



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGEMENT**

**CASE NO. 552/2010**

In the matter between:

**MNCEDISI MAYISELA AND OTHERS**

**APPLICANTS**

and

**SWAZILAND GOVERNMENT**

**1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY - MINISTRY  
OF LABOUR AND SOCIAL SECURITY**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation** : *Mncedisi Mayisela & Others v Swaziland  
Government & 2 Others*[2014] SZIC 15 (10 April  
2014)

**CORAM** : **DLAMINI J,**  
*(Sitting with D. Nhlengetfwa & P. Mamba  
Nominated Members of the Court)*

**Heard** : **25 November 2013**

**Delivered** : **10 April 2014**

**Summary:** *Labour law – Industrial Relations – Applicants seek an order that the Respondents effect promotions on their posts and grades. Applicants failing to prove that they have clear right to such promotions. Decision to promote or not to promote falls within managerial prerogative of the Employer, and Courts should not readily interfere with the exercise of*

*such prerogative. Purported promotions irregular and therefore null and void. Application dismissed.*

1. To be or not to be promoted. Principally this is what this dispute before this Court concerns. Mncedisi Mayisela and five (5) of his colleagues seek Orders as follows from this Court;

- *Directing the 2<sup>nd</sup> Respondent to sign the Applicants' C.S.C. form 7(a) and transmit same to the Secretary to Cabinet, Principal Secretary – Ministry of Public Service, Auditor General and Accountant General forthwith for implementation of the promotions of the Applicants.*
- *Directing the Respondents to pay the Applicants their salary with effect from their respective dates as set out in Annexure "A".*
- *Costs*
- *Further and / or alternative relief.*

2. According to the founding affidavit of Mncedisi Mayisela, he and the other Applicants are employed by the 1<sup>st</sup> Respondent (Swaziland Government) under the Human Resources Planning and Development Unit in the Ministry of Labour and Social Security and are stationed at the Ministry's Headquarters in Mbabane. Initially this unit was under the Ministry of Public Service and Information and was administered by a Consultant from the Commonwealth under the Human Resources Development Department. When the Consultant's

contract expired on or about February 2009, the Government and the Ministry of Labour and Social Security established a stand-alone department which is responsible for the national Human Resources Planning and Development. And this department was no longer under the Ministry of Public Service and Information but was now under the Ministry of Labour and Social Security.

3. Mayisela further states that in February of 2009, the Principal Secretary in the Ministry of Public Service and Information requested for the evaluation and grading of the Human Resources Planning and Development posts. A year later, in February of 2010, the Acting Director of Management Service department in the Ministry of Public Service and Information confirmed to the Civil Service Commission that the Ministry had determined and approved an organizational structure and grades of the Applicants. Then in June of the same year, 2010, the Acting Principal Secretary also wrote to the Civil Service Commission confirming that the indeed the department for the national Human Resources Planning and Development had been established under the Ministry of Labour and Social Security. Apparently the Acting Principal Secretary also requested that the

present Applicants be promoted, and the justification for such promotions was that the establishment of the stand-alone unit brought with it such promotions. And parallel to the promotions were salary upgrades which saw the increase of the Applicants' salaries ranging from grade E4 to E5.

4. The further evidence of Mncedisi Mayisela is to the effect that in June 2010, the Civil Service Commission issued letters of promotion to the 2<sup>nd</sup> Respondent (Principal Secretary in the Ministry of Labour and Social Security) for her signature and onward transmission to the relevant departments for implementation. But lo and behold! To the surprise of the Applicants, the 2<sup>nd</sup> Respondent refused to sign and forward the letters of promotion. In correspondence directed to the Civil Service Commission the 2<sup>nd</sup> Respondent she questioned the authenticity of the memorandum allegedly written by the acting Principal Secretary requesting for the promotions of the Applicants, saying that the said memorandum was not written by the Acting Principal Secretary. The Civil Service Commission responded to this memorandum by reaffirming its position to promote the Applicants and approving their new grades.

5. The 2<sup>nd</sup> Respondent then requested that the promotions of the Applicants be suspended pending a forensic audit being carried out by K.P.M.G. Auditors in the Civil Service Commission, of which the Applicants' promotions were part of. Being dissatisfied with the suspension of their promotions the Applicants are now before this Court for redress.
  
6. The application by Mncedisi Mayisela and his colleagues is opposed by the Respondents. In their answering affidavit deposed to by Nomathemba Hlope, the Principal Secretary in the Ministry of Labour and Social Security, they raised a preliminary objection – *point in limine*. This *point in limine* is to the effect that the Applicants have failed to establish a case against the Respondents that would warrant the grant of the order they seek in that the documents they rely on in persuading the Court to grant their prayers, annexures 'A' to 'Q', are classified as privileged communication between the CSC and Government - which privileged communication shall not, in terms of section 179 of the Constitution, be produced or disclosed in any legal proceedings without leave of a Judge of a Superior Court.

7. The second point *in limine* was to the effect that this matter of the Applicants was prematurely and improperly before this Court as it was still pending before the Civil Service Commission, which Commission was still awaiting the completion of the forensic investigation by KPMG on certain aspects of the same matter. However, when the matter was heard this point was no longer pursued by the Respondents' Counsel, Attorney Mr. Khuluse.
  
8. In dismissing the point *in limine* on section 179 of the Constitution of our Kingdom, the Court points out that this particular provision in the Constitution specifically prohibits a person from producing or disclosing any communication, written or oral, which has taken place between a service commission or any member or officer of that commission, and the Government, or a line Minister, or any officer of the Government, or between any member or officer of a service commission and its chairman, or between members or officers of a service commission, in exercise of, or in connection with the exercise of, the functions of the service commission, unless a judge of a superior court orders otherwise. But the communications in question in this matter (annexures 'A' to 'Q') are not just communication with

a third party. They are communication directly to the Applicants in this matter. And being such communication directly to the Applicants by the Civil Service Commission, surely the Applicants do not need an order from a Judge of a superior court to be able to use same in this Court. The point *in limine* by the Respondents accordingly fails.

9. On the merits of the matter, Principal Secretary Nomathemba Hlope, stated that the Swaziland Government had taken a policy decision that human resource planning and development in the country be undertaken through a project under the Ministry of Public Service and Information. Towards the attainment of this of this policy decision, all necessary preparations were made but the unit never took off because Government decided in 2009 to establish a permanent Human Resources Planning and Development Department under the newly established Ministry of Labour and Social Security. Hlope further states in her affidavit that the reality of this is that there never was a standalone project unit responsible for National Human Resources Planning and Development but rather that the functions of an existing department were relocated from the Ministry of Public Service to that of Labour and Social Security.

10. At paragraph 9.6 of her answering affidavit she states that *‘worth noting is the fact that this entailed the creation of new posts that were subsequently established by way of Establishment Circular Number 5 of 2009...And at paragraph 9.7 she continues to state ‘...the HRPD Department as it existed at the MOPSI and as it exists under the LSS never performed these functions which were specific to the project unit’.*
  
11. With reference to the memorandum of 16 February 2009, which was apparently a request made for the evaluation and grading of Human Resources Planning and Development posts, the Principal Secretary clarified that this memorandum was meant for the posts that were created specifically for the project that never took off and that as such it has no bearing on the Applicants as their posts were created by Establishment Circular No. 5 of 2009.
  
12. In support of the Applicants’ case, Attorney Mr. Mkhwanazi referred the Court to section 176 of the Constitution of Swaziland, which basically spells out the functions and powers of service commissions. He went on state that the Applicants have a clear right to be promoted



in terms of this section 176, conceding though that this is despite that such should be the case even though there is some contradiction in this respect. Mkhwanazi further submitted that there was an injury being occasioned to the Applicants by Principal Secretary Hlope, which she was doing out of spite. Finally he stated that the Applicants had no alternative remedy other than to seek final determination before this Court. He accordingly prayed for an order in terms of the Notice of Motion.

13. On behalf of the Respondents, Attorney Mr. Khuluse submitted that the Applicants cannot and should not argue that they have a clear right to the promotions they seek. This, because theirs is one tainted with gross irregularities. He submitted that procedurally, for promotions, there is supposed to be a request from the line Ministry to have the grades and salaries of the Applicants reviewed, which in this case never occurred. Attorney Khuluse also submitted that the approval of the organizational structure is the responsibility of the Principal Secretary for the Ministry of Public Service and Information and not just a Director. In this regard, he referred the Court to page 22 of the book of pleadings, a memorandum by the Principal Secretary of the

Ministry of Public Service and Information. Khuluse pointed out that the Civil Service Commission acted on a misconception that the Applicants' salary grades were to be regulated in terms of the memorandum, whereas the memorandum was only meant for project posts.

14. The Court was also referred to page 70 of the book of pleadings, wherein is an extract of Circular No.5 of 2009, which established the Applicants' unit. In terms of this Circular, the Director of the Human Resources Planning and Development unit is on grade F1, the Senior HRPD Analyst on E3, the HRPD Analyst on E2 and the Principal Laboratory Technologist is on E3. This, according to Khuluse is the correct and rightful instrument that regulates posts grading in the Civil Service. He went on to bring to the attention of the Court that on learning that it acted on wrong information in the case of the Applicants' promotions and grading, the Civil Service Commission then decided to await the Commission of Enquiry's findings and recommendations. In fact, according to Khuluse, the Commission of Enquiry's findings and recommendations are that there were irregularities in the promotions of the Applicants with

recommendations that same be reversed. And further Government would have already acted on these recommendations and findings had it not been that this matter is still pending before this Court. It is on the basis of the foregoing that the Respondents argue that the Applicants do not have a clear right to order they seek, hence they pray for a dismissal of their application with costs.

15. When the matter was next called for continuation, the Applicants were now represented by Attorney Mr. Ndlangamandla who was standing in for his Principal Mr. Mkhwanazi who was indisposed. Ndlangamandla brought a new argument all together, now arguing that the Applicants had a legitimate expectation to be promoted as they were. This was an unexpected twist in the case of the Applicants, which had not even been pleaded. The general rule is that an Applicant must stand or fall by his founding affidavit and the facts alleged therein. And certainly bringing new matters from the Bar is not allowed. Over and above these concerns by the Court on this new line of argument on 'legitimate expectation' of the Applicants, they, as employees, to succeed would have had to prove the existence of the reasonable or legitimate expectation. That is, that there were special

circumstances which existed and which justified such expectation on their part. Which in *casu* they have not done.

16. The question of whether or not the Applicants are entitled to the order they seek largely centers on whether they have successfully established that they have a clear right to the promotions in issue. The Applicants' contention is that they have a clear right and in fact are entitled to the promotions. The Respondents however contend otherwise. They argue that the said promotions were irregular and therefore they do not have a clear right to same.

17. The law relating to establishing a clear right is that *'the onus is on the Applicant applying for a final interdict to establish on a balance of probabilities that the facts and evidence prove that he has a clear or definite right...the right which the Applicant must prove is also a right which can be protected...'* (see: **Minister of Law and Order v Committee of the Church Summit 1994 (3) SA 89**)

18. According to the Respondents, the procedure of effecting a promotion in respect of a salary grade in the Civil Service is that there first has to

be request by the relevant Ministry (through its Principal Secretary) to the Ministry of Public Service for a re-grading. The Ministry of Public Service thereafter makes an assessment need for the re-grading and either approves or rejects such application. Should the application be approved, a recommendation to that effect will then be made to the Civil Service Commission for implementation.

19. Indeed on the evidence before this Court, all indicators are that there was never request for the re-grading of the Applicants' posts and salary grades by the relevant Ministry's (Labour and Social Security) internal promotions board nor was there a recommendation to that effect. This is a clear indicator that the purported promotions were irregular and as such null and void. Once the procedure for conferring a right on an employee has been flouted, it follows that there can never be a clear and/or legal right arising from such. There should never be any semblance of doubt to a clear right otherwise it should not even be said to be such. Making matters worse for the Applicants in this matter is that the Civil Service Commission, which for some unexplained reason they have not even joined to the present proceedings, has acknowledged that there may have been some

irregularity in the purported promotions. In particular, Allen McFadden – the Executive Secretary of the Civil Service Commission - states in his confirmatory affidavit as follows: ‘...*this matter has been pending before the Civil Service Commission since 15<sup>th</sup> October 2010 and is awaiting completion of a forensic investigation into allegations of dishonesty from certain quarters in the manner the re-grading and promotion of the Applicants was handled. **The Commission is awaiting a report of the investigation which will inform the way forward in this matter***’ (Court’s emphasis). The Court cannot therefore ignore the fact that a Commission of Enquiry was set up to specifically investigate the purported promotions of the Applicants.

20. 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 readily interfere with the exercise of discretion. Employees do not have an automatic right to promotion. Instead the right to promote or not to promote falls within the managerial prerogative of the Employer.

21. The Applicants in this matter have failed to establish on a balance of probabilities that the facts and evidence prove that they have a clear or definite right, which can be protected, to the purported promotions. 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. And that is the order the Court makes. The Court makes no order as to costs.

The members agree.

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**T. A. DLAMINI**  
**JUDGE – INDUSTRIAL COURT**

**DELIVERED IN OPEN COURT ON THIS 10<sup>th</sup> DAY OF APRIL 2014.**

*For the Applicant: Attorney M. Mkhwanazi (Mkhwanazi Attorneys)*

*For the Respondent: Attorney S. Khuluse (Attorney General's Chambers)*