IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 489/2014

In the matter between:

SWAZILAND NATIONAL ASSOCIATION OF GOVERNMENT ACCOUNTANCY PERSONNEL	**APPLICANT**

and

MINISTRY OF PUBLIC SERVICE	**1ST RESPONDENT**
ACCOUNTANT GENERAL	**2ND RESPONDENT**
MINISTRY OF FINANCE	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation : *Swaziland National Association of Government Accountancy Personnel v Ministry of Public Service & Others SZIC 50 (06 November 2014)*

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

Heard : **22 October 2014**
Delivered : **26 March 2015**

Summary: ***Labour law – Industrial Relations –*** *Applicants seek orders to compel the Respondents to comply with Schemes of Service of 2009 and also to have double streaming of posts declared null and void. Respondents confirming that double streaming of posts done unilaterally. Court finding that issues meant for bilateral discussion and negotiation cannot be decided and resolved unilaterally.* ***Held:*** *Issue of double streaming of posts in Accounting cadre referred to the Conciliation, Mediation and Arbitration Commission (CMAC) for mediation.*

1. The Applicant in this matter, the Swaziland National Association of Government Accounting Personnel (SNAGAP) has applied to this Court, on a certificate of urgency, for orders as follows;

- *That the above Honourable Court dispenses with the time limits, forms and provisions of service as required in terms of the Rules of this Honourable Court and that the matter be heard as one of urgency.*
- *Directing 1st and 2nd Respondents to implement the amended Scheme of Service of September 2009 per the Resolution of the meeting of 21st June 2012.*
- *Declaring that the double streaming into categories I and II of Title Posts in the Accounting Cadre, to be null and void and should be set aside.*
- *That the Amended Scheme of Service dated September 2009 be with effect from 21st June 2013.*
- *Costs of the application in the event of opposition.*
- *Such further and or alternative relief as the above honourable Court seems meet.*(Sic)

2. The application is opposed by the Respondents. In support of the Applicants' case, Simeon Simelane, the President of the Applicant association in his founding affidavit states that primarily, the present application seeks compel the 1st and 2nd Respondents to comply with the approved Scheme of Services of September 2009 as per the settlement of the parties in negotiations. He also states that the Applicant association also seeks to have the double streaming of Title Posts in the Accounting Cadre declared null and void and be set aside because it was not agreed to between the parties. The complaint here, being that in the new circular, Circular No.1 of 2014, the 1st Respondent has inserted terms that had not been deliberated and agreed upon. The President of the Association makes reference to minutes of 21 June 2013, which he says will prove that Circular No.1 of 2014 is not what the parties deliberated and agreed on. Unfortunately though, the minutes which were presented to Court were unsigned, and as such not much reliance could be placed on same.

3. Simelane goes on to point out that in terms of this 2014 Circular, the senior posts of Accountant General, Deputy Accountant General and

Financial Controller have all not been double streamed. Whereas on the other hand the junior posts of Principal Accountant, Senior Accountant and Accountant have all been double streamed into categories I and II respectively. He further states that the issue of double streaming remained an issue where the parties failed to agree. As a result of this double streaming, Simelane further states, employees who are performing the same duties are unjustifiably remunerated at different pay levels thus violating the principle of equal pay for equal work. This has apparently resulted in chaos in the Accountancy Cadre. Some junior Officers have now been elevated to earn as much or, in some cases, even more than their Supervisors. This has created tension at the various departments in the Accountancy Cadre. Hence the present application where they seek that the amended Schemes of Service of September 2009 be implemented across the board, moreso because in all their meetings the negotiations were based upon the September 2009 Scheme of Service.

4. Attorney Simelane in his submissions on behalf of the Applicant, stated that the expectations of his clients was that the Respondent

would implement the Schemes of Service based on the working document they had used in their negotiations – the 2009 Scheme of Service. But to their surprise, the Government unilaterally introduced the double streaming concept, much against their expectations and agreement. Attorney Simelane further submitted that the Applicant Association would have preferred that the double streaming concept be deliberated and negotiated extensively between the social partners so that common ground could be achieved.

5. As pointed out above, this application is opposed. The Respondents through Evart Madlopha, the Principal Secretary in the Ministry of Public Service, contend that Article 11.1 of the Schemes of Service of 2009, explicitly provides that the new Scheme of Service will take effect once officers have obtained the minimum prescribed qualifications. In giving effect to this requirement in terms of this article 11.1, Government as the Employer was then required to create holding positions for those Officers who do not possess the required qualifications. And that when the affected Officers acquire the necessary qualifications or exit the Civil Service the positions will be abolished.

6. In essence, the case of the Respondents is that Circular No.1 of 2014 did not bring forth new terms into the agreed Scheme of Service. In this regard the Court was referred to the contentious clause 11.1 which provides thus; *'The Scheme of Service shall take effect once officers have obtained the prescribed qualifications. This is a pre-requisite for the full implementation of this Scheme of Service.'* It was submitted on behalf of the Respondents that clause 11.1 is peremptory and that in effect it requires that Officers possess the prescribed qualification in order to convert to the new grades as per the Scheme of Service. Attorney Kunene on behalf of the Respondents further submitted that in order to give effect and proper implementation of this clause and in an effort to ensure that those Officers who qualify convert to the new Scheme of Service, the Respondents then created holding positions and categorized them into I and II.

7. It is not in dispute that the classification of posts into I and II was done unilaterally by the Government. This unilateral act by the Respondents is the source of the discontent by the Applicant Association's members. They argue that any change in the terms and conditions of service must be a matter of mutual agreement between

the two parties. They also complain that it amounts to an unfair labour practice if the Respondents strip the officers of some functions in a bid to justify the different remuneration grades. Yet another complaint is that the Officers classified under posts II are remunerated at a lower scale in complete disregard of their years of service and experience thus prejudicing them.

8. On the contentious clause 11.1, the Applicant's representative argued that it does not accord with the interpretation imputed to it by the Respondent. Attorney Simelane also pointed out that this clause does not deal with the issue of Officers who are already in service but without the requisite qualifications. It is for these reasons that the Applicant association argues that the double streaming should not have been unilaterally decided by the Respondents, instead they strongly feel that it should have been deliberated between the parties and compromise reached. The finding of the Court though in relation to this now contentious clause 11.1 of Circular No.1 of 2014 is that indeed it is peremptory. It states that it shall take effect once officers have obtained the prescribed qualifications. And the officers it refers to are those already in the service of the Swaziland government,

whom the present Applicant represents in these proceedings. It cannot refer to officers yet to be employed. The finding of the Court, and in fact it should be common sense, that for Officers yet to be employed, it shall be peremptory that they possess the requisite qualifications in terms of this circular before they can be engaged. Unlike the employees already in service, they will not be accorded the privilege of first obtaining the requisite qualifications in terms of the new scheme of service.

9. The Court though cannot ignore that the parties to this dispute have in place a recognition agreement which regulates their relations in issues mutual interest. In the preamble of the Recognition Agreement one of the clauses therein states that it is meant to *'ensure the speedy and impartial settlement of disputes and grievances referred to under clause 12 of the agreement.*' Under clause 12, the Agreement of the parties defines the principles and procedures that regulate and govern consultation and negotiation processes between them.

10. This Court in a previous matter of the same parties **(*Swaziland National Association of Government Accountants and Accounting***

Personnel v Swaziland Government IC Case No. 497/2007) a matter decided by the then Judge President Dunseith JP, found that schemes of service are terms or conditions of service that affect a group of employees covered by the Recognition Agreement. As such, regard has to be had to clause 12 of the Recognition Agreement for settlement of this dispute between the parties. This in effect means that all issues relating to schemes of service have to be resolved and settled between the parties through bilateral discussions and negotiations. No one party can decide any issues that will affect all employees or group of employees without having fully discussed and negotiated it with the other.

11. From the pleadings it is clear that this present matter between these parties has quite a long history. It emanates from the initial decision of the Government to review and implement the Schemes of Service for the Accountancy and Stores cadres through Circular No.4 of 2007. The Applicant Association was not happy with that Circular hence it challenged it and was successful. The Court then, per Dunseith JP, directed that it be withdrawn and further ordered the parties to revise the Schemes of Service through bilateral discussion.

12. Now, in the present matter, Evart Madlopha, the Principal Secretary in the Ministry of Public Service, in his answering affidavit does not deny that the double streaming of posts was never agreed upon between the parties but was the unilateral act of the employer. He points out instead that it was necessary for Government to create 'holding posts' for those officers who were found not to possess the required qualifications. In the reality of things, the contentions of Madlopha are that the intentions of the Government, in the creation of the holding posts, were for all intents and purposes compliance with clause 11.1 in the Scheme of Service used by the parties as a working document. A question the Court asks itself however, is even if that is the case, why did Government decide to implement the holding positions in the cadre without discussing and negotiating it with the Applicant Association? No matter how good and well intended the actions of Government in this regard, the manner it went about the process is the source of discontent in this matter. At the same time though, the Court points out that effect has to be given to clause 11.1.

13. Principally, the object of bilateral discussions and negotiations is to resolve issues that need to be agreed-on on mutually acceptable terms.

This means that issues for bilateral discussions and negotiations should not be resolved unilaterally. Logically, the rules of engagement in bilateral negotiations presuppose and imply that the final agreement of the parties is the joint effort of both. This therefore means that whatever one party comes up with unilaterally cannot be said to be the product of the joint efforts of the partners, especially when the parties are already on the bilateral negotiation table. In effect, and in relation to this present matter, this means that the creation of holding posts was not a product of the bilateral negotiations of the parties. Hence the Applicant has qualms with same since it is not mutually acceptable. Like the rest of the issues, this 'double streaming'/ 'holding posts' issue has to go through the bilateral discussion and negotiation process. This is meant to promote openness and fairness in the specialized sphere of our labour relations, which in turn will encourage harmonious and constructive collective bargaining thus providing quicker means of resolving some of the disputes that come before our Courts.

14. After hearing the submissions and arguments of the parties, this Court, in line with Clause 12 of the Recognition Agreement of the parties,

decided to refer the matter to the parties to explore the possibilities of a mutually agreed settlement. It would seem that they have failed to do so, hence now the Court has to decide on how best this dispute can be resolved.

15. The present dispute of the Applicants is one of interest as opposed to a dispute of right. A dispute of right principally concerns the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute. Whereas a dispute of interest concerns the creation of fresh rights for the employees. **(**See **Rycroft & Jordaan 'A Guide to SA Labour Law, Juta 1992 at page 169).**

16. Collective bargaining, mediation and, as a last resort, peaceful industrial action are generally regarded as the most appropriate avenues for the settlement of conflict in the workplace regarding disputes of interests. As pointed out in the preceding paragraph, this matter has already been referred by this Court to the parties for them to work out their differences through collective bargaining but without

success. The Court is therefore minded to involve a third party to engage the parties, through the process of mediation, in trying to resolve this impasse. In the meantime, it is the considered view of the Court that the status quo be maintained. The Court is of the view that, in the interests of equity and fairness, as well as taking into account the peremptory provisions of clause 11.1, it cannot order the nullification of the temporary holding positions created for those officers who do not yet have the prescribed qualifications. This, the Court does also taking into account the interests of the hundreds of officers who already possess the prescribed qualifications *viz* against those who are yet to acquire same, who are 61 in total. One cannot ignore as well that the reason behind the introduction of the holding positions by the Employer was to give effect to clause 11.1 in the schemes of service as negotiated and agreed between the parties. Further to this, the Court cannot overlook the fact that the Applicant union was aware, and in fact had ample time and opportunity to consult and engage with its membership before agreeing to and ultimately signing the now contentious schemes of service.

17. On the question of the implementation date of the 2014 Circular, the finding of the Court is that the parties signed the agreement with the understanding that the effective date was to be the 01st April 2014. The Applicant's representative signed this Collective Agreement after having requested an adjournment to consult its members on the effective date. They cannot then do a complete turn about on the date and now want the effective date to be June 2013. In this respect their claim is without merit and should fail.

18. After carefully considering all the intricate factors at play in this matter, including the interest of equity, justice and fairness the Court accordingly issues an order as follows;

A) The dispute of the parties relating to double streaming into categories I and II of the title posts in the Accounting Cadre is hereby referred to the Conciliation, Mediation and Arbitration Commission for mediation by the Executive Director together with one of the Senior Commissioners within 30 days of the granting of this order. Thereafter the Executive Director is to file a report with this Court on the process and its outcome within 14

days after completion of the process. In the meantime though, the Court directs that the status quo be and is hereby maintained.

B) Whatever the outcome of the mediation process in terms of Order (A) above, the implementation date of the 2014 Circular shall remain as the 01st April, 2014.

C) The Court makes no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 26th DAY OF MARCH 2015.

For the Applicant : Attorney M. P. Simelane (M. P. Simelane Attorneys)
For the Respondents : Attorney V. Kunene (Attorney General's Chambers)