



IN THE INDUSTRIAL COURT OF ESWATINI
JUDGMENT

Case No. 370/18

In the matter between:

MAKHOSAZANE HLOPHE

1st Applicant

SIKHUMBUZO MAMBA

2nd Applicant

And

THE CHAIRMAN – CIVIL SERVICE COMMISSION

1st Respondent

PRINCIPAL SECRETARY – MINISTRY OF

LABOUR AND SOCIAL SECURITY

2nd Respondent

PRINCIPAL SECRETARY – MINISTRY OF

PUBLIC SERVICE

3rd Respondent

LABOUR COMMISSIONER

4th Respondent

JABULILE DLAMINI

5th Respondent

THE ATTORNEY GENERAL

6th Respondent

Neutral citation: Makhosazane Hlophe and Another v The Chairman Civil Service Commission and 5 Others (370/2018) [2019] SZIC 58 (04 July 2019)

Coram: NSIBANDE S. JP

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

Heard: 20 March 2019

Delivered: 04 July 2019

JUDGMENT

[1] The Applicants approached the Court by certificate of urgency seeking an order in the following terms:-

- 1. That the Honuourable Court dispenses with the Rules of the Court relating to forms of service, time periods for the filing of applications and enrol, hear and determine this matter as an urgent one.*
- 2. Condoning the Applicant's non compliance with the Rules of Court.*

3. *Declaring the appointment of the Fifth Respondent to the post of Senior Claims Officer in the Workmen's Compensation Unit of the Department of Labour to be contrary to the Schemes of Service for the Labour Relation Cadre and Relation 28(1) and (2) of the Civil Service Board (General Regulations No.16 of 1976.*
4. *Declaring the First Respondent's decision of appoint (sic) the Fifth Respondent to the position of Senior Claims Officer to be illegal, invalid and of no legal force or effect.*
5. *Ordering the First Respondent to furnish the Applicants with the reasons for suppressing the appointment and/or promotion of the First Applicants in favour of the fifth Respondent, to the position of Senior Claims Officer.*
6. *That the First Respondent be and its hereby ordered to appoint and/or promote the First Applicant to the position of Senior Claims Officer in the Workmen's Compensation Unit of the Department of Labour.*
7. *That prayers 3,4, and 5 operate with immediate interim effect pending final determination of this matter on a date to be appointed by the above Honourable Court.*

8. *Costs of suit.*

9. *Granting any further and/or alternative relief.”*

[2] The matter first came to Court on 20th November 2018 before Acting Judge X. Hlatshwayo wherein the parties agreed upon timelines for the filing of pleadings and further agreed that the assumption of duty of the 5th Respondent be held in abeyance pending finalisation of the matter. The matter was then set for argument on 12th December 2018. By that date Acting Judge Hlatshwayo’s appointment had lapsed and the matter found its way to this Court. The Court *mero motu* raised the question of service of all process on the 5th Respondent and directed that she be served with same before the matter could be argued as she had a direct and substantial interest in whatever order the Court would deliver. The matter was eventually heard on 20th February.

[3] The 1st Applicant is, in all reality, the main Applicant herein. The 2nd Applicant appears to have been cited as a party to the application because it is said he has an interest in the matter. He filed a confirmatory affidavit aligning himself with and supporting the application. Both Applicants were employed in 2008 and are both Labour Officers.

[4] The 1st Applicant states in her founding affidavit that she is based at the Workmen's Compensation Unit of the Ministry of Labour and Social Security. She contends that she is sufficiently qualified and is next in line to be appointed to the position of Senior Claims (Labour) Officer (the position being contested in terms of the application before Court). The Respondents do not deny these allegations in their Answering Affidavit.

[5] The Applicants' complaint is that the 1st Respondent (The Civil Service Commission) has unlawfully and irregularly appointed the 5th Respondent (Jabulile Dlamini) to the position of Senior Claims Officer in the Workman's Compensation Unit of the Department of Labour, on the recommendation of the 2nd Respondent (the Principal Secretary in the Ministry of Labour & Social Security), to the detriment of the Applicants.

[6] It is alleged that the appointment of the 5th Respondent is unlawful and irregular because –

6.1 there exists a Schemes of Service for the Labour Relations Cadre in terms of which the contested post is a promotional post to which no direct appointment can be made.

6.2 the 1st Applicant is not only qualified but was in fact recommended by the Internal Promotions Board for the position. Despite such recommendation, the 1st Applicant was not appointed nor was she given a hearing nor reasons for the rejection of the recommendation.

6.3 the manner of the 5th Respondent's appointment did not comply with relevant internal policies and laws regarding the filling up of positions of the Labour Relations Cadre.

[7] In advancing the Applicants' submissions the Court was referred to the **Schemes of Services for the Labour Relations Cadre** (the Schemes), in particular Article 4 (i) and (Vii) thereof.

In terms of Article 4 (i) of the Schemes "*All candidates for appointment to the Labour Relations Cadre must satisfy the Labour Commissioner of their suitability and aptitude for the work of the Department and be approved by the Civil Service Board.*

Article 4(vii) reads thus – "**Senior Labour Officer** (Grade 18 – Officers who have had a minimum of two years satisfactory service as Labour Officers may be considered for promotion to this grade but officers who entered direct at level 16 with a Degree must spend a minimum of three years on the entry grade before

they can be considered for promotion. **There is no direct entry to this grade.**
(my emphasis)

It is common cause that the 5th Respondent has not served as a Labour Officer and that her entry into the position has not been through promotion but has been direct. There has been no allegation made that the Labour Commissioner was satisfied with the 5th Respondent's suitability and aptitude for the work of the Department. In fact, the Applicants' submit that the Labour Commissioner was by-passed in the appointment of the Respondent. The Labour Commissioner did not indicate his satisfaction with 5th Respondent's suitability and aptitude for the work, according to the Applicants.

[8] The Respondents' answer was provided by the 2nd Respondent and it is that the 5th Respondent was not appointed Senior Labour Officer but that the 1st Respondent, acting on the recommendation of the 2nd Respondent approved the variation of her appointment from Internal Audit to Senior Claims Officer.

8.1 The 2nd Respondent explains, in his answering affidavit, that a decision was made to relocate the administration of the Workman's Compensation Unit from the office of the Commissioner of Labour to a newly created office of the Commissioner Compensation, after the audit of the Unit revealed a myriad of problems.

8.2 The 2nd Respondent, explains that following an audit exercise carried out in 2013, it was discovered that the Workmen's Compensation Unit had serious operational challenges. In order to address these challenges the Ministry of Labour was transformed into the Ministry of Labour and Social Security with the intention of placing all issues relating to Social Security, under the Social Security Department. This included the Workmen's Compensation Unit. Consequently was created. Due to financial constraints the Social Security Department has not been operationalized, however the posts of Commissioner Compensation and Principal Claims Officer were created. The office of the Senior Claims Officer was amongst those that would have been created in setting up the Social Security Department, had there been no financial constraints.

8.3 It is 2nd Respondent's assertion that because of the continued financial constraints, other posts could not be created but that the post of Senior Labour Officer was traded, from the Office of the Commissioner of Labour for the post of Senior Claims Officer. 2nd Respondent avers that the post of Senior Claims Officer is distinct from that of the Senior Labour Officer with different responsibilities, with the Senior Claims Officer being responsible for the processing and administration of Workmen's Compensation Claims.

[9] The Respondent's submission was that the contested post was therefore not provided for the Scheme of Service referred to by the Applicants.

[10] The Respondents further submitted that in any event the 5th Respondent was not promoted to the position but was appointed in variation of her position following the issuance of **Establishment Circular Number 3/2018** freezing all hiring and promotion in the Public Service due to the prevailing fiscal crisis.

10.1 The 2nd Respondent concedes that after being directed by 1st Respondent to advertise the position within the Department, the Internal Promotion Board assessed officers and recommended that 1st Applicant be promoted to the vacant position of Senior Claims Officer. However, before that could happen **Circular Number 3/2018** was issued, effectively preventing the promotion of the 1st Applicant. **Circular Number 3/2018** reads thus:-

*“Principal Secretaries and Heads of Departments are hereby informed that Cabinet has directed that all vacant posts including creation of new posts **and promotions** across Government be frozen. This state of affairs has been necessitated by the current financial situation in the country and the cash-flow problems faced by Government.”* The circular is dated 31st July 2018 and its effective date is 1st August 2018.

The 2nd Respondent submits further that in the exercise of its managerial prerogative to organise the work place, it then requested the 1st Respondent to cross-transfer the 5th Respondent to the position of Senior Claims Officer in order to ensure that the Workmen's Compensation Unit worked efficiently. The Cross-transfer of the 5th Respondent ensured that the critical position was filled by a competent employee without raising any costs for government because the 5th Respondent would maintain her C5 pay grade, whereas if the 1st Applicant was promoted her salary grade would have to change from C4 to C5.

[11] It was the Respondent's submission therefore that it acted within its prerogative to manage its work place and more particularly that it has not been shown by the Applicants that it acted in bad faith.

[12] The Applicants' first submission was that since the 1st Respondent had not filed any affidavit in response to their claim, then the application was as good as unopposed, since it is the Civil Service Commission that is constitutionally empowered with the authority to appoint, promote and transfer Public Officers **(see Section 187 of the Constitution of the Kingdom of Eswatini)**.

While it is correct that the Respondent is the appointing authority in so far as Public Officers are concerned, the 2nd Respondent was the office on the ground

with the internal knowledge of the department and its needs and was personally involved in the variation of the appointment of the 5th Respondents appointment. While it may have been prudent for the 1st Respondent to file an affidavit explaining the variation, our view is that the 2nd Respondents affidavit properly and adequately sets out the position as it prevailed when the application for variation of appointment was made.

[13] The Applicants' submission is that an employer who implements a policy and brings it to life is bound by that policy. That, having agreed to the Scheme, the Government was bound by same until they are varied. (**Sandile Mbhmali v Swaziland Electricity Company Case No. 124/2009**). That the failure to comply with the Schemes and peremptory provisions of **Regulation 28** of the **Civil Service Board (General) Regulations** renders the whole process procedurally unfair and the appointment of the 5th Respondent unlawful in the circumstances

[14] Applicants also cited **City of Cape Town v SA Municipal Workers Union OBO Sylvester and Others** where the Court stated that the overall test in deciding whether an employee seeking promotion has been suppressed correctly is one of fairness, and **“that in deciding whether or not the employer had acted unfairly in failing to appoint or refusing to promote**

the employee, relevant factors to consider include whether the failure or refusal to promote was caused by unacceptable irrelevant, or invidious considerations on the part of the employer; or whether the employer's decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; or whether there were insubstantial reasons for the employers decisions not to promote; whether the employer's decision not to promote was based on a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions.”

[15] The submission was that the Respondent had taken into consideration irrelevant considerations such as the 5th Respondent's being in a team that audited the Workmen's Compensation Unit and that in so doing it had acted unfairly both substantively and procedurally

[16] The Applicants' submissions are correct in our view however they must be tested against the particular facts of this matter, as each matter depend on its own peculiar facts. It is not disputed that the 1st Applicant was recommended for promotion to the contested position. It can not be disputed that before the 1st Applicant was promoted, in terms of the recommendation, (if she was going

to be promoted at all), the Government of the Kingdom of Eswatini issued **Establishment Circular Number 3/2018** effectively freezing all hiring **and promotions** (my emphasis) in the public sector due to a fiscal crisis engulfing the Kingdom's Government. It can not be denied (and the Applicants have not done so) that the 2nd Respondent, in reaction to the issuance of the circular by Government appealed to the 1st Respondent to reconsider the variation of appointment application for the reason that the 5th Respondent not only qualified for the position but that the variation of her appointment would present no extra costs to the Government as she would remain in her C5 pay grade whilst at the same time addressing the issue of the Workmen's Compensation Unit. It can also not be denied that the 1st Respondent varied the 5th Respondent's appointment from the post of Internal Auditor Grade C5, to that of Senior Claims Officer Grade C5. This is borne out by Annexure AG1 being the variation of appointment letter dated 31st October 2018.

[17] The Courts have been reluctant to interfere with the managerial prerogative of employers in the employment selection and appointment process, in the absence of good cause clearly shown. In the absence of gross unreasonableness which leads the Court to draw an inference of *mala fides*, this Court should be hesitant to interfere with the exercise of management's discretion. (**Goliath v Medscheme (Pty) Ltd** 1996 (17) ILJ 760; **George v**

Liberty Life Association of Africa Ltd (1996) 17 ILJ 571; Ndlovu v CCMA & Others (2000)12 BLLR 146 2(IC)).

[18] On the particular facts of this matter, we are unable to say that the 1st Respondent's decision to vary the appointment of the 5th Respondent to the position of Senior Claims Officer is unfair. It appears to us that the 5th Respondent was not promoted or appointed into the position and that with the **Establishment Circular No.3/2018** that prohibits promotions and/or appointments having being issued it was rational for the 1st Respondent to vary the terms of the 5th Respondent's appointment thus allowing the employer to organise the workplace in keeping with its managerial prerogative. We do not see how the question of unfairness can arise in these circumstances. The learned author John Grogan in his book Workplace law at page 262 quotes a Commissioner in the case of **Collen v Distell (Pty) Ltd [2001] 8 BALR 834 CCMA** as saying "*the relative inferiority of a successful candidate is only relevant if it suggest that a superior candidate was overlooked for some unacceptable reason...*"

In the circumstances of this case there was no promotion, there was a variation of appointment. The reason set out by the employer for the variation of the 5th Respondent's appointment is reasonable. The employer could not be expected

to leave the Workman's Compensation Unit without a leader in circumstances where it was prohibited by **Circular 3/2018** from promoting anyone to the Senior Labour Officer position.

In the premises, the application must be dismissed. We make no order as to costs.

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicants: Mr A. Fakudze with Mr M. Hlophe

For the Respondents: Ms. B. Mkhonta