IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal Case No.84/2015

In the matter between:

SWAZILAND GOVERNMENT Appellant

And

SWAZILAND NATIONAL ASSOCIATION OF CIVIL SERVANTS ON BEHALF OF HOSPITAL ORDERLIES AND AUXILLIARY STAFF 1st Respondent

KHANYISILE MSIBI N.O. 2nd Respondent

CONCILIATION MEDIATION AND ARBITRATION COMMISSION 3rd Respondent

Neutral citation: *Swaziland Government vs. National Association of Civil Servants on behalf of Hospital Orderlies and Auxiliary Staff & 2 Others. (84/2015) [2016] SZSC 17 (30 June 2016)*

Coram: **M.C.B. MAPHALALA, CJ**
DR. B.J. ODOKI, JA
S.P. DLAMINI, JA

Heard: O4 May 2016

Delivered: 30th June 2016

Summary: *No specific grounds of Appeal – Non-compliance with Rule 6 (4) of the Court of Appeal Rules – equal pay for equal work (pay differentiation amounting to discrimination) costs interpretation and of section 29 the employment Act – Award by arbitrator not reviewed and reasons thereof- Appeal dismissed with costs.*

JUDGMENT

S. P. DLAMINI JA

[1] This is an appeal against a judgment of the High Court wherein the Court *a quo* Judge dismissed with costs the application for review filed by the applicant against the findings of the 2nd respondent. The background and issues in this matter are sufficiently covered in the judgment of the court *a quo* from page 165 to 177 of the records of appeal.

[2] The crux of the matter that resulted in the proceedings in the court *a quo* and, subsequently this appeal, is the award contained in paragraph 6 of the Arbitration Record on page 147 of the Record of appeal. Perhaps it is appropriate at this stage to commend the 2nd respondent for the professional manner in which she went about her work including the recording of the proceedings, without any doubt this was of great assistance to the court *a quo* and this court in considering all the relevant aspects of the case.

[3] Both appellant and 1st respondent have filed main heads of argument in the matter traversing various issues. Regard being had to the points raised in the heads of argument of the respondent concerning compliance with Rule 36 (4), which is preliminary in nature, this court has considered it first because it is effectively challenging the validity of the Notice of Appeal. The respondent argues that the Notice of Appeal does not set out specific grounds of appeal and is not compliant with Rule36 (4) of the Court of Appeal Rules. The point

being made by the respondent here is that the challenge is a preliminary point of law. That if it is indeed found, as contended, that the appeal is defective and not compliant with Rule 6 (4) this may have the result of disposing the matter on that basis alone. Hence there would no need to go into the merits of the other issues raised in the appeal.

[4] The Notice of appeal is contained in pages 178 t0 179 of the record of appeal wherein the relevant position says ***"Take Notice*** *that the Appellant who was the Applicant in the High Court of Swaziland, being dissatisfied with the judgment of the said Court contained in the Order dated the 24th day of November, 2015 doth appeal to the Supreme Court on the following ground*:

> 1. *The High Court erred and misdirected itself in dismissing the application with cost.''*

[5] The Learned Counsel for applicant contends that this is sufficient. This Court is not persuaded by his argument and disagrees. The Notice of appeal falls short of the requirements of Rule 6 (4) which provides that:-

> ***"(4) The notice of appeal shall set forth concisely and under distinct heads the grounds of appeal and such grounds shall be numbered consecutively."***

[6] Notwithstanding the aforegoing, in the interest of justice the court has exercised its discretionary powers to consider the merits of the case. Apart

from the issue of costs to which that court will return to later, the main issue for consideration before this court is stated in paragraph 1 of the appellant's main heads of argument where it is stated:

> ***"The principal issue in this appeal is whether the High Court was correct in finding that there was evidence before the second Respondent that the pay differentiation between hospital orderlies at psychiatric hospitals and hospital orderlies at non-psychiatric hospitals amounted to discrimination for differentiation to constitute discrimination."***

[7] It is stated by appellant at paragraph 12 of the heads of argument that;

"12. There are four requirements that a litigant, in order to be successful, in equal pay for equal work claim must satisfy:

(a) There is a comparator;
(b) The work done by the comparator is the came as his or hers;
(c) There is a difference in the salary of the comparator and him or her: and
(d) There is casual link between the differentiation and a listed or analogous ground of discrimination."

[8] Both Counsel for appellant and respondent agreed at the hearing of the matter that the only point in issue was the **Causal link** between the pay differentiation and a listed or analogous ground of discrimination. Therefore apart from this, respondent met all the requirements of the relief sought.

[9] In concluding the matter, 2nd Respondent at page 147 of the record ordered that:-

"(i) ***The Respondents are directed to upgrade the positions of all orderlies in the country to Grade A4. This upgrade is to be implemented as from the 1st April, 2014, to enable the Respondents to sufficiently include the same in its budget; and***

(ii) ***The Respondents are directed to firstly consider internal advertising all auxiliary positions. This is to be implemented with immediate effect. The Respondents can only recruit externally if no suitable position is identified within the cadre.***

[10] It cannot be disputed, and it was not disputed in this matter, that an employer may pay different wages to employees who perform the same type of work, provided there are certain justifiable variable that inform the disparity, such as expertise, skill and experience etc. Authority for this is found in the Judgment the learned Judge of Masuku AJA (as he then was) in the matter of **Satellite Investments (PTY) LTD vs. Joseph Dlamini and Two Others, Industrial Court of Appeal Case No. 04/2010 at page 5** and. Further, the learned **Judge Masuku AJA**, cited with approval the case of **Transport and General Motors Union and another vs. Bayete Holdings (1999) 201 LJ 1117(LC)** wherein it was stated:

"***However, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination; see Du Toit et al the Labour Relations Act of 1995 (2 ed) at 436. Discrimination takes place when two similarly circumstanced individuals are treated differently pay***

differentials are Justified by the fact that employees have different levels of responsibilities, expertise skills, and the like.''

[11] As it was contended in the case of **Satellite Investments (Pty) Ltd** case supra, as it is similarly contended in present matter, that the Law only prohibits discrimination found in Section 29 of the employment Act, of 1980 which provides that:-

> *"No employer shall in any contract of employment discriminate against any person or between employees on grounds of race, colour, religion marital status, sex, national Origin , tribal or class extraction, political or social status''*

[12] The Learned Judge Masuku AJA (as he then was) deals with this issue comprehensively in pages 7 to 9 of his judgment in the **Satellite Investments (Pty) Ltd** Case including citing various authorities supporting the Learned Judge's finding that such a contention is not supportable at law.

[13] This court associates itself fully with the dictum that appears below in the judgment of Judge Masuku AJA on this point and accordingly rejects this argument;

> (23) **The question for determination is whether, as the appellants contend, it is correct that if discrimination alleged does not fall within the ambit of any of the special categories mentioned in**

either section, then the complainant ought to fail in his complaint? In other words, the appellants claim that for person to successfully prove that he or she has been discriminated against, the alleged act of discrimination must necessarily fall within one or more of the categories mentioned in the Constitution and the Act above, failing which any other conduct cannot in law be properly regarded as discrimination. Is that contention supportable?

(24) **In the first place , what one must point out is that there is no provision in both the Constitution and the Act that the items of possible discrimination mentioned in either section constitute the *numerous clausus* of all types of discrimination known to and to be proscribed to in this country, such that any other type or species would not be regarded as such, not because it is not, objectively viewed an act of discrimination, but for the reason that it has not been included by the Legislature in the prohibited category.**

(25) **In my view, the contention by the appellants is not supportable. First, no authority was cited in support thereof. Secondly, society throws up a vagary of new and unprecedented situations that the Legislature, in all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distrain such conduct, turn a blind eye thereon for no other reason than that is not specifically proscribed in either section? My answer is an emphatic No!**

(26) **If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument sake, never anticipated the type of discrimination alleged by a complaint before Court. This would amount to the Courts failing to perform their duties.**

(27) **An example would in this regard will do. There is nowadays the HIV- Aids pandemic. It was relatively unknown and hence not prevalent when the Employment Act was promulgated in 1980. There have been cases in other countries where the Courts have come out strongly and condemned discrimination based on a person's HIV status in the work place. See for instance the Botswana case of Lemo v Northern Air Maintenance *(pty)* L*td* [2004] 2 B.L.R. 317 (I.C.), where Dr. Dingake J. held that discrimination by an employer, based on one's HIV status was out of order. Can we bravely proclaim that such blatant discrimination ought to be countenanced, debilitating as it might be, and for no other reason than that Parliament never imagined it would exist many years later? Again, my answer is a reason No!**

(28) **It is a fact of life that Parliament, with all its good intensions and reasonable foresight, is never able to keep pace with new vagaries of situations our society throws up. Furthermore, it is common case that its wheels procedure and processes are in same cases exceedingly slow as not to be able to keep pace with the rate at which societies throw unwanted and unprecedented situations which require immediate and decisive intervention.**

To count only on the Legislature in all these areas, while real and corrosive harm is being perpetrated on a person in the society, would be an exercise in abdication by the Courts."

[14] At the arbitration level there was a total of five witnesses. Three witnesses testified on behalf of the respondents and two witnesses testified for Appellant. The thrust of the testimony of respondent's witnesses was that the duties of a mental hospital orderly were for all interests and purposes similar to those of a Hospital Orderly. A witness falling under this category, Zodwa Simelane, further stated that she was employed by the appellant in June 1999 as a hospital orderly and remunerated at grade A 2. She further states that she was aggrieved by the payment at grade A 2 and lodged a dispute against her employer and as a result she was promoted to grade A4. Since this witness had worked as an orderly at both the Psychiatric Hospital and Mbabane Government Hospital was able to state that the work of all the orderlies was similar. She pointed out the only difference was the risk of physical violence to the orderlies working at the Psychiatric Hospital yet the orderlies at the Government Hospital face the risk of contracting diseases such as HIV and TB.

Another witness in this category is Simon Mkhonta who testified that he was employed by appellant as a Hospital Orderly in 2002 based at Psychiatric Ward in Piggs Peak. Strangely, he was remunerated at Grade A2 whereas his job description fell under grade A4. This was not the only strange thing about the testimony, Zodwa Simelane stated that at the Mental Hospital there are orderlies paid at both Grade A2 and Grade A4 and that since this does not make sense to the orderlies they requested an explanation from the appellant to explain the differences between the grades. The testimony on behalf of the appellant came from two witnesses. The thrust of the testimony of the two witnesses was that the difference between the orderlies was the risk of

violence from violent patients and that mental health orderlies underwent "numerous training".

[15] The 2nd respondent in weighing all the testimony conclude, *inter alia*, at pages 142 to 143 of the record that;

> ***"5.1.8 The Respondent went on to painstaking lengths to show that the duties carried on by these two categories are not the same. Accordingly the duties carried out by nurses in the mental hospitals are not similar to those carried out by nurses elsewhere.***
>
> ***5.1.9 I am thus inclined to state that orderlies are employed in the same designation and performing the same job, thereby rendering it unfair for the Respondents to make disparate payments to them.***
>
> ***5.1.10 The justification that the mental orderlies are paid more because they are trained is a misconception. The witness for the Respondents testified that they undergo a one day workshop. Such as a worship does not in my view amount to training. It appears to be more of an induction on the job and hence would not in my view justify such payment. Employers are mandated to train their employees, and it becomes unfair when one group is trained in order to justify or warrant such pay. In my view all these orderlies possess the same skill or experience.***

[16] The Court *a quo* agreed with the findings of the 2nd respondent and concluded at pages 174 to 176 of the record that;

(19) **Having read the papers filed by Applicants Counsel and 3rd Respondent's Counsel and having listened to persuasive and impressive arguments by Counsel for both parties, the Court wishes to register its appreciation to the professional and qualitative manner in which Counsel have handled the case at hand.**

(20) It is the Court's considered view that reasonableness is a ground for review. If the Court comes to the conclusion that a ruling by an arbitrator or court *a quo* was so grossly unreasonable, it can set it aside. An unreasonable ruling is also an irrational one. In this particular case, this Court finds nothing unreasonable in the manner the arbitrator handled the case. She applied her mind to all the issues that were brought before here. I therefore entirely agree with 3rd Respondent's Counsel that since all the orderlies possess the same skill, expertise and experience, differential treatment of the orderlies is unjustified.

(21) Applicant's Counsel has argued that there is no evidence on the Record of proceeding to show that the reason for the difference in pay is a ground of discrimination prohibited by the law. He basis his argument on the fact that an act of discrimination should fall within the ambit of discrimination as defined in Section 29 of the Employment Act, 1980. There is merit in this argument, but it runs short of the canon of interpretation that a statute must be interpreted based on its purpose. This is what we call the purposive interpretation of statute.

(22) The case of Seaford Court Estate Ltd v Asher (1949) 2 KB 481 bears testimony to this legal truth, particularly when the Lord Denning says at page 498 to 499-

> **" whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of fact which may arise and even if it were, it is not possible to provide for them in terms of free ambiguity. A judge……must set to work on the constructive task of finding the intention of Parliament and he must do this not from the language of the statute but also from a consideration of the social conditions which gave rise to it and the mischief which it was passed to remedy and then he must supplement the written word so to give 'force and life' to the intention of the Legislature."**

This canon of interpretation was also invoked in the case of Nothmen v Barret London Borough Council (1978) 1W.L.R at 228.

(23) The subject matter in Section 29 of the Employment Act, 1980 is the elimination of all forms of "discrimination" in a workplace. The law prohibits any employer from discriminating an employee on various grounds including but not limited to those mentioned in the Employment Act. In other words, the grounds for discrimination need not be limited to those mentioned in the Employment Act. In the Transport and General Workers Union Case (supra) Grogan A.J. said that-

"Discrimination takes place when two similar circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise skill and the like.''

Likewise, in the Louw's case (supra), the Learned Judge confirms this position when HE says-

"In other words it is not unfair labor practice to pay different wages for equal work to equal value if the reason or motive being the cause for so doing, is direct or indirect discrimination or arbitrary grounds or the listed ground e.g race or ethnic origin…Discrimination on a particular "ground" means that the ground is the reason for is the reason for the disparate treatment of people; for example different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment"

(24) This Court holds the view that the differential treatment of the orderlies is direct or indirect discrimination. Further support for the proposition that discrimination must not be limited to the instances listed in Section 29 of the Employment Act 1980 is found in the case of Satellite investment (Pty) LTD(supra) where the Industrial Court of Appeal observed in paragraphs 25 to 27 as follows-

"in my view the contention by the appellant is supportable. First no authority was cited in support thereof. Secondly society throws up a

vagary of new and unprecedented situations that the Legislature in all its manifold wisdom would not have anticipated. The question then is if there is a type of discrimination which is obviously untenable and totally insupportable should the courts when approached by a litigant to distain such conduct turn a blind eye thereon for no other reason that it is not specifically proscribed in either section? My answer is an emphatic No!

If that were to be so it would mean that the courts would thereby fail to protect victims of overt discrimination and the court' hands would be withered and be unable to move in order to give the needed protection for no other reason than that the Legislature many years ago in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before court. This would amount the courts failing to perform their duties.

An example would in this regard do. There is nowadays the HIV-AIDS pandemic. It was relatively unknown and hence not prevalent when the Employment Act was promulgated in 1980. There have been cases in other countries where the courts have come out strongly and condemned discrimination based on a person's HIV status in the workplace."

[17] It was appellant's further contention that in the absence of the "causal link between differentiation and a listed or analogous ground of discrimination", the award by second respondent was irrational because it was not justifiable in relation to the reason given for it.

[18] The Court *a quo* dealt with the issue as to whether the arbitration process by second respondent was reviewable on the basis of being in irrational as contended by appellant. After considering various authorities including **TAKHONA DLAMINI V PRESIDENT OF INDUSTRIAL COURT AND ANOTHER CASE NO. 23/1991, COUNCILLOR MANDLA DLAMINI AND ANOTHER V MUSA NXUMALO APPEAL CASE 10/2002 AND ATLAS MOTORS (Pty) Ltd v MACHAWE AND ANOTHER CASE NO.77/2003,** the learned Fakudze J states at paragraph [20] of the judgment and page 173 of the record of appeal the following;

> **" [20] It is the Court's considered view that reasonableness is a ground for review. If the Court comes to the conclusion that a ruling by an arbitrator or *court a quo* was so grossly unreasonable, it can set it aside. An unreasonable ruling is also an irrational one. In this particular case, this Court finds nothing unreasonable in the manner the arbitrator handled the case. She applied her mind to all the issues that were brought before her. I therefore entirely agree with third respondent's Counsel, differential treatment of the orderlies is unjustified."**

[19] It is the position of this Court that the Court *a quo* applied the law correctly in finding that, in the circumstances of this case, second respondent's ruling was not unreasonable or irrational. Therefore, in my view, appellant's argument that the ruling was irrational was correctly rejected. As noted above, the Court *a quo* correctly relied on the referred authorities, particularly the **Councillor Mandla Dlamini and Another Case** wherein it is stated that;

"It is now time for the courts in Swaziland to hold that it is no longer necessary for a litigant to prove that a decision-maker acted grossly unreasonable in order for such litigant to succeed on review. In this day and age, the test of gross unreasonableness is too narrow and too stringent or perhaps unreasonable to high a threshold. The test must be whether the decision maker acted procedurally fairly or unfairly in the circumstances"

When applying the test to the present case, the court a quo found that there was no procedural unfairness established on the part of the second respondent. This Court is satisfied with the testimony adduced during the arbitration process upon which 2nd respondent relied for the award. The evidence for and on behalf of respondents was sufficient to establish a case of prohibited discrimination at the work place. In the face of such evidence, appellant proffered not to give any explanation at all except to rely on the issue of violence. However, the issue of violence was successfully challenged at the arbitration process. Appellant's argument regarding the alleged irrational or unreasonable conduct on the part of second respondent is not sustained.

[20] Consequently, the Court *a quo* correctly upheld the award arrived at by the arbitrator (2nd respondent) and dismissed the application for review by appellant with costs.

[21] Therefore, this Court agrees with the findings of the Court *a quo*. There was no misdirection on the part of the Court *a quo* at all. On the basis of the **Satellite Investment (Pty) Ltd** Case which is also relied upon by the Court *a quo* together with other authorities stated therein, the contention by

the appellant as to the correct application and interpretation of Section 29 of the Employment Act 1980 is rejected by this Court. It is now trite in our law that Section 29 cannot be interpreted as to limit discrimination to the grounds stated therein.

In this result, the judgment of the Court *a quo* is hereby confirmed and the appeal dismissed with cost.

ORDER:

In the premise, it is ordered that;

(a) The appeal be and is hereby dismissed with costs; and

(b) The judgment of the Court *a quo* is upheld.

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S.P. DLAMINI

JUSTICE OF APPEAL

I agree

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M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

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DR. B.J. ODOKI

JUSTICE OF APPEAL

For Applicant: **Mr. M Vilakati**

1st Respondent: **Mr. A. Lukhele**