



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 187/2020

In the matter between:

**OSCAR NKAMBULE
JOHANNES G. SIMELANE
MABANDLA DHLADHLA**

1st Applicant
2nd Applicant
3rd Applicant

And

**THE CHAIRMAN OF THE CIVIL
SERVICE COMMISSION**

1st Respondent

**THE MINISTRY OF PUBLIC WORKS
AND TRANSPORT
THE PRINCIPAL SECRETARY OF MINISTRY OF
PUBLIC WORKS AND TRANSPORT
THE ESWATINI GOVERNMENT
SONNYBOY MABUZA
THE ATTORNEY GENERAL**

2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent

Neutral citation: Oscar Nkambule & Others v The Chairman of the Civil Service Commission & Others [187/20] [2020] SZIC 28 (26 March 2024)

Coram: **NGCAMPHALALA AJ**
*(Sitting with Mr.D.P.M.Mmango and Ms. N. Dlamini,
Nominated Members of the Court)*

Date Delivered: 19 March 2024

SUMMARY: Application for the declaration of the promotion process as conducted by the employer to be declared null and void- declaration that the promotion of 5th Respondent to the position of Workshop Manager be declared invalid and unprocedural- application is opposed by the Respondent – proper procedure followed- prerogative to promote sole discretion of the employer- section 187(1) of the Constitution of the Kingdom of Eswatini.

Held– Promotion of an employee falls within the prerogative of the employer- no justification for Court to usurp the employer's power of deciding matters of promotion- Application dismissed-no order as to cost.

JUDGMENT

- [1] The 1st Applicant is Oscar Nkambule an adult Liswati male of Mbabane, employed by the Eswatini Government under the Ministry of Public Work as a panel beater, in the District of Hhohho.
- [2] The 2nd Applicant is Johannes G. Simelane an adult male Liswati employed by the Eswatini Government under the Ministry of Public Works and Transport, CTA Mbabane as a spray painter Grade 1 and Technician.
- [3] The 3rd Applicant is Mabandla Dhladhla, an adult male Liswati of KaBhudla, employed by the Eswatini Government under the Ministry of public Works and Transport as an inspector of works in the body shop section.

- [4] The 1st Respondent is the Chairman of the Civil Service Commission responsible for contracts of employment, for living and disciplining civil servants in the Kingdom of Eswatini, having his principal place of business at the inter-ministerial building.
- [5] The 2nd Respondent is The Ministry of Public Works and Transport, the employer of the Applicant, with its offices at the Ministry of Public Works and Transport Building, Mbabane. The Central Transport Administration is an extension and or department of the Ministry of Works and Transport, where all the Applicants are housed, included, including 5th Respondent.
- [6] The 4th is Eswatini Government.
- [7] The 5th Respondent is Sonnyboy Mabuza, an adult male Swazi of Mbabane, employed by the Ministry of Public Works and Transport, recently promoted to be Workshop Manager (Body shop), Mbabane.
- [8] The 6th Respondent is the Attorney General, cited herein in his capacity as the legal representative of all Government Departments, with his offices at the Justice Building, Usuthu Link Road, Mbabane.

BRIEF BACKGROUND

- [9] The present matter has a history before the above honourable Court having previously been dismissed by the Court on a point of law, without dealing with the merits of the case.

[10] The Court is again seized with the matter, wherein now the Applicants now seek to declare the promotion of the 5th Respondent as invalid, wrongful, unprocedural and in breach of the general orders. Further they seek to have the Court review and set aside the promotions at the Central Transport Administration, carried out on or about September, 2017 in favor of the 5th Respondent. The Applicants are further seeking that the Court declare that the promotion of the 5th Respondent was an unfair labour practice, as a consequence thereof the Court should direct the 1st, 2nd, 3rd and 4th Respondent to promote the Applicants to such positions relevant to their qualifications, and experience in line with their appraisals. Therefore the Respondents be ordered to pay the Applicants arrears, underpayments of such higher grade as they would have enjoyed had the promotions been carried out fairly.

[11] The Applicants application is opposed by the Respondents and an Answering Affidavit has been filed by the 2nd Respondent, the Principal Secretary in the Ministry of Transport and Public Works. The Applicant thereafter filed their Replying Affidavit, and the matter was accordingly allocated a date for arguments. The parties accordingly filed all pleadings, heads of argument and the matter was duly heard and judgment reserved. The Court however has taken a while for ~~the~~ it to issue its judgment for several reasons, including the misplacement of the file and the need for the reconstruction of a new file.

ANALYSIS OF FACTS AND APPLICABLE LAW

[12] It was the Applicants evidence that the present matter emanates on or about September, 2017 when the Respondent conducted and affected promotions.

It was their evidence that promotions within the Civil Service, are done in terms of the government general order. The procedure being that the head of department, must request from the 3rd Respondent to fill up , vacant positions within the Central Transport Administration.

[13] In essence it was their submission that the internal promotions board, deals with promotions for Civil Servants, but such board as a matter of procedure should receive a request accompanied by the names of all qualifying officers for a vacant position, from the head of department. It was the Applicants further averment that the board shall consider the claim for promotion of all those officers eligible to be considered for promotion on the basis of official qualification, merits, experience and seniority.

[14] The Applicants now argue that in the present case, when promotions were carried out, the head of department and the Principal Secretary were not consulted and they were further not given an opportunity to give their input and to present the Applicants appraisals. It was the Applicants submission that they were not given a fair chance to participate for the promotion. They aver that they were sidelined together with their head of department. Yet they interested employees by virtue of their qualifications, experience and serving under the department.

[15] It was their evidence that when the 5th Respondent was promoted, the immediate supervisor and the head of department, namely the General Transport Manager were not consulted, and as a result did not sign the appraisal form procedure and was further not aware of the promotions. The

supervisor and the head of department, only became aware of the promotions when the list of the officers recommended for promotion were leaked.

- [16] It was their submission that they then lodged a complaint that the office being the 5th Respondent did not submit an appraisal form duly prepared and signed by the supervisor. Further they raised the complaint that the 5th Respondent lacked the requisite experience for the post, since he has never worked at the workshop. The 5th respondent therefore according to the Applicants lacks the relevant experience when compared to them. It was their averment that the correct procedure in effecting the appointment was unlawful, irregular and constitutional unfair labour practice. This was also attested to by the General Transport Manager who signed a confirmatory affidavit.
- [17] Despite the Applicants lodging a complaint it was their evidence that the Respondent proceeded with the promotions. The Respondent failed to deal with the grievance as lodged by themselves. It was their submission that since the Respondents have failed to deal with their grievance internally, and they have been left with option but to approach the Courts.
- [18] It was further their averment that Section 4 of the Industrial Relations Act, promotes for fairness and harmony in the Industrial arena. It is their averment that it is the duty of the Court to enforce and apply as well as give effect to the Civil Service Act, Government General Orders, the Industrial Relations Act, Employment Act and Constitution. It was their submission that the Act and manner in which the promotions were affected was not fair, and same

was discriminatory and amounts to union bashing since they the Applicants are union members.

[19] In closing it was their submission that despite reporting a dispute with CMAC, no resolution could be found. It is therefore their averment that the recruitment and promotion of the 5th Respondent is an unfair labour practice, and is in total breach of the Government General Orders. As a consequence thereof the promotion and appointment of the 5th Respondent at CTA should be set aside. In support of their assertions the Applicants filed the following authorities,

BEN M. ZWANE VS SWAZILAND GOVERNMENT [2004] SZIC 8 (04 MAY, 2004),

SIDUMO AND OTHERS VS RUSTENBURG PLATINUM MINES AND OTHERS,

DLAMINI NEE MADZINANE VS CMAC AND ANOTHER (352/2017) SZIC 115(08 NOVEMBER 2017), and

MAGALELA NGWENYA VS NATIONAL AGRICULTURAL MARKETING BOARD (NAMBOARD).

[20] In rebuttal it was the Respondents averment that on the 31st January, 2017 a request to fill a vacant position at Central Transport Administration was made by the General Transport Manager. In this correspondence the general Transport Manager who is not the head of department in terms of the General Orders sought the assistance of the Principal Secretary at the Ministry to fill the vacant positions.

[21] **SECTION 187(1) OF THE CONSTITUTION OF THE KINGDOM OF ESWATINI** provides as follows:

“subject to the provision of this Constitution or any other law, the power of appointment including acting appointments, secondment, and confirmation of appointment, promotions, transfer termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission.”

[22] This provision vests control of public officers’ promotion, disciplinary control, dismissal with the Civil Service Commission. The Court can only interfere in cases of unfair labour practice, where the employer alleges and proves that he is being victimized or discrimination against by the employer. It is trite law that the Courts are reluctant to interfere with an employer’s decision to refuse a promotion. They will only do so when the decision or reasoning is assailable because there is evidence that the employee acted on the basis of some unreasonable, irrelevant or insidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acts in bad faith. But equally, where there is no rational relationship between the decision not to promote, the purpose of the promotion and the information upon which the impugned decision is based, inference with the decision will be justified.

[23] It was the 2nd Respondent submission; the Court cannot therefore usurp powers of the Civil Service Commission with regard to the powers it possesses. It was the Respondent further argument that the Civil Service Commission on the recommendation by the 2nd Respondent through its

promotions at the Central Transport Administration in line with General Order A170 (2). It was further its averment that the Applicants allege that they were not afforded an opportunity to be part of the promotion process. It was the 2nd Respondent submission that the employer has the right not to communicate with an employee with regards to whether they were considered for the position. Further the employer had the right to choose whichever candidates it deemed most suitable for the position of workshop manager. They were not forced to choose one of the Applicants.

[24] The Court was referred to the cases of;

MNCEDISI MAYISELA AND OTHERS V THE SWD GOVT AND TWO OTHERS I/C CASE NO. 552/2017 [2014] and MOSES HEZEKIAL TSABEDZE V THE CIVIL SERVICE COMMISSION AND FOUR OTHERS I/C CASE NO 306/2012[2014].

It was its further averment her averment that the Applicants have failed to prove beyond a balance of probabilities that the promotion of the 5th Respondent was unreasonable and in bad faith. They have further failed to present their qualifications, which render them more suitable than the 5th Respondent. It was her averment that even if they had presented those qualifications, the managerial prerogative of the employer allows it to look beyond the academic qualification as well as experience.

[25] In closing its argument it was the 32nd Respondent argument that the appointment of the officers including the 5th Respondent was not flawed. It was it averment that the General Transport Manager (GTM) took part in the process of the promotions as he himself wrote a memorandum to the Principal

Secretary requesting the filing of vacant posts. Further the GTM stated that the 3rd Respondent has no knowledge of the promotion yet the said officer has deposed to the present Answering Affidavit, stating that she was part of the promotions and that the head of department was present.

- [26] It was the 2nd Respondents argument that the prayers as prayed for by thew Applicants cannot be granted by the Court. In particular prayer five as prayed for, as the Applicants cannot be renumerated arrear wages for work that they have not done. Further in ordering prayer two the Court would be usurping the powers of the Civil Service Commission with regards to the termination of appointments as vested in it by **SECTION 187 (1) OF THE CONSTITUTION**. It was therefore its prayer that the Applicants claim be dismissed with costs. It was further its argument that the Applicants have not warranted enough evidence before the Court, to allow for an order to be granted in their favor.

ANALYSIS OF LAW

- [27] There is no doubt, and it is now trite that it is the prerogative of management to organize the workplace guided by the exigencies that may have developed at the workplace. The principles of good industrial relations however require that the employer or manager must first consult the employee. The principle in terms of our Labour law is that the decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed the Court should not interfere with the exercise of discretion. Employees do not have automatic right to promotion, instead,

the right to promote or not to promote falls within the managerial prerogative and discretion of the employer.

[28] A further principle in terms of our law is that the mere fact that an employee is already in the post does not give him or her the right to a promotion even if such position becomes available in future. At best it gives such an employee the right to be heard. See **ADMINISTRATION TRANSVAAL AND OTHERS V TRAUB (1989) 10 ILJ 823 (A)**. So, it is now settled in terms of the labour law that employees do not have an automatic right to promotion.

[29] The Applicants are seeking the declaration of the promotion process to be declared null and void, further for the Court to set aside the promotions of the 5th respondent to the position of Workshop Manager, instead to promote themselves into the position or any other wherein they have the requisite qualification. The Court has no authority to promote civil servants, that authority is vested in the Civil Service Commission in terms of section 187 (1) of the Constitution of Kingdom of Swaziland. The section provides that:

“Subject to the provision of this constitution or any other law, the power of appointment (including acting appointment, secondment, and confirmation of appointments), promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers, shall vest in the Civil Service Commission.”

The Court can interfere only in cases of unfair labour practices, for example where the Applicants, alleges and proves that they have not been promoted because they are being victimized or discriminated against by the employer.

[30] However on the Applicants papers as drafted, and the evidence before the Court, the Court is unable to grant the order as sought by the Applicants. The Applicants have failed to show victimization or discrimination on the part of the 2nd Respondents, nor the fact that the 2nd Respondent did not follow the proper process when the promotions were affected. The Applicants have merely stated in their papers that they believe they were sidelined because they are shop stewards but do not bring any evidence before Court to support such allegations. Further in their argument they state that procedure was flouted by the non-inclusion of the head of department and Principal Secretary, however evidence has been adduced in the form of correspondence and affidavit to prove that both the head of department and principal secretary were involved in the promotions.

[31] Further the Applicants have failed show that the employer has exercised its right not to promote them capriciously for unsubstantial reasons, or that the decision not to promote them was based on a wrong principal or in a biased manner. The Applicants have thus failed to establish on a balance of probabilities that the facts and evidence prove that they have a clear or definite right, to be promoted. In light of the totality of the foregoing and taking into account all the circumstances and observations of the Court in this matter, the ineluctable conclusion is that the Applicants case is without merit and should accordingly be dismissed. The Court makes no order as to costs.

[32] The Court makes the following order.

- 1) The Applicant's Application is dismissed.
- 2) There is no order as to costs.

One Member agrees.



B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Sithole & Magagula Attorneys.

For Respondents Attorney General's Chambers.