



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 252/16

In the matter between:

HLOBISILE NDZIMANDZE

Applicant

And

PRINCIPAL SECRETARY – MINISTRY OF

FINANCE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

CIVIL SERVICE COMMISSION

3rd Respondent

Neutral citation: Hlobisile Ndzimandze and The Principal Secretary Ministry of Finance and 2 Others (252/2016) [2019] *SZIC* 73 (24 October 2019)

Coram: **NSIBANDE S. JP**

(Sitting with Nominated Members of the Court Mr. N. Manana and Mr. M. Dlamini)

Heard: 26 June 2019

Delivered: 24 October 2019

Summary – Labour Law – Industrial Relations – Applicant seeks an order declaring withholding of work by 1st Respondent be declared an unfair labour practice, that 1st respondent be directed to provide work to Applicant; that the Civil Service Commission directive that Attorney General consults with Applicant be declared unlawful and in breach of its constitutional mandate.

Held – that the Applicant has not made sufficient averments to support the relief claimed in prayers 1 and 2 of the Notice of Motion.

Held – that the CSC is the party vested with power to consult Applicant on her transfer and not the Attorney General. The party that transfers is the party that consults.

Held – Costs follow the event.

JUDGMENT

[1] The Applicant seeks an order in the following terms:-

1. *Declaring that the 1st Respondent’s action of depriving and not allocating work to the Applicant is an unfair labour practice;*

2. *Ordering the 1st Respondent to provide the Applicant with the work of Legal Advisor in the Ministry of Finance forthwith;*
3. *Declaring the 4th Respondent's directive to the Attorney General to consult or transferring the Applicant and/or to transfer the Applicant, unlawful and in breach of its own constitutional mandate."*

[2] The Applicant and the Respondents have a protracted and sad history of litigation between them. Their history of litigation started five (5) years ago in 2014 when the Applicant approached this Court contesting her transfer from the Ministry of Finance. Her application was unsuccessful in this Court. She approached the High Court in review proceedings and was successful in having the transfer set aside for being irregular and *mala fide*. The Respondents, being dissatisfied with the judgement of the High Court sought to appeal against it to the Supreme Court. They were unsuccessful in the appeal following that the Supreme Court dismissed their application for condonation for the late filing of the Court record and deemed the appeal abandoned.

[3] It appears that despite the judgment of **Mlangeni J.** in the High Court matter and the comments of Supreme Court Justice, **Dlamini J.**, the Applicant's situation did not improve. She continued to be starved of work and her grievance

regarding the Ministry's refusal to give her work continued to be ignored. Instead, the Respondents again attempted to transfer her, causing her to approach the Court once again to protect her rights. This Court in the matter of **Hlobisile Ndzimandze v The Chairman of the Civil Service Commission N.O, Swaziland Government, Attorney General IC Case No. 252/2016 (B)**, as per **Dlamini J**, left no doubt as to the powers of the Attorney General to transfer or consult the Applicant on an intended transfer when it ordered that: *“(a) the third respondent does not have the power or authority, in the exercise of his powers as Attorney General, to transfer the applicant or consult her on any intended transfer. (my emphasis).”*

[4] On the Applicant's 2nd prayer in that matter, the Court directed that the Civil Service Commission (herein after referred to as the CSC) deal with the Applicant's grievance without further delay, before determining any intended transfer of her. The CSC was also directed to hear the complaint of the Principal Secretary of the Ministry of Finance against the Applicant, before determining any intended transfer of her.

[5] The CSC, in keeping with the direction of the Court, heard the Applicant's grievance as well as the Principal Secretary Finance's complaint against her and

issued its decision in a letter dated 21st March 2018. The CSC decision is captured in the last paragraph of the letter and is as follows:-

“... that the Civil Service Commission made a decision that the Attorney General consult with the officer and find her a suitable Ministry and/or revert her to the Attorney General’s Chambers where she can best serve her employer. In light of that transition, the Principal Secretary Ministry of Finance is mandated to utilise the officer as Legal Advisor the best way possible, effective immediately.”

In reaching this decision, the CSC states that it took into consideration the fact that the working relationship between Ms Ndzimandze, the substantive Principal Secretary and Directors had deteriorated immensely. In terms of the letter, several other factors were taken into consideration.

[6] The Applicant, having received the CSC’s decision, complains that her grievance was not resolved. Firstly, she complains that the 1st Respondent has continued to refuse to provide her with work. She calls upon the Court to declare the 1st Respondent’s refusal to grant her work an unfair labour practice and to order that the Respondents comply with the implicit terms and conditions of her employment and provide her with work.

[7] Secondly she complains that the CSC, by directing that the 2nd Respondent consult with her and find her a suitable Ministry or revert her to the Attorney

General's Chambers, has acted unlawfully and contrary to its mandate as set out in **Section 187 of the Constitution of the Kingdom of Eswatini**; that the CSC is not entitled to delegate its *quasi judicial* power/authority; and that, therefore, the order directing the 2nd Respondent to consult with the Applicant is unlawful and ought to be set aside accordingly.

[8] The Respondents opposed the application and raised the following preliminary issues –

8.1 **Ad Res Judicata/Functus Officio**

The Respondents contended that the relief sought under prayer 1 of the notice of motion was long adjudicated upon by this Court in litigation involving the same parties as well as in the High Court between the same parties. In the alternative, the Respondents argue that the Court is *functus officio* on the issue of deprivation of work to the Applicant because the Court has in fact pronounced that deprivation of work is an unfair labour practice. In argument, the Respondents conceded that 1st Respondents action of depriving the Applicant work or of deliberating not assigning work to her amounted to an unfair labour practise.

8.2 **Lack of cause of Action**

The Respondents complain that the Applicant's papers lack sufficient averments to support the granting of the relief sought in prayers 1 and 2; that throughout

the body of her Founding Affidavit, the Applicant makes no allegation that she was deprived of work between 23rd March 2018, when she received the CSC's decision and 10th April 2018, when the present application was launched. It was Respondents' argument that the Applicant was, therefore, not entitled to the relief she claim under prayers 1 and 2.

[9] On the question of the constitutional validity of the CSC's decision to have the 2nd Respondent consult with Applicant, the Respondent submitted that there is nothing untoward about the CSC involving the 2nd Respondent in consultation with the Applicant. It was submitted that the power set out in **Section 187 of the Constitution** is subject to the constitution "or any other law." It was argued therefore that the CSC was within its legal right to instruct the Attorney General, as head of department of the legal services of the Government. It was argued that the CSC had made the decision to transfer the Applicant from the Ministry of Finance and that it made logical sense for it to involve the 2nd Respondent in the decision of where she would be transferred to, as he was well placed to know the legal needs and legal personnel requirements of the Government. This was said to be *in tandem* with the **Civil Service Order and Civil Service Regulations** (in particular **Regulation 23**) as well as **Sections 77 (3) (a) and (5) of the Constitution of Eswatini.**

[10] The Applicant's attorney addressed the two issues raised by Respondents regarding the submission on *resjudicata/functus officio* and the lack of sufficient averments to sustain an order in terms of prayer 2. It was submitted that prayer 2 sought specific performance and that the Court had not granted such prayer previously. Nor had the Courts declared that the refusal to give Applicant work is an unfair labour practice.

[11] It seems to us that the Respondents concede that the continued refusal of 1st Respondent to give the Applicant work constitutes an unfair labour practice. They simply respond to this prayer by saying that the previous Court decisions have indicated that such deprivation is indeed an unfair labour practice. However, this issue is tied to the 2nd issue that the Respondents raised – has there been sufficient averments made by the Applicant to entitle her to the declaratory order and the 2nd Order calling for the 1st Respondent to provide her with work?

[12] The Applicant's founding affidavit sets out how 1st Respondent in the person of Mr Bheki Bhembe, has failed to allocate work to her since his appointment into the position in or about 2014/2015. It sets out, how he has sought to explain the refusal to allocate work, firstly by saying it was because of pending cases they had to finally saying that it was because of the refusal of the Directors at the

Ministry to work with Applicant because of bad working relations. The only allegation Applicant makes relating to the 1st Respondent's conduct after the 23rd March 2018 is at paragraph 24 where she states *"To date, the 1st Respondent refuses to give me work,"* There is no mention of what has happened with regard to the allocation of work since the issuance of the CSC's decision contained in annexure "HN1." If one has regard to the fact that the CSC's decision was made on 21st March 2018 and is said to have been received by the Applicant on 23rd March 2018, one would have expect that the Applicant, in her founding affidavit would have set out instances of the 1st Respondent's refusal to allocate work to her, between 23rd March and 10th April 2018, when she launched this application. There are no such allegations in the Founding Affidavit. Regard must be had to the fact that the CSC, in page 5 of its decision directs the 1st Respondent to *"utilise the office as Legal Advisor, the best way possible effective immediately."* We are in agreement with the Respondents that a clear and concise statement of material facts upon which the Applicant relies for the relief claimed in prayers 1 and 2 has not been made by the Applicant.

[13] The matter that now remains for determination is that of the order of the CSC regarding the consultation between the Applicant and the Attorney General. The premise of the Respondent's defence to this prayer is that the CSC has taken the decision that Applicant be transferred as it is within its power to do so in terms

of **Section 187 (1) of the Constitution of the Kingdom of Eswatini**. It was argued that having taken the decision to transfer Applicant, the CSC was entitled to take the input of the Head of Department as provided for by **Regulation 23 of the Civil Service Regulations**. **Section 187 (1) of the Constitution** reads *“subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments and confirmation of appointments), promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall rest in the Civil Service Commission.”*

Regulation 23 of the Civil Service Regulations reads, *“If the Board (the CSC) proposes to tender advice which in the opinion of the Board, is substantively at variance with the recommendation made to the Board by a head of department, the Board shall so inform the head of department who may, if he so wishes be heard by the Board.”*

[14] The point being made by the Respondents is that there is nothing untoward about the CSC asking that Applicant be consulted by the 2nd Respondent to determine where she can be best placed, because the CSC had made the decision to transfer the Applicant, as per its constitutional mandate.

[15] This point ignores the fact that this Court, in the litigation involving these very parties settled this matter. The High Court also had occasion to comment on this issue at the review application between these very same parties.

[16] At paragraph 33 of the High Court judgment **Mlangeni J**, commenting on the supposed consultation between Applicant and the Attorney General says; “*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.*” (**Civil Case No. 449/15 – Hlobisile Ndzimandze v The Civil Service Commission, Swaziland Government, the Accountant General N.O. and the Attorney General N.O.**)

[17] At paragraph 22 and 23 **Dlamini J**, in his judgment (**Hlobisile Ndzimandze v The Chairman of the Civil Service Commission N.O, Swaziland Government, Attorney General Industrial Court Case No. 252/2016 (B)**) and after analysing Sections 187 (1) and 186 (2) (c) as well as Section 77 of the Constitution stated the following:-

“In my view though, the supervision of the Attorney General on his subordinates only goes as far as they exercise the functions bestowed in the Attorney General by the Constitution...

However, issues relating to the management of public officers i.e. human resource issues... constitutionally vest in the Civil Service Commission and no

one else. So that whenever there is a need for a transfer in respect of a public officer for instance, the requisite consultation in that transfer is the exclusive preserve of the Civil Service Commission (my emphasis).”

[18] **Justice Dlamini** sheds further light on the issue by stating that *“If the Civil Service Commission deems it necessary that it takes into account a recommendation by the Attorney General in respect of a transfer... it is perfectly entitled to do so. But the ultimate power and authority to consult and transfer public officers vests only with it. One needs to point out as well that even though the constitution allows for the delegation of the functions of the Civil Service Commission, such delegation however is only upon the decision or any of the other members of the Commission (see **Section 186 (2) (e)**).”*

[18] The position stated above is, in our view the correct position at law. It is clear and unambiguous, that the Attorney General has no business consulting with the Applicant but that he can make whatever recommendation to the Civil Service Commission. In terms of Regulations 23 of the Civil Service Regulations he would have to request an opportunity to be heard by the CSC in order to make such recommendation. It matters not, in our view that the CSC has taken the decision to transfer the Applicant already, as the Respondents submit. The person who consults must be the person who makes the ultimate decision (**Per Dlamini J in Case 252/2016 (B)**). In the circumstances of this

matter we find that the Applicant has made a case for the relief she claims under prayer 3 of the Notice of Motion.

[19] The issue of costs was raised in argument with the Applicant seeking costs and the Respondent resisting any costs order. Having considered the circumstances of this application, in particular the court's judgment under case **No. 252/2016 (B)**, it is our view that the Respondents defence of the matter was clearly untenable. In the circumstances costs ought to follow the event.

In the circumstances the Court makes the following order;

- (a) The 4th Respondent's directive to the Attorney General to consult with the Applicant is hereby declared unlawful and in breach of its constituted mandate.**
- (b) The Respondents are directed to pay costs of this application.**

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr M.M. Sibandze (Musa M. Sibandze Attorneys)

For the Respondents: Mr N.G. Dlamini (The Attorney General's Office)