IN THE HIGH COURT OF SWAZILAND

Case No.787/14

In the matter between:

SWAZILAND GOVERNMENT	Applicant
VS	
KHANYISILE MSIBI N.O.	1st Respondent
CONCILIATION MEDIATION AND ARBITRATION COMMISSION	2nd Respondent
SWAZILAND NATIONAL ASSOCIATION OF CIVIL SERVANTS ON BEHALF OF HOSPITAL ORDERLIES AND AUXILLIARY STAFF	3rd Respondent

Neutral citation: *Swaziland Government vs Khanyisile Msibi(787/2014) [2015] SZHC 206 (25 November 2015)*

Coram: FAKUDZE, J

Heard: 16 November, 2015

Delivered: 25 November, 2015

Summary: ***Equal remuneration for work of equal value considered – An employer may pay different wages to the same type of employees who do the same type of work, provided there are certain justifiable variables that inform the disparity, such as expertise, skill and experience – The grounds for discrimination in terms of Section 29 of the Employment Act 1980 and Section 20 of the Constitution should not be limited to gender, race, color, ethnic origin, tribe, birth, creed or religion or social or economic standing, political opinion, age or disability – In this case, no justifiable variables that inform the disparity in paying different wages to employees who do the same type of work – Application therefore dismissed with costs.***

JUDGMENT

BACKGROUND

[1] This is an Application in terms of Section 19 (5) of the Industrial Relations Act, 2000 ("the Act") for the review of an award made by the First Respondent and arbitrator at the Conciliation Mediation and Arbitration Commission ("CMAC").

[2] The issues in dispute before the arbitrator was the payment of Hospital Orderlies in psychiatric hospitals on grade A4 whereas Hospital Orderlies who are in non psychiatric hospitals are paid on a lower grade. The other issue was that promotions should be made internally before external considerations.

[3] After analyzing the evidence, the arbitrator made the following award –

(a) That the Respondents are directed to upgrade the positions of all orderlies in the country to Grade A4. This upgrade is to be implemented as from the 1st April 2014 to enable the Respondents to sufficiently include the same in its budget.

(b) That the Respondents are directed to firstly consider internal advertising of all auxiliary positions. This is to be

implemented with immediate effect. The Respondents can only recruit externally if no suitable position is identified within the cadre.

APPLICATION FOR REVIEW

[4] Following the Ruling by the arbitrator, the Applicant, who was Respondent in the arbitration, filed a Notice of Motion to the High Court for an Order in the following terms -

(a) Reviewing and setting aside the arbitration award of the 1st Respondent upgrading the position of all orderlies in the country to Grade A4.

(b) Remitting the matter back to the 2nd Respondent for arbitration before an arbitrator other than the 1st Respondent.

(c) Costs against the 3rd Respondent in the event it unsuccessfully opposes the application; and

(d) Further and/or alternative relief.

[5] An affidavit is support of the Notice of Motion was signed and attested to by the Principal Secretary in the Ministry of Public Service. The grounds for Review are stated in paragraph 8 of the Founding Affidavit as follows –

8.1 The 1st Respondent failed to take into account relevant considerations. She made her award without taking into account whether the reason for the differences in pay between the claimant and the comparator was a ground of discrimination prohibited by Section 29 of the Employment Act No. 5 of 1980 and /or Section 20 of the Constitution of Swaziland.

8.2 There was no evidence before the arbitrator of a causal link between differentiation and a prohibited ground of discrimination. The arbitrator's award is irrational in that there was no objective basis justifying her conclusion between the material properly available to her and the award she eventually arrived at.

8.3 The award made by the 1st Respondent regard had to the absence of a causal link between the differentiation and a listed ground of discrimination is so unreasonable that no reasonable arbitrator could have come to it.

[6] The 3rd Respondent filed a Notice of Intention to Oppose the Review Application. He went on to file the Answering Affidavit. Both parties have filed detailed Heads of argument. There were no papers filed by the 1st and 2nd Respondents. It is therefore reasonable for this Court to conclude that they will abide by the decision of this Court.

THE APPLICABLE LAW

[7] There are two issues for consideration in this Application. The first one is whether reasonableness is a ground for review or not and the other one is discrimination of employees who are doing a similar job but paid differently. Let us determine the applicable law in each matter. It is common cause that **Takhona Dlamini v President of Industrial Court and Another Case No. 23/1997** is the leading case in our jurisdiction on common law review grounds. Tebbut J.A stated that-

> "***Those grounds embrace, inter alia, the fact that the decision was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose, or that the court took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant an inference that the court had failed to apply its***

> ***mind to the matter….. The grounds are, however, not exhaustive. It may also be that an error of law may give rise to a good ground for review***."

[8] Even though a Superior Court has power to review the decisions of lower courts and statutory bodies, it must jealously guard against finding itself re -analyzing evidence with a view to reconsidering the decision. This is based on the principle that the issue before a court on review is not the correctness or otherwise of the decision under review. The formulation of the test to be used by a litigant to succeed on review was clearly set out by the Learned Judge President in the matter between **Councillor Mandla Dlamini and Another v Musa Nxumalo Appeal case 10/2002**. His Lordship said that -

> ***"It is now time for the courts in Swaziland to hold that it is no longer necessary for a litigant to prove that a decision- maker acted grossly unreasonable in order for such litigant to succeed on review. In this day and age, the test of gross unreasonableness is too narrow and too stringent or perhaps unreasonably too high a threshold. The test must be whether the decision maker acted procedurally fairly or unfairly in the circumstances."***

[9] The line of reasoning in the Councillor Mandla Dlamini case was adopted by **Mamba J. in the case of Atlas Motors (Pty) Ltd V Machava and Another Case No. 77/2003.** The Learned Judge observed in paragraph 15 that the emphasis is still on the conduct of the proceedings and not the results thereof. The requirement is still that the proceedings must be conducted in a fair manner in the sense that for example the rules of natural justice must be observed. I fully agree with the observations made by the Learned Judges in the two abovementioned cases.

[10] What the above cases are establishing is that reasonableness can be a ground for review. The Applicant's contention in the case that is before this Court is that the arbitrator's award was unreasonable in the circumstances and is therefore subject

to review by this Court. I agree with the Applicant that reasonableness can be a ground for review.

[11] The other segment of the case before this honorable Court is the issue of discrimination. In the arbitration proceedings the Applicant's grievance was that hospital orderlies and auxiliary staff employed by the Appellant at non psychiatric hospitals performed work of equal value to their colleagues at psychiatric hospitals and yet the latter were paid on a higher grade. This suggests that there is discrimination in the workplace.

[12] Discrimination in the workplace is prohibited by Section 29 of the Employment Act 1980. The Section specifically provides that –

> ***"No employer shall in a contract of employment between himself and an employee, discriminate any person or between employees on grounds of race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political or social status."***

It is worth noting that similar words are used in Section 20 of the Constitution.

[13] **In Louw v Golden Arrow Bus Services (Pty) Ltd 2000 (21) ILJ 188 (L.C.),** the South African Labor Court held that to succeed in an equal remuneration claim, a litigant must establish that –

(a) There is a comparator;

(b) The work done by the comparator is the same as his or hers;

(c) There is a difference in the salary of the comparator and him or her; and

(d) There is a causal link between the differentiation and a listed or analogous ground of discrimination.

[14] In the Louw case (*supra*), The Learned Judge Landman J. further observed that –

` "**I*n other words, it is not an unfair labor practice to pay different wages for equal work or for work of equal value. It is however an unfair labor practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing is direct or indirect discrimination on arbitrary grounds or the listed grounds, e.g. race or ethnic origin."*** at 196.

BORNE OF CONTENTION

[15] The Applicant's case is that it is common cause that there is a differentiation in salary between orderlies at psychiatric hospitals and their colleagues at non psychiatric hospitals. Those working at the psychiatric hospitals are paid more than those working at non psychiatric hospitals. Applicant's Counsel submits that the existence of a causal link between this differentiation as a ground of discrimination or an analogous ground listed in Section 29 of the Employment Act 1980, is a factor of paramount importance that the First Respondent had to take into account. In this case, the First Respondent failed to consider whether the reason for the difference in pay between the two categories of employees was a listed or an analogous ground of discrimination.

[16] Applicant's Counsel avers that there is no evidence on the record to show that the reason for the difference in pay was the ground of discrimination prohibited by law. All that the Applicant is saying that an act of discrimination should fall within the ambit of discrimination as defined in Section 29 of the Employment Act, 1980. These grounds are race, colour, Religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status. Applicant's Counsel submits that if the alleged act does not fall within one or more of the categories mentioned in the Act, it cannot therefore be properly regarded as discrimination. The principle that is being invoked by Applicant's Counsel is that of *expressiouniusestexclusioalterius (*which means that the express mention of one thing implies the exclusion of another). This reason alone subjects the arbitration to review because it is irrational and unreasonable and since irrationality or unreasonableness is a ground for review, the award must be reviewed.

[16] The 3rd Respondent's Counsel argues that the arbitrator took all the facts into account in arriving at the award. Counsel further submits that the Record of proceedings prove that the arbitrator applied her mind in making the award. 3rd Respondent's Counsel states that all the orderlies possess the same skill, expertise and experience. An employer may pay different wages to the same type of employees who do the same type of work, provided there are certain justifiable factors that inform disparity such as expertise, skill and experience. 3rd Respondent's Counsel argues that all the factors that are necessary for arriving at the conclusion the arbitrator arrived at are fully captured in paragraph 5.1.18 of the Record of proceedings where the arbitrator says that-

> ***"In the present case, however, all these orderlies possess the same skill and experience. The notion of risk can, only if justified, be rectified by the payment of a risk allowance. Even then, same would have to be particularly quantified with the employer engaging all relevant stakeholders. It would be unfair for the employer to particularly decide on its own contention to award the one group a higher grade without first having consulted extensively."***

[17] 3rd Respondent's Counsel relies on the case of **Satellite Investments (Pty) Ltd v Joseph Dlamini and others Industrial Court Appeal of Swaziland Appeal Case No. 04/2010** as his authority. He argues that the facts in this Review Application are materially the same as those in the Satellite Investment (Pty) Ltd case.

In paragraph 12 of the Satellite case judgment, the Appeal Judge made reference to **Transport General Workers Union Another v Bayete Holdings (1999) (L.C)** where Grogan A.J. stated that -

> "***However the mere fact that an employer pays one employee more than another does not in itself amount to discrimination. Discrimination takes place where two similar circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, skill and the like."***

This case is also referred to by the arbitrator in her analysis.

[18] 3rd Respondent's Counsel finally argues that the only difference between psychiatric hospital orderlies and the other non psychiatric orderlies is that the former undergo a one day training and this is so minimal a variable that it cannot justify the differential treatment.

COURT'S FINDINGS AND CONCLUSION

[19] Having read the papers filed by Applicant's Counsel and 3rd Respondent's Counsel and having listened to persuasive and impressive arguments by Counsel for both parties, the Court wishes to register its appreciation to the professional and qualitative manner in which Counsel have handled the case at hand.

[20] It is the Court's considered view that reasonableness is a ground for review. If the Court comes to the conclusion that a ruling by an arbitrator or *court a quo* was so grossly unreasonable, it can set it aside. An unreasonable ruling is also an irrational one. In this particular case, this Court finds nothing unreasonable in the manner the arbitrator handled the case. She applied her mind to all the issues that were brought before her. I therefore entirely agree with 3rd Respondent's Counsel that since all the orderlies possess the same skill, expertise and experience, differential treatment of the orderlies is unjustified.

[21] Applicant's Counsel has argued that there is no evidence on the Record of proceedings to show that the reason for the difference in pay is a ground of discrimination prohibited by the law. He basis his argument on the fact that an act of discrimination should fall within the ambit of discrimination as defined in Section 29 of the Employment Act, 1980. There is merit in this argument, but it runs short of the canon of interpretation that a statute must be interpreted based on its purpose. This is what we call the purposive interpretation of a statute.

[22] The case of Seaford **Court Estates Ltd V Asher (1949) 2 KB 481** bears testimony to this legal truth, particularly when Lord Denning says at page 498 to 499-

> "***whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise and even if it were, it is not possible to provide for them in terms of free ambiguity. A judge….. must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute but also from a consideration of the social conditions which gave rise to it and the mischief which it was passed to remedy and then he must supplement the written word so to give 'force and life' to the intention of the Legislature."***

This canon of interpretation was also invoked in the case of **Nothmen v Barret London Borough Council (1978) 1 W.L.R** at 228.

[23] The subject matter in Section 29 of the Employment Act, 1980 is the elimination of all forms of "discrimination" in a workplace. The law prohibits any employer from discriminating an employee on various grounds including but not limited to those mentioned in the Employment Act. In other words, the grounds for discrimination need not be limited to those mentioned in the Employment Act. In the **Transport and General Workers Union Case (*supra*)** Grogan A.J. said that -

> ***"Discrimination takes place when two similar circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, skill and the like."***

Likewise, in the **Louw's case (*supra*)**, the Learned Judge confirms this position when He says -

> "***In other words it is not unfair labor practice to pay different wages for equal value. It is, however, an unfair labor practice to pay different wages for equal work to equal value if the reason or motive being the cause for so doing, is direct or indirect discrimination or arbitrary grounds or the listed ground e.g. race or ethnic origin…..Discrimination on a particular "ground" means that the***

ground is the reason for the disparate treatment of people; for example different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment."

[24] This Court holds the view that the differential treatment of the orderlies is direct or indirect discrimination. Further support for the proposition that discrimination must not be limited to the instances listed in the Section 29 of the Employment Act 1980 is found in the case of **Satellite investments (Pty) Ltd (*Supra*)** where the Industrial Court of Appeal observed in paragraphs 25 to27 as follows -

"In my view the contention by the appellant is supportable. First no authority was cited in support thereof. Secondly society throws up a vagary of new and unprecedented situations that the Legislature in all its manifold wisdom would not have anticipated. The question then is if there is a type of discrimination which is obviously untenable and totally insupportable should the courts when approached by a litigant to distrain such conduct turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic NO!

If that were to be so it would mean that the courts would thereby fail to protect victims of overt discrimination and the courts' hands would be withered and be unable to move in order to give the needed protection for no other reason than that the Legislature many years ago in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before court. This would amount to the courts failing to perform their duties.

An example would in this regard do. There is nowadays the HIV-AIDS pandemic. It was relatively unknown and hence not prevalent when the Employment Act was promulgated in 1980. There have been cases in other countries where the courts have come out strongly and condemned discrimination based on a person's HIV status in the workplace."

[25] I fully agree with the views expressed by the Learned Judges in the Satellite Investments (Pty) Ltd case. The basis for this Court in supporting the view that discrimination should not be given a limited meaning is the fact that by its nature and effect, discrimination is offensive to human dignity and therefore irrational. This Court is fully aware that it is not the role of the courts to make laws; that is the role of the Legislature. Courts have an important role of interpreting and finding out the intention of the Legislature in the enacted a law. This Court hold the view that in performing this challenging and arduous task, it must consider the social conditions under which the enacted law is meant to apply; it is also the duty of the courts to give meaning to what the Legislature intended.

[26] Not only is the Satellite Investments case instructive in the manner in which Section 29 of the Employment Act, 1980 should be interpreted, Sub - sections (4) and (5) of Section 20 of the Constitution are equally instructive. These Sub-sections state that-

> ***"(4) Subject to the provisions of sub-section (5), Parliament shall not be competent to enact a law that is discriminatory of itself or in its effect.***
>
> (***5) Nothing in this Section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social economic or educational or other imbalances in society."***

[27] I would not like to comment on these Sub- sections because they speak for themselves.

[28] It is this Court's considered view that the award arrived at by the arbitrator on the basis of discrimination should be upheld by this Court. In the light of all that has been said above, this Court rules in favor of the 3rd Respondent and the Applicant's application for review is therefore dismissed with costs.

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FAKUDZE J.

JUDGE OF THE HIGH COURT

For Applicant: Mr. M. Vilakati

3rd Respondent: Mr. A.M. Lukhele