It is crystal clear from the above quote that the Applicant was not being transferred for inefficiency. The reasons for her transfer are to be found elsewhere. It is unfortunate that the court-a-quo was unable to see through this, in spite of the Principal Secretary's concession that the conclusion was **"wrong of me"**. The Apparent acceptance by the court-a-quo that the transfer was **"mainly due to lack of capacity (on the Applicant's part) ---"** is inconsistent with the concession by the Principal Secretary. I respectfully see this as failure by the court-a-quo to apply its mind to the most important aspect of this fiasco. It appears to me that a decision was taken to do a swap, and reasons for it had to be contrived as the matter became complicated.

[38] Indeed the Attorney-General had something else in mind. He was willing to have the Applicant back in his Chambers for on-ward transfer to another Ministry where there was **"presently a vacant Legal Advisor post ---."** (See paragraph [42] of the judgment of the court-a-quo). What emerges unmistakably is the uncertainty of the intended future of the Applicant. On the one hand she was intended for training within the Chambers; on the other hand she was intended for on-ward transfer to a Ministry which had a vacancy for Legal Advisor.

[39] Applicant has averred and furnished proof that shows, prima facie, that at the Attorney-General's Chambers there is no post of Legal Advisor, that Legal professionals there are categorized as Crown Counsel or draftsmen, and therefore that she was being transferred to a non-existent post. This, according to her, demonstrates the contrived nature

of the whole move to variate her position. The court-a-quo observes at paragraph 45.1 of its judgment as follows:-

> ***"It is not necessary therefore for the court to decide on whether or not there is a position of Legal Advisor in the Attorney-General's Chambers. That question does not arise. There is no intention on the Attorney General to keep the Applicant permanently at the Chambers***". I respectfully see the issue differently. I see the future of the Applicant at that stage as very uncertain, and certainly she had no guarantee of anything in the absence of a written instrument. If indeed there was a vacancy of a Legal Advisor in the different Ministry one would think the less controversial movement would have been for the Applicant to be transferred directly to such Ministry. Objectively, this would probably have been a more acceptable way of dealing with the problem and would have given the Applicant much less reason for diffidence.

This in my view, disposes of the Respondent's argument about the insignificance of tags and titles

[40] I note that at the background of all this is a poignant complaint by the Applicant that she was being constructively dismissed. On the facts that she alleged there was probably a sound basis for this complaint. This complaint, in my view, should have been ventilated by the employer before setting in motion the process to transfer the Applicant. This taints the transfer with mala fides. This is yet another important issue that the court-a-quo completely overlooked in the exercise of its discretion.

[41] From the aforegoing it is abundantly clear that I respectfully disagree with the court-a-quo on the most important factual aspects of this matter, namely-

41.1 the question of consultation between the employer and the employee;

41.2 the reason(s) for the transfer of the Applicant;

41.3 the existence or otherwise of the position of the Legal Advisor in the Chambers of the Attorney General;

41.4 the certainty or lack of certainty of the Applicant's future at the chambers of the Attorney-General where she was being transferred to.

[42] My conclusions as stated above are, however, not the end of the matter. There is an equally important enquiry that I need to embark upon, i.e. whether the issues upon which I disagree with the court-a-quo are appealable or reviewable.

[43] Review of Industrial Court decisions by the High Court is based upon common law grounds. See Section 19 (5) of the Industrial Relations Act 2000 as amended. It is acceptable that this list is not exhaustive, and I mention some presently:-

43.1 ultra vires;

43.2 failure of natural justice;

43.3 irregularity in procedure;

43.4 unreasonableness;

43.5 taking into account irrelevant considerations or ignoring relevant ones;

43.6 failure by decision-maker to apply his mind to the facts;

43.7 mala fide, capriciousness or arbitrariness.

See: **O.K. BAZAARS SWD (PTY) LTD t/a SHOPRITE vs. HAPPINESS DLUDLU AND ORS (773/11) {SZHC] 222.**

[44] The Respondents argue that in the present matter review does not lie. Respondents argue that the Applicant is effectively challenging the correctness of the decision of the court-a-quo, that is – the court arrived at a wrong decision on the facts, and therefore the proper procedure is to appeal. They appear to me to be correct in respect of the issue of consultation between the employer and employee, or lack of it. The learned judge a quo did address this issue at length and came to the conclusion that there was consultation. At paragraph [52] of the judgment Mazibuko J. makes the following finding of fact:-

> ***"Government has given the Applicant a consultation on this matter on two (2) instances namely; one consultation was held with the Principal Secretary, the other was with the Commission."***

See also line 2, paragraph 83 of the judgment under review.

[45] I stated in preceding parts of this judgment that I respectfully disagree with this finding, and I gave my reasons therefor. I therefore come to the conclusion that this aspect is not reviewable and that it is appropriate for appeal. An appeal on this aspect might also provide an opportunity to explore the question whether or not the aspect should have been referred to oral evidence. I daresay that it should have. This aspect is arguably the most important, and it being the subject of contradictory averments and interpretations, it surely would have thrown more light to hear the protagonists from the box. But it is not for determination in this application and need not be entertained any further.

[46] But the relevant issues that arise in this matter are numerous. Kindly refer to my paragraph 40 in this judgment. In my respectful view the court-a-quo failed to apply its mind to the actual reasons for the transfer. I have stated above that the evidence, objectively analyzed, shows that

the transfer was not motivated by the Applicant's inefficiency; the alleged inefficiency was used to justify a 'fait accompli'. This is so glaring that had the court-a-quo applied its mind to the evidence it would have arrived at a different conclusion.

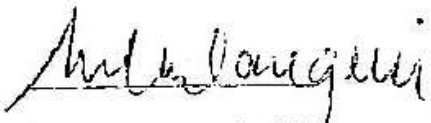
[47] The future of the Applicant being shrouded in uncertainty, in the proper exercise of discretion the court-a-quo ought not to have allowed the Applicant to be transferred to the Chambers of the Attorney General, especially in light of the evidence that there was, in fact, a vacant position of Legal Advisor in a different Ministry. It may well be that the employer ultimately wanted to stamp its authority rather than seek an amicable solution. This, in my view, is contrary to the spirit of modern labour relations. Given the apparent **"mistake"** in the manner the Applicant was confirmed as Legal Advisor, and given the fact that the "mistake" was not of the Applicant's making, a less robust approach was desirable in addressing the mistake.

[48] I do not need to go on and on. Suffice to point out, for the avoidance of doubt, that the matter before me has both appealable and reviewable aspects. The Applicant cannot realistically be expected to appeal some and review others. She has opted to review and I find that she is, to a larger extent, entitled to adopt this approach.

[49] In the totality of the aforegoing, the application for review succeeds. The orders of Mazibuko J. at paragraph 85 of the judgment are hereby substituted with the following orders:-

49.1 The purported transfer of the Applicant to the position of Legal Advisor in the Attorney-General's Chambers per instrument dated 22nd April 2014 is irregular and is hereby set aside.

49.2 Respondents to pay costs of suit at the ordinary scale.



**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**

For The Applicant: **Attorney M. Sibandze**

For The Respondent: **Attorney Z. Shabangu**