

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 326/16B

In the matter between:

LEONARD S. DLAMINI

Applicant

AND

ESWATINI NAZARENE HEALTH INSTITUTION

Respondent

(ENHI)

Neutral citation: Leonard S. Dlamini v Eswatini Nazarene Health Institution
(ENHI) 326/16B [2023] SZIC 01 (27 January , 2023)

Coram:

L.L. HLOPHE-JUDGE

*(Sitting with Mr. M.P. Dlamini and Mr. EL.B. Dlamini –
Nominated Members of the Court)*

DELIVERED: 27th January, 2023

SUMMARY: *Applicant sought to be migrated or promoted from the post of Hospital Administrator to Senior Hospital Administrator- Whether the Court can order the creation of a non-existent position within Respondent's establishment to accommodate the Applicant- Further*

whether the Court can direct the Respondent a public enterprise to promote the Applicant.

HELD: *Following the issuance of a government circular provides for the same in respect of some government employees within the health sector- The employer is bound to follow its own promotion policy-The order sought would usurp the employer's managerial prerogative- The application is dismissed.*

JUDGEMENT

INTRODUCTION

[1] The Applicant has applied to this Court seeking an order in the following terms:

1.1.Ordering and directing the Respondent to recognise applicant's position at the Respondent's employ as that of Senior Hospital Administrator.

1.2.Ordering and directing the Respondent to properly grade Applicant's salary scale and implement it at E3 notch 5 pay scale in terms of Establishment Circular No. 2 of 2017.

1.3.Ordering and directing the Respondent to back pay the Applicant his salary from the 1st April 2017 (effective date of circular No. 2 of 2017) to the date of the order.

1.4.Costs of the application.

1.5.Any further and/or alternative relief.

- [2] The Respondent, The Eswatini Nazarene Health Institution (ENHI) is, by means of Legal Notice Number 2 of 2009, a "Category A" public enterprise, and has opposed the application, filing its papers in the process.

BACKGROUND

- [3] The Applicant contends that he was employed by the Respondent as a Radiographer in 1985. In July 1995 he assumed the position of Hospital Administrator at the Respondents' undertaking.
- [4] It would appear that prior to 2009 the Respondent was not part of any Government structure in the sense that it was neither a Government department nor a parastatal. It was in that sense a fully-fledged private entity.
- [5] Whatever change occurred appears to have happened in 2009 as confirmed by the Legal Notice referred to above. The said Legal Notice provided as follows in section 2:

AMENDMENT OF SCHEDULE 2

2. The schedule to the **Public Enterprises (Control and Monitoring) Act 1989** is amended by classifying the following under "Category A"
- a) **Swaziland Nazarene Health Institutions (SNHI).**

- b)
- c)
- d)

[6] According to the Applicant at that time Government and the (ENHI) concluded a Management Agreement. The contentious Clause of the agreement in question is 14.4 and it provided as follows;

“Employ all professional, support and management staff for the SNHI (including a Chief Executive Officer as set out in Article 12.3 and 29.2) on such scales of remuneration and on such terms and conditions that are commensurate with comparable Institutions of Government”.

[7] At some point after the conclusion of the Management Agreement, and by means of a document described as **Establishment Circular Number 2 of 2017**, the Applicant contends that the Government of the Kingdom of Eswatini upgraded certain posts occupied by its employees and their salaries with the aim of correcting various cadre’s grades, overlaps and gaps.

[8] According to the Applicant when this happened it should have been applied to him with the result that his position should have been upgraded from that of Hospital Administrator to that of Senior Hospital Administrator on salary

grade E3 Notch 5, which is the salary grade to which all those who held the positions of Hospital Administrator he contends were upgraded to.

- [9] For whatever reason sometime around February 2018, the Manzini Regional Health Administrator one Mlondolozzi Dlamini, intervened and wrote a letter to the CEO of the Respondent dated 26th February 2018 in which he sought to confirm that indeed there had been an upgrade of certain positions at the Respondent's undertaking, (ENHI), together with the attached salaries. He confirmed in the following terms:

Dear Sir,

Re: Confirmation that following the implementation of Circular No. 2 of 2017 correcting the anomaly of degrading senior government officers including the Health Administration cadre, Hospital Administrators have all been upgraded to Senior Hospital Administrators salary grades E3 Notch 5 (E3558070 effective date 01/04/17

I hereby kindly wish to confirm the above stated caption. The RFMH Administrator has also been upgraded to Senior Hospital Administrator as is the case with all Hospital Administrators, included are even those who are on probation (see attached copy).

Your co-operation in this regard would be highly appreciated.

Thanking you in anticipation.

Yours Faithfully

Mlondolozzi Dlamini

Regional Health Administrator

- [10] We note that Mr Mlondolozzi Dlamini says in his letter that he attached a copy of a document to support his assertion that all Hospital Administrators were upgraded to Senior Hospital Administrators including those on probation, however no such copy was furnished to the court.
- [11] It is not in dispute that sometime after the issuance of the Circular in question (and we can only assume this was after the Applicant had complained about his situation) that the Ministry of Public Service, through its department responsible for the terms and conditions of service in government the (MSD), undertook a salary review exercise specifically at the Respondents undertaking which maintained the position of the Applicant was that of Hospital Administrator and upgraded his salary to grade E3 notch 1, which is the rate at which he is being paid.

[12] This however did not resolve the Applicant's problems as he maintained that he should now be Senior Hospital Administrator and have a salary fixed at E3 Notch 5. This dispute he then reported with The Conciliation Mediation Arbitration and Conciliation Commission (CMAC) for conciliation. Who after an unsuccessful conciliation issued a certificate of an unresolved dispute. It was after this certificate that the Applicant instituted the reliefs stated in paragraph 1 herein above.

RESPONDENTS CASE

[13] For its part the Respondent, whilst admitting that at some point there was a Management Agreement between the Respondent (the Nazarene Health Institutions) and the Eswatini Government. It denied that, that agreement had the effect of equating the employees of the Respondent to those of a Government Department. It clarified that such was unthinkable considering that as at that stage the relationship between the Government and the Respondent was that the latter had become a "Category A" public Enterprise. Such Enterprises are run by their own structure often manned by the Board of Directors who employ that institutions employees. It contended that it would have been impracticable for the Respondent to pay and manage its employees,

being a public enterprise, in accordance with terms and conditions of service similar to those of government structures including to migrate the terms of such employees into those of Government.

[14] It was further submitted on behalf of the Respondent that if the status of the employee was to change from that of Hospital Administrator to that of Senior Hospital Administrator, that would have necessitated a promotion which would have had to be done consciously. Relying on an extract from circular No.2 of 2017, it argued that the structure depicted therein showed that at government prior to the implementation of that structure there was no office of Hospital Administrator. Such an office is shown as having come up with the Circular in question which created the position of Hospital Administrator as an upgrade of that of Assistant Hospital Administrator.

[15] The post of Senior Hospital Administrator remained as such with only the change in the salary from D4 to E3. Respondent confirms further that following complaints by the Applicant after the issuance of Circular No.2 of 2017, The Ministry of Public Service's MSD department conducted a review of the salary structure of the Respondent. The result of this was to maintain the position of Applicant as Hospital Administrator but upgraded it from being

Grade E2 equivalent to Grade E3 Notch 1. The Respondent maintained it would have been impracticable to equate the employees of the Respondent with those of Government as the two entities are affected by different dynamics and considerations.

[16] Falling on the maxim *inclusio unius est exclusio alterius*, which means; 'the express inclusion of one thing means the express exclusion of the other'. (**Hiemstra and Gonin Trilingual Legal Dictionary** (Juta 1981)) at 208, Respondents submitted that since the Applicant's post as Hospital Administrator was not listed in Establishment Circular No.2/2017 it could not therefore have been catered for so as to end up being upgraded to that of Senior Hospital Administrator. In that sense it was argued that clause 14.4 had to be interpreted so as to exclude making the employees of the Respondent those of Government.

[17] As for the letter from the Manzini Regional Health Administrator dated 26th February 2018, it was argued that such a letter could not be of help to the Applicant. Firstly, because it talked of an inaccuracy that the position of Hospital Administrator had been migrated to that of Senior Hospital Administrator like similar such positions had been migrated with no proof of

such assertion being provided. Secondly because it was written by an officer who had no authority to bind the government in that regard. As shown above a cursory glance of the Government structure as shown in Circular No. 2 of 2017, there had been no mention of the position of Hospital Administrator, as it was not included in Appendix 1 which is attached to Circular No. 2 of 2017 indicating the positions in Government that were to be affected by the upgrades and/ or changes.

ANALYSIS OF EVIDENCE

[18] Considering what has been stated above in the arguments of the parties we cannot agree with the position as asserted by the Applicant. It cannot be disputed that the Respondent in 2009 was, following a Management Agreement between the parties designated the status of a Category A Public Enterprise.

[19] It is true that such Enterprises are run by Boards of Directors who take the necessary decisions on who to employ or promote in whatever structure of the organization. Moreover, Promotions are the preserve of management in any establishment. See Dlamini –nee Madzinane v CMAC and Another

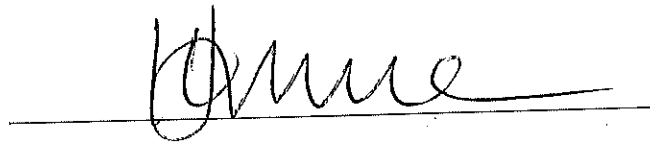
(352/2017) [2017] SZIC 115 (08 November 2017) where the court stated the following:

“Promotion is a managerial prerogative and an employer can promote whoever it sees fit for the position but the employer is required to act fairly when promoting or not promoting. The managerial prerogative must be exercised both procedural and substantively fair....”

[20] We agree that no evidence has been placed before the court that the Management of ENHI had taken a decision to review its structure with the result that the position of Senior Hospital Administrator would then be established in its entity; nor had a decision been taken to promote the Applicant to be its Senior Hospital Administrator. As such Applicants suggestions that he ought to have been migrated to the non-existent position in Respondents establishment cannot stand. The MSD department reviewed his position and suggested an upgrade to grade E3 Notch 1 which was implemented by the Respondent.

[21] For the above reasons the Application is dismissed. We make no order as to costs.

The Members agree.

A handwritten signature in black ink, appearing to read 'L. L. Hlophe', is written over a horizontal line.

L. L. HLOPHE
JUDGE- INDUSTRIAL COURT

FOR APPLICANT: Mr M. Mthethwa (Ben J. Simelane and Associates)

FOR RESPONDENT: Mr. Z.D. Jele (Robinson Bertram)