



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 195/2017

In the matter between

**SWAZILAND REVENUE AUTHORITY
STAFF ASSOCIATION**

APPLICANT

And

SWAZILAND REVENUE AUTHORITY

RESPONDENT

Neutral citation : Swaziland Revenue Authority Staff Association v
Swaziland Revenue Authority (195/2017) [2017] SZIC
122 (2017)

CORAM

SIPHO L. MADZINANE : ACTING JUDGE

DAN MMANGO : MEMBER

ARTHUR NTIWANE : MEMBER

DATE HEARD : 12 OCTOBER 2017
DATE DELIVERED : 01 NOVEMBER 2017

J U D G E M E N T

Summary: Declaration – applicant alleging that the P.E.U issued circular No. 3 of 2016 and its members who hold positions of director are entitled to benefit from the its implementation. Respondent argues that applicant’s members are not entitled to benefit because of a clarification by P.E.U. that excludes applicant’s members. Court held that as the determination hinges on policy considerations of P.E.U. which is under the Ministry of Finance, both parties should be joined.

1. This is an application by the staff association of the members of Respondent’s employees who are seeking the following reliefs against the respondent.
 - (a) Declaring that the applicant’s members who hold the position of director in the respondent’s establishment are entitled to benefit in terms of P.E.U. Circular No.3 of 2016.
 - (b) Directing the respondent to incorporate the Applicant’s members who hold the position of director among those to benefit from the implementation of P.E.U. Circular No. 3 of 2016.

- (c) Declaring that the exclusion of the Applicant's members who hold the position of Director from the implementation of P.E.U. Circular No. 3 2016 is unfair labour practice.
 - (d) Costs of suit and further and alternative relief.
- 2. The application is supported by the affidavit of June Khanyile who is a Vice President of the applicant.
- 3. According to the Applicant, the Public Enterprise Unit on the 17th November 2016 issued Circular No.3 of 2016 in terms of which it set out how Chief Executive Officers, Chief Financial Officers and Executive Management will be paid. The said Circular was effective on the 01st December 2016.
- 4. Applicant contends that its members who are directors and who are internally called Head of Divisions, have been excluded by the Respondent from benefiting in terms of the Circular. Accordingly, applicant contends that such conduct on the part of the Respondent constitutes unfair labour practice.
- 5. Applicant also argues that Respondent has adopted an unreasonable and/or absurd interpretation of the circular regarding who are supposed to be its (circular) beneficiaries. Applicant argues that such interpretation is malafide as the circular is unequivocal in its wording as to who are the beneficiaries.

6. According to the Applicant, the interpretation adopted by the Respondent, excludes the directors from benefiting in its implementation yet the circular includes the directors as beneficiaries to the circular.
7. It is on those basis the Applicant has approached the court for a declaratory order and an interdict to enforce its members' rights in terms of the circular.
8. The application is opposed by the respondent. The Respondent has set out a resume and then raised a point of law and pleaded over to the merits.
9. At the commencement of the argument, both parties agreed that it is imperative that the Court determine the point of law first before adverting to the merits of the matter.
10. The Respondent contended that the Applicant has failed to join the Public Enterprise Unit and the Minister of Finance, the latter being the line Ministry under which the P.E.U. falls under.
11. According to the Respondent, the circular in issue herein was intended to provide a framework for the classification and remuneration of executive managerial employees within Public Enterprises.
12. The Respondent's argument is that in terms of **Section 10 of the Public Enterprises (Control and Monitoring Act) of 1989**, it is obliged to implement the circular in accordance with the directives of the Public Enterprise Unit. The Public Enterprise Unit has powers to control and regulate public enterprises like the respondent.

13. Mr Jele on behalf of the respondent, argued that the Public Enterprise Unit has a direct and substantial interest in the proceedings before Court primarily because the interpretation that may be accorded to the wording of the circular would have certain consequences on the Public Enterprise Unit. P.E.U. is the one that has determined the classes of employees that are to be affected by the circular. The Minister of Finance also has basis to be joined as the P.E.U. is a unit under the Ministry of Finance and the Minister of Finance exercises both executive and administrative powers on the P.E.U. It was argued that the determination before court is about policy considerations of the P.E.U. and the Minister.
14. The Respondent further argued that when it was confronted by the question who amongst its employees were supposed to benefit from the circular in issue, it (Respondent) sought clarification from the Public Enterprise Unit. The latter gave the respondent an interpretation which interpretation directed who are the beneficiaries to the circular. In terms of the interpretation, the Applicant's members who are directors were excluded.
15. The point of law of non-joinder raised by the Respondent is opposed by the Applicant on the basis that the matter before Court is between an employer and its employees regarding the implementation of the circular. As such, the refusal of the employer to implement the circular is detrimental to the Applicant's members and it amounts to unfair labour practice, so goes the argument. Applicant argued that the conduct of the Respondent to seek the opinion of P.E.U. regarding the circular is unfair.

16. Mr Shabangu argued that the Public Enterprise Unit has no direct and substantial interest in the matter. There is no need to join them as they have already given their subjective interpretation of the circular, so goes the argument. There is no grey area in the circular as P.E.U. has already said unequivocally and expressly who are the beneficiaries of the circular. As such, an academic interest is not sufficient for the honourable Court to find that P.E.U. be joined. All that is left is for the court to interpret the circular objectively.

16.1. Finally, Mr Shabangu argued that the allegations as set out in the Respondent's affidavit as basis for the joinder of the P.E.U. and Minister of Finance are not sufficient to establish the threshold of joinder of necessity.

17. **COMMON CAUSE FACTS**

(i) It is not in dispute that the P.E.U. issued the circular and the interpretation, implementation of which is in issue in these proceedings. The circular is dated the 17th November 2016 and is signed by Director of P.E.U and it was to be effective on the 01st December 2016.

(II) That after the circular, P.E.U. issued a clarification of the circular on the 21st February 2017.

- (iii) On the 22nd February 2017, through an internal memorandum, the Respondent's Head of Corporate Services wrote to the Applicant and advised of the clarification of the circular by the Public Enterprise Unit.
- (iv) On the 12th May 2017, CMAC issued a certificate of unresolved dispute between the parties in this matter.
- (v) That in the certificate of unresolved dispute, Respondent stated that it was advised by the P.E.U. Director which positions were affected by the circular hence they are following that directive.
- (vi) That Respondent is a Category A of public enterprise.

18. **AD QUESTION FOR DETERMINATION**

The question for determination is whether or not P.E.U. and Minister of Finance should be joined in these proceedings as parties.

19. To enable the court to properly determine the question, the law applicable is relevant.

19.1. *According to **Hebstein and Van Winsen**, at page 172 “A direct and substantial interest has been held to be an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a legal interest in the subject matter of the litigation, excluding an*

indirect commercial interest only. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it infact exists.” Underlining my emphasis.

20. According to the Respondent, for determination by the honourable Court, are policy considerations by the Public Enterprise Unit. Further both parties, on being asked by the court that given the clarification and/or interpretation of the circular by the Public Enterprise visit dated the 21st February 2017, what was expected of the Respondent. Respondent stated that in terms of Section 10 of the Public Enterprises (Control and Monitoring) Act of 1989, it was bound to implement the circular and directives of the P.E.U. Failure to do so would attract disciplinary measures and would be unlawful for the Respondent to do so. The court may point out that despite repetition of the question to Mr Shabangu, he avoided to give a direct response but stated that Applicant was not aware of the interpretation and/or clarification by the P.E.U.

21. The Court may point out that from the documents filed of record in this matter, that the Applicant was first advised on the 22nd February 2017 by the Respondent’s Head of Corporate Services about the clarification given by the Public Enterprises Unit. Same was repeated at CMAC during the conciliation exercise hence the certificate of unresolved dispute reflects that. Finally, when Respondent raised same in the answering affidavit, Applicant did not deny nor state that it was not aware. Accordingly, the court rejects the assertion by the Applicant that it was not aware of the clarification by P.E.U. that the Applicant’s members who are directors are not going to benefit from the circular.

22. Section 10 of the Public Enterprise (Control and Monitoring) Act 1989 provides as follows:

“10(1) “ No category A Public Enterprise shall do any of the following without the approval in writing by the Minister responsible acting in consultation with the standing committee”

(a)

(b)

(c)

(d)

(e) Make any major adjustment to the level or structure of staff salaries and wages or other terms and conditions of service of its staff.

(2) For purposes of subsection (1) the standing committee shall, in consultation with the Public Enterprises Unit, determine what is major in relation to each category A Public Enterprise.

(3) The Minister responsible may, in consultation with the Public Enterprise Unit, waive his approval for any given period of time in respect of any policy decision concerning any matter referred to in subsection (1) which affects any particular category A Public Enterprise.

- (4) *The Minister shall, upon the waiver of his approval under Subsection (3), give appropriate directives in writing to the category A Public Enterprise concerned.*
- (5) *Where a policy that is being pursued by a category A Public Enterprise is not adequate or conducive to the achievement of its objectives as specified in the statement of objectives, corporate plans, performance targets or other policy directives approved under this Act in relation to that category A Public Enterprise, the Minister responsible may, in consultation with Public Enterprise Unit, with the approval of the standing committee, determine the appropriate policy to be adopted by such category A Public Enterprise and the category A Public enterprise shall give effect to such policy". (Underling the court's emphasis).*

23. **AD LAW TO THE FACTS**

In this matter, the dispute relates to the implementation of a circular issued by the Public Enterprise Unit. The latter after it had issued the circular, also issued a clarification to same after it had been approached by the respondent. This was presumably following a disagreement the Applicant and the Respondent had regarding the interpretation and who were the beneficiaries of the circular.

It is not in dispute that the P.E.U issued the clarification and in terms of which, it excludes the members of the Applicant who are directors at the Respondent's undertaking from benefitting in circular No. 3 /2016. In terms of the Public Enterprise (Control and Monitoring) Act of 1989, the Respondent has a legal duty to effect the directives from the P.E.U. Further, the P.E.U. is an entity under the Minister of Finance. If the Respondent does not implement directives of the P.E.U, it commits an offence for which management of the Respondent can be disciplined and possibly criminally charged.

24. It is the Court's finding that the court in determining the matter, in particular the reliefs sought by the applicant, same will have a bearing on the policy **(the circular no.3/2016 and clarification)** issued by the Public Enterprise Unit.
25. Therefore it is the Court's finding that the Public Enterprise Unit and the Minister of Finance be joined as parties to the proceedings.
26. As to whether the honourable Court would be competent to deal with the matter after the joinder of the Public Enterprise Unit and the Minister of Finance, this court makes no finding. It is a question that the parties would have to deal with as and when they deem it appropriate.
27. Accordingly, the court makes the following orders:
 - (a) That the Public Enterprise Unit and the Minister of Finance be joined as 2nd and 3rd Respondents respectively in this matter.

- (b) The Applicant is directed to serve the pleadings on the Public Enterprise Unit and Minister of Finance.
- (c) The joined parties are afforded a period of (14) fourteen days within which to file any opposing papers if they deem it necessary.
- (d) The court makes no order as to costs.

The Members agree.



S.L. MADZINANE
ACTING JUDGE – INDUSTRIAL COURT

For Applicant : Mr. Z. Shabangu
(Magagula & Hlophe Attorneys)

For Respondent : Mr. Z. Jele
(Robinson Bertram Attorneys)