



INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 205/2017 C

In the matter between:

PHUMELELE DLAMINI

Applicant

A111d

NATIONAL EMERGENCY RESPONSE

COUNCIL ON HIV AND AIDS

Respondent

Neutral citation: Phumelele Dlamini vs National E emergency Response Council on HIV and AIDS (205/2017 C) SZIC 17 (Marcli 2021)

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 23rd March 2021

Delivered: 26th March 2021

SUMMARY: Distinction between a claim of right versus a claim of interest.

The Applicant's claim requires an interpretation of a contract of employment and implementation of a condition in that contract.

J-Ield: The Applicant's claim is to enforce a right which accrued to her when she was promoted to the position of Program Manager HIV and TB. Consequently the Applicant's dispute is a claim of right and should be judicially determined.

JUDGMENT

1. The Respondent is, The National Emergency Response Council on HIV and AIDS; a statutory body established in terms of NERCHA Act no. 8 of 2003, with power to sue and be sued. The Applicant is a government parastatal and is scheduled in category A under the Public Enterprise Unit. The Respondent delivered its evidence through Ms Thembisile Gama, whose position is or then was, Director Corporate Affairs (hereinafter referred to as Ms Gama).
2. The Applicant is Ms Phumelele Dlamini who is a former employee of the Respondent.

- 2.1 By written agreement elated 3rd September 2015, the Applicant was employed by Respondent as Project Processing and Monitoring Manager.
 - 2.2 The contract of employment was for a period of 5 (five) years, commencing pt June 2014 and ending 3 pt May 2019.
 - 2.3 The position was payable at grade 8 within the Respondent's pay structure.
 - 2.4 A copy of the contract of employment was presented before Court as exhibit PDIA.
 - 2.5 The Applicant rendered her service and was paid her remuneration at the agreed scale of grade 8.
3. Subsequent to the aforementioned position the Applicant was also appointed to 2 (two) other positions namely; Grants Manager and later; Program Manager BIV and TB.
- 3.1 The Applicant stated that she was appointed Program Manager on the 10th December 2014, by letter exhibit PD3(c). That appointment was subject to a condition that her remuneration would change with effect from the 1st April 2015, in accordance with circular 4/2013.

However, the Respondent failed to fulfill that condition. Inter alia, the Applicant demands compliance with that condition.

3.2 The Applicant reported her grievance as a dispute at the Conciliation, Mediation and Arbitration Commission. The Commission failed to conciliate the parties and issued a certificate to that effect. The Applicant has referred the dispute to Court for determination.

4. In its defence the Respondent raised a point in limine as follows:

"The above Honorable Court lacks jurisdiction to entertain the dispute since it is one of interest."

The Applicant has challenged the point in limine as raised by the Respondent.

4.1 The Applicant's argument is that hers is a claim of right not one of interest. The Applicant submitted that she has a right to demand that the Respondent should comply with the condition in the letter of appointment. In particular the Applicant demanded compliance with circular no. 4/2013.

4.2 Furthermore, the Applicant requires the Respondent to acknowledge that she did extra work as Program Manager HIV and TB for which she was not compensated.

4.3 An extract of the Applicant's evidence reads thus when she was being cross examined.

"AWI: *Following my appointment to Program Manager HIV and TB, my remuneration was supposed to change effective 1st April 2015.*

It was going to change because I had taken additional responsibilities "

RC: *Your salary was going to change in terms of what, what would be your basis for the change?*

AWI: *In compliance with circular number 4/2013."*

(Record pages 113 -114)

4.4 "AWI: *Mr Jele, there is a provision in the TB grant. There was a provision in the TB grant for payment to the HIV Manager. It was provided for as an allowance of the additional work that was now being given to the TB Manager. Under the TB grant there was a provision for the JiJV Manager salary package,' and there in the TB grant there was a provision for an allowance which was supposed to be added to the remuneration package of the HIV Manager. So that provision is there, I saw it and I worked with it.*

At every quarter I had to report that, it was still pending finalisation of the job profiles hence it had not been paid."

(Record page 132)

S. According to Ms Gama between the period 2014 to 2018 the-Respondent underwent an organizational review. As a consequence, the Respondent introduced a corporate strategy at the workplace for the period 2014 to 2018. That corporate strategy brought about changes at the workplace, for instance, certain positions were consolidated while new ones were established.

6. Ms Gama mentioned that the Respondent had consolidated"the TB and I-ITV functions to make a single unit. The Applicant occupied the position of Program Manager I-ITV and TB after the 2 (two) functions, aforementioned, had been consolidated.

6.1 The new position was with effect from pt January 2015 and was payable at grade 8.

6.2 The Applicant was also notified that a change in her remuneration would be effected on the pt April 2015 in compliance with circular 4/2013. The letter is marked exhibit PD3 (c).

The letter reads thus:

"RE: ORGANISATIONAL CHANGE - PROGRAM MANAGER HIV AND TB.

- 1. We are pleased to inform you, that following the completion of the organizational restructuring and as approved by NERCI-JA Council, you
· are appointed to the position of Program Manager HIV and TB.*
- 2. The position now reports to Director Grants Management Division.*
- 3. The position is with effect from January 2015, and is on Grade 8, equivalent to your current position.*
- 4. A change in your remuneration will be effected on the 1st April 2015, in compliance with Circular 4/2013.*

(Pleadings page 22)

- 7. The Court was referred to an addendum to the contract of employment which is marked exhibit PDI B. The addendum was also signed on the 3rd September, 2015. The addendum reads thus:*

"Whereas NERCHA and the Employee entered into a Contract of Employment,

And whereas NERCJ-JA undertook an organizational review which resulted in changes in the organization and consequently the position of the Employee

was changed by letter dated 10th December 2014. A copy of the letter is attached.

This Addendum serves to confirm that all other terms and conditions of the contract of employment remain as stipulated in the contract between NERCHA and the Employee."

(Pleading page 18)

Inter alia, the addendum confirmed that the Applicant's position had been changed to Program Manager HIV and TB, as stated in the letter dated 10th December 2014 viz exhibit PD3 (c).

8. The Respondent laid emphasis on clause 4 in the letter of appointment (exhibit PD3 (c)), in that clause the Respondent made an undertaking that it would effect a change in the Applicant's remuneration on t11e pt April 2015, in compliance with circular no 4/2013.

- 8.1 Ms Gama confirmed that the Public Enterprise Unit issued circular no 4/2013. However circular no 4/2013 was not fully implemented by the Respondent. In relation to the Applicant's remuneration Ms Gama confirmed that circular no 4/2013 was not applied. The Respondent did not satisfy the undertaking it had made in the addendum regarding circular no 4/2013..

8.2 According to Ms Gama circular no 4/2013 would have resulted in a salary reduction for the Applicant and the other staff members in the Respondent's employ. Consequently circular no 4/2013 was withdrawn. The Court has noted that Ms Gama did not provide evidence to support her allegation that circular no 4/2013, if implemented, would have resulted in a salary reduction for the Respondent's employees (including the Applicant).

9. Instead of circular no 4/2013 the Respondent implemented circular 1/2015 at the workplace. The latter circular provided for cost of living adjustment for all employees of the Respondent.

9.1 Ms Gama explained that all circulars relating to remuneration of employees who are employed in parastatal organisations (such as the Respondent), are issued by the Public Enterprise Unit - as the controlling body. Once a circular is issued the Respondent's council has the power to decide whether or not to implement the circular taking into consideration its budget.

9.2 The Respondent's Council approved the contents of circular no 1/2015 and proceeded to implement it for the benefit of all its

employees. The Applicant therefore benefitted under circular 1/2015.

10. The Court was further referred to circular no 2/2015, which was presented as exhibit R1. In that circular the Public Enterprise Unit had authorised the Respondent to increase the remuneration of its employees by 4.67% of the current salary structure.

10.1 An extract of circular 2/2015 reads as follows:

"2 a)

b) *The rate of 'Major' for tariff, fees and prices (including property rates) is 4.67%.*

3. *If you want to increase salaries above 4.67% you need to get a mandate from your line ministry before you negotiate, agree and sign any agreements with staff unions. "*

(Exhibit R1)

10.2 According to Ms Gama, the Respondent's council approved the directive in circular 2/2015 and it was accordingly implemented. All employees of the Respondent benefitted from circular no 2/2015.

10.3 Even though circular no 2/2015 was authorised by the Public Enterprise Unit on the 9th March 2015, its implementation was delayed by a month. The Respondent's Council had to debate the practicality of implementing the said circular, taking into consideration its resources.

11. The Respondent referred the Court to exhibits R9, R10, and R11. These are salary advice slips which the Respondent issued in favour of the Applicant respectively, with the following detail;

22.05.2014	E26, 331-44
23.06.2014	E27, 628-60
23.03.2015	E27, 735-24

11.1 The aforementioned salary payments preceded the implementation of circular no 2/2015.

11.2 According to the Respondent, the Applicant occupied the position of Grants Manager when she was paid a salary in terms of exhibits R9 and R10, for instance, May and June, 2014. Ms Gama added that the Applicant's salary was relatively the same during her tenure as Grants Manager.

11.3 Ms Gama mentioned also that even though the Applicant had been appointed Program Manager HIV and TB with effect from 1st January

2015, her salary did not change until April 2015. The Applicant was paid on grade 8, which was the same salary grade she enjoyed in her previous position.

11.4 In April 2015 the Applicant's salary increased to E29, 113 -12, as shown in exhibit R12. This increment was a result of the 4.67% which the Respondent had been authorised by the Public Enterprise Unit to implement. The Applicant, together with the other employees of the Respondent benefitted from circular no 2/2015.

12. The Court was further referred to circular no 4/2016, which is dated 13th April, 2016. In terms of this circular the Public Enterprise Unit authorised the Respondent to effect an increment in remuneration amounting to 4.96%. The proposed increment was approved by the Respondent's Council. In May 2016 the Respondent implemented that increment in the salary of its employees including the Applicant. As a result the Applicant's salary was increased to E30, 569-65 as shown in exhibit R14.

13. The Respondent has denied that there were added responsibilities to the Applicant's duties when she was appointed Program Manager HIV and TB. According to the Respondent all changes in the Applicant's work were a result

of the organizational review. The Applicant accepted the position with the function of HIV and TB consolidated. The evidence of Ms Gama reads thus:

13.1 *"RC: Jvfs Gama, the complaint of the employee in this Court is that after her appointment or after the change of her position to Program Manager HIV and TB, there were added responsibilities, what would be your comments on that?"*

RTf¹: The employer is not aware of any added responsibilities to the employee's job because all changes that were made were made as a result of the organizational review done and concluded in 2014, communicated to the employee and all changes were approved following NERCHA's processes and communicated to all staff and accepted by all staff. In the case of the employee, she signed the contract, signed and the addendum of the contract and was given the letter of the 10th December 2014. There were never any changes or misunderstandings with regards to the position and [at] the time. Even when the addendum was signed in 2015, the employee signed for all the changes which were basically stating that the position had been consolidated to be both HIV and TB."

(Underlining added)

(Record page 24)

13.2 "RC: Now, the alleged added responsibilities in the letter of complaint, are they part of the job description of Program Manager IfIV and TB?

RWJ: Yes, they were specifically made by the letter dated 10¹¹ December 2014 and it was within the contract including the addendum that also changed the name of the position to include both TB and IIIV. Both contract and addendum and letter of the 10th December 2014 were signed by the employee, meaning that she has approved and accepted those changes." ·
(Record page 30)

14. By letter dated 21¹ March, 2016 the Applicant wrote the Respondent and demanded financial compensation for the added responsibilities to her work from the time she was appointed Program Manager HIV and TB. The Applicant's letter is marked exhibit PD3 B, and an excerpt reads as follows:

"RE: SALARY REVIEW IN RESPECT OF INCREASED RESPONSIBILITIES ·

1. *It will be recalled that prior to January, 2015, I was the Grant Manager responsible for the Global Fund HIV/AIDS portfolio and remunerated under this Grant. Whilst I was not happy with the remuneration, I accepted it anyway.*

2. *In January 2015, the TB portfolio was added to my responsibilities but my remuneration was not increased in accordance with the added duties.*
 3. *According to NERCJJA practice all officers whose responsibilities are added they always have their salaries increased accordingly.*
 4. *It is in this respect that I request my salary to be increased by 15% in view of my added responsibilities.*
 5. *Furtha, I request that the salary be backdated to pt January, 2015.*
- " (Pleadings page 21)

14.1 The 15% that is stated in paragraph 4 of the Applicant's letter (exhibit PD3 B) is the Applicant's monthly estimate of the value of the additional work which she alleged to be contributing to the organisation as Program Manager HJV and TB. However, at some point the Applicant increased her claim from 15% to 50%.

14.2 The Respondent replied the Applicant by letter dated 24th March 2016 and which is marked exhibit PD3A. An extract of the reply reads as follows:

"With regards to your request, NERCHA, by letter dated 10th December 2014 offered you the position of Programme Manager JfJV and TB, which offer was accepted by yourself. You also signed a contract of employment and addendum to the contract dated yd

September 2015. NERCHA is therefore not aware of any additional responsibilities or functions that were added to you save for those assigned to you as Program Manager HIV and TB. As stated in your letter of the 10th December 2014, the position is on grade 8 which is equivalent to your current remuneration.

In practice NERCHA remunerates for additional responsibilities which are assigned to an officer, in writing, and are outside the scope of the contract of employment. We regret to inform you that your request is declined. "

(Pleading page 20)

- 14.3 There is clearly a dispute of fact as to whether there were added responsibilities that the Applicant discharged since she occupied the position of Program Manager HIV and TB.
- 14.4 In her evidence Ms Gama denied that there were added responsibilities which the Applicant was required to carry out in her new position as Program Manager HIV and TB..
- 14.5 It is however common cause that; when the Applicant was appointed Program Manager HIV and TB, the Respondent did make an undertaking that a change in the Applicant's remuneration would be effected, on the 1st April 2015, in accordance with circular no 4/2013.

It is also common cause that, the said circular was not implemented and therefore there was no change in the Applicant's remuneration.

15. The issue before Court is whether or not the Applicant's claims amount to a dispute of right or dispute of interest. Legal authorities have explained these two (2) concepts as follows:

15.1 *"An 'interest dispute' arises when there is disagreement as to new terms and conditions of work, or the renewal of those which have expired. Can also be regarded as disputes concerning the creation of new rights, especially through collective bargaining. Also referred to as 'economic dispute', Such disputes are not based on existing rights and are normally non-judicial. They are normally resolved by the use of social and economic power (e.g. strikes and lock-outs)."*

15.2 *"A 'rights dispute' relates to the interpretation, implementation or violation of existing rights, whether such rights flow from statutory law, collective agreement or individual employment contracts. Such disputes are normally subject to adjudication or arbitration and are also referred to as 'judicial disputes'."*

BARKER, et al: SOUTH AFRICAN LABOUR GLOSSARY,
Juta, 1996,(ISBN070213631 x)page41.

- 15.3 The matter before Court concerns -
 - 15.3.1 the interpretation and implementation of a condition in a contract of employment, and
 - 15.3.2 an alleged violation of an existing right which flows from a contract of employment.
- 15.4 The Applicant's appointment to the position of Program Manager HIV and TB was accompanied by a condition that her remuneration would change on the 1st April 2015, in compliance with circular no 4/2013. That condition was not fulfilled by the Respondent.
- 15.5 Clearly the Applicant expected circular no 4/2013 to improve her remuneration hence her demand that the condition in her letter of appointment be fulfilled. The Applicant is demanding a right that accrued to her when she accepted her appointment as Program Manager and HIV and TB. The Applicant's claim is not based on a wishful thinking or hope but on a condition under which she was appointed to serve.

15.6 The Applicant's claim that her work load increased since her appointment to the position of Program Manager HIV and TB requires an interpretation, inter alia, of her job profile as read with the terms and conditions of her employment contract. That exercise amounts to an interpretation and implementation of existing rights as Program Manager HIV and TB. The exercise aforementioned places the Applicant's claim in the realm of a rights dispute.

15.7 In addition the Applicant has submitted that the Respondent's conduct amounts to a violation of her existing rights. The contention was that; the Respondent's failure to implement circular no 4/2013, (to which the Applicant claims that she was entitled), amounted to a violation of her rights. The Applicant's contention also places the matter in realm of a rights dispute.

15.8 With the foregoing reason, the Court is persuaded that the Applicant's claim is a dispute of right. The Applicant is entitled to refer that dispute to Court for adjudication - since it is a judiciable dispute. Consequently the point in limine is dismissed.

16. There is another matter that deserves the Court's attention. The Respondent's witness (Ms Gama) repeatedly emphasized the point that the

Applicant

signed, inter alia, the contract of employment. The Applicant and the Respondent had different versions of the said contract as aforementioned. In addition to the foregoing dispute the Applicant challenged the validity of that contract. The Applicant's argument is that she signed the contract while she was placed under duress, by the Respondent. The Applicant testified as follows regarding her claim of duress:

16.1 *"AWJ: I then signed the contract on the 3rd of September 2015 and I handed it over to the Human Resources Manager. I must point out Your Lordship that it was under duress."*

(Record page 98)

16.2 The Applicant's claim that she signed the contract of employment under duress requires judicial determination. A contract that is signed under duress has different legal consequences compared to the one that is determined to have been signed voluntarily. This is another reason the matter should be judicially determined. The validity or otherwise of the employment contract is a matter that cannot be resolved by the use of social or economic power such as strikes or lock-outs.

17. At this stage the Court is concerned with the question: whether the Applicant's dispute is a claim of right or claim of interest. The Applicant's counsel correctly captured the point when he said;

"... but as I understood the Court we are not in the claim yet, we are just determining the issues of paragraph 4 of the letter"

(Record page 110)

Wherefore the Court orders as follows:

17.1 The Respondent's point in limine is dismissed.

17.2 The matter is referred to Court for determination on the Applicant's claim.

17.3 The Respondent is to pay the costs relating to the point in limine.

D.MAZIBUKO

INDUSTRIAL COURT JUDGE

For Applicant

Mr M. Ndlangamandla

of MLR Ndlangamandla Attorneys

For Respondent

Mr D. Jele

of Robinson Bertram