



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 127/2008

In the matter between:-

PETER KHANAKHANA SIMELANE

APPLICANT AND

THE PRINCIPAL SECRETARY – MINISTRY OF

HEALTH AND SOCIAL WELFARE

1ST RESPONDENT

THE PRINCIPAL SECRETARY – MINISTRY OF

PUBLIC SERVICE

2ND RESPONDENT

THE CIVIL SERVICE BOARD

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

Neutral citation : *Peter Khanakhana Simelane v The Principal Secretary Ministry of Health & Social Welfare and Others (127/2008) 2015 [SZIC] 43 (10 September 2015)*

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

Delivered : **09 SEPTEMBER 2015**

Summary: *Labour law – Industrial Relations – Applicant seeks to be paid all arrear remuneration for the incorrect job grading. He also wants his retirement package and all dues to be recalculated and paid out at the relevant job grading.*

***Held** – Applicant has not made out a case for the claims he seeks. **Held** - There can be no promotion to a non-existent position. **Held** - Application dismissed. Respondents though ordered to pay half of the Applicant's costs for the lacklustre and unprofessional manner in dealing with his matter.*

1. Peter Khanakhana Simelane is a former civil servant. He is now retired. At the time of his retirement in February, 2008, he had been pursuing a dispute on what he called incorrect grading of his position. He retired occupying the position of Orthopaedic Technician. He had qualms with this grading since, as far back as 1983, he had been trained in India as an Orthopaedic Technologist. He also received training from Brazil as an Orthotist and Prosthetist. This further training now entailed him performing his initial duties as an Orthopaedic Technician and also running the whole orthopaedic department at the Mbabane Government hospital, and for which he was not remunerated. Hence this dispute now before this Court for determination.
2. The gist of the Applicant's case is that his running of the whole Orthopaedic unit was because of the training he received in India which included management and administration. Despite this further training and increase in responsibilities, he never received an

increment in his position grade and remuneration. He now wants to be paid all arrear remuneration with regards to what he calls an incorrect job grade. He also wants his retirement package and all dues to be calculated and paid out at the relevant job posting, in accordance with the training he received and for being in charge of the Orthopaedic unit at the Mbabane Government Hospital.

3. In his evidence in chief, the Applicant referred the Court to a letter he wrote addressed to the Principal Secretary, Ministry of Health, dated 25 March 1988. In that letter the Applicant was complaining that despite all his qualifications locally and in far flung countries such as Ethiopia, India, Brazil and Great Britain, he was still graded and remunerated at grade 14. All he wanted was that the Ministry and Government consider his qualifications and adjust his grade to a suitable one. There were a lot of these correspondences written by Simelane directed to the Principal Secretary through the Senior Medical Officer. But it would seem most of these elicited no response from the Principal Secretary on most occasions. Simelane though was not deterred in the pursuit of what he believed he was entitled to , he continued writing until he received a response in 1991 indicating that

his request would be considered but not for him as an individual but for the whole cadre. This was to entail the creation of new positions and a new career structure for the whole unit.

4. However all what was promised to Simelane by the Principal Secretary never came to fruition until he decided to report a dispute with the Conciliation Mediation and Arbitration Commission for conciliation some 2 years before he was due to retire. At conciliation the Applicant and Government team struck a compromise in terms of which an agreement was reached. The agreement of the parties in this regard was to the effect that '*...Respondents [Government] shall institute the review of the Orthopaedic cadre...*' This process was to be commissioned in not more than 3 months from April 2006. This means that it had to have been so commissioned by the end of July 2006. This agreement of the parties was further made an order of this Court. Unfortunately though, at the time of his retirement in 2008 all this had not been done, hence this dispute now before this Court. In his evidence in chief and under cross questioning by the Respondents' Counsel, the Applicant confirmed that at the time of his retirement in 2008, the highest post in the Orthopaedic unit was that which was

- occupied by him – Orthopaedic Technician. But he blamed the state of affairs on government’s lackluster attitude.
5. This application of the Applicant is strongly opposed by the Respondents. Principally their defence is that the position occupied by Mr. Simelane at the time of his retirement, that of Orthopaedic Technician, was the highest post in the cadre and as such his claim cannot be quantified. The Respondents confirm that there was an agreement reached with the Applicant at CMAC but quickly point out that such agreement was to the effect that the whole Orthopaedic cadre was to be reviewed and not just the position of Mr. Simelane. The Respondents also contended that a review of the cadre was carried out as per the agreement and that recommendations were made in the year 2007. The recommendations were on the creation of new posts including that of Senior Orthopaedic Technician, which however to-date hereof have still not been created.
 6. In support of the Respondents’ case, a Ms. Hlob’sile Dlamini from the Management Services Division was introduced as a witness by Attorney Mr. V. Kunene. She testified that her unit, the Management

Services Division, was responsible for job evaluation, salary reviews and salary grading, determination of work methods and systems and determination of the establishments and levels of positions in government ministries and departments.

7. She further testified that she personally knew of the matter of the Applicant. In 2006, she stated, he was stationed at the Mbabane Government hospital as an Orthopaedic Technician under the Ministry of Health. This was during the period when she, Ms. Dlamini, was the Sectoral Officer for this Ministry. The Applicant complained that he was being underpaid because, according to him, over and above being an Orthopaedic Technician, he also played a supervisory role for the unit. She also testified on the dispute he reported to CMAC and the subsequent agreement reached thereat. Following this agreement at CMAC, a review of the Orthopaedic cadre was undertaken by the Public Service Ministry and this culminated in a number of recommendations, principal of which was the creation and addition of higher level posts within the cadre. This after the review had discovered that there were only two levels in the cadre, that of Assistant Orthopaedic and Orthopaedic Technician. The

recommendation here was for the creation of 3 levels above that of Technicians.

8. However, when the Applicant retired in 2008, the recommendations had not been implemented. In fact, as at the date of this trial these recommendations had still not been effected. This means that there are still only two levels in the cadre. When questioned on why these recommendations have still not been implemented, she stated that the creation of post in government is a laborious process in that; it comes with financial implications needing the approval of the Ministry of Finance in terms of funding before the Ministry of Public Service can act on those recommendations. Another reason she advanced was that government was currently not creating any new posts until the fiscal position improves.
9. On the quantification of the Applicant's claim, she pointed out that it would be impossible to pay him what he is claiming because the position he occupied was the highest in the unit in terms of the Swaziland Government's establishment and that one cannot be paid outside of the establishment circular. As it is, the position on which

- the Applicant wants to be paid, that of Orthotist, is non-existent in the government establishment and therefore cannot even be graded.
10. Another witness to testify in support of the Respondents' case was the current Principal Secretary in the Ministry of Information, Communication and Technology, Mr. Sikelela Dlamini. At the time of the Applicant's tenure in the civil service he was the Under Secretary in the Ministry of Health and Social Welfare. His evidence was more or less the same as that of Ms. Dlamini. On the issue of the further training of the Applicant, the Principal Secretary clarified that the further training of Civil Servants is part of government's responsibility of developing its human capital. He quickly pointed out though that such further training does not automatically entitle one to a promotion. Qualifying this statement, he went on to state that a promotion can only be to an existing post, so that where there is none such post available, then one would not be promoted. This is even contained in the bonding agreement, he concluded.
 11. Under cross examination by Attorney V. Ndzinisa on behalf of the Applicant, the Principal Secretary maintained that even though the

Applicant performed the supervisory functions in his unit, there was no existing post for such supervisory functions and that therefore he could not be compensated for same. He clarified that government could only compensate Mr. Peter Khanakhana Simelane if a) he had authority to perform the supervisory duties and b) that for him to perform same there must have been an existing post that was above that which he occupied, which in this case was non-existent. And further that without such post above that which was occupied by Mr. Simelane, then there was no way the Ministry of Health could have authority to effect payment in compensation for the supervisory functions he was executing.

12. It is common cause that the Applicant was engaged by the Swaziland Government, under the Ministry of Health, as an Orthopaedic Technician. It is also not in dispute that he received a number of trainings, in furthering his career, which were sanctioned by the Government. It is also not in dispute that the Applicant had been responsible for the Orthopaedic unit at the Mbabane Government Hospital where he was based and that at the time he retired he had amassed over thirty years experience on the job.

13. It also emerged in evidence that since 1988, the Applicant had been engaging the office of the Principal Secretary through the Senior Medical Officer, complaining that he had been acting as the Orthopaedic Technician in-charge without any compensation or remuneration. He was requesting that his qualifications and the fact that he was supervising the unit be taken into account and that his position be adjusted to a senior one together with his remuneration grade. He was basically requesting that since there was no post senior or higher than the one he was occupying, then one should be created for him. In some instances even his supervisors wrote letters in support of Mr. Simelane's request.
14. All these efforts however came to nought. In most of the instances they elicited no responses at all from the office of the Principal Secretary. When a response was forthcoming though, he was advised that his matter could not be isolated from the cadre as a whole and that if his request was acceded to, it would entail a review of the whole cadre and subsequently the creation of new positions in the whole

unit. One such correspondence is dated 23 October 1991 and is signed off by the then Principal Secretary, a S.P. Hlope. It states that;

'...the matter cited in your letter cannot be isolated from the cadre as a whole as the exercise would entail the creation of new positions which presently do not exist in the service.' We will however, request Labour and Public Service to look into the issue of creating a new career structure for this cadre'

15. In an earlier memorandum to the Senior Medical Officer, this same Principal Secretary (S.P. Hlope) had informed the Senior Medical Officer at the Mbabane Government Hospital to take necessary steps of initiating a request for posts in the cadre. Obviously nothing was done in this regard and the Applicant though was undeterred in his quest for a higher and better paying position in recognition of his qualifications and the work he was doing. He continued writing to the office of the Principal Secretary even in the year 2006. One would assume that a number of Principal Secretaries dealt with the issue of the Applicant without any positive break through between the years 1988 and 2006 – 18 full years!

16. Then on the 11th January 2006, a letter was directed to the Applicant from the office of the Principal Secretary. This letter advises the Applicant as follows;

'Your several letters whereby you appeal for promotion as Senior Orthopaedic Technician refers.

We are very sorry for our failure to reply your letters in time. This is because the appeal was very complex and thus a need to consult.

It has therefore been directed I inform you that unless your supervisors consider recommending you for promotion against an existing vacancy commensurate to your qualifications and or experience, it is thus not easy/possible that you may be promoted.

Note further that during consultation about the matter, it transpired that it is not possible for the Ministry responsible for the creation of posts to approve a request just for the benefit of an individual. Posts are created because of job need...' (Sic)

17. The Applicant though was still not giving up. By this time he had about two years left before his retirement from public service. He then decided to involve his Attorneys in the pursuit of what he believed he was entitled to. A dispute was eventually reported at CMAC where an agreement was reached to the effect that the whole cadre was to be reviewed. However, it is now history that when the Applicant eventually retired in February of 2008, a review of the Orthopaedic cadre had been commissioned but its recommendations not implemented.

18. The recommendations were to the effect that indeed there was a need for the positions of Senior Orthopaedic Technologist and Orthotist/Prosthetist. That was in the year 2007. The unfortunate scenario here is that this review was commissioned at the instance of the Applicant, who felt he was being treated unfairly, but he never got what he wanted until he exited the civil service. To date though, nothing has been done about these recommendations. The excuse here being that it is a lengthy process to create new posts in the civil service. As it is, things are still as they were some 40 years ago in the Orthopaedic Unit. Despite the need for posts of Senior Orthopaedic

Technician and Orthotist/Prosthetist, in terms of the recommendations of the Review commissioned by Government, nothing has been done. A sad and unfortunate state of affairs for those still in the unit and the now retired Peter Khanakhana Simelane.

19. The findings of the review exercise of the cadre were that the unit was at the time manned by five (5) employees, two (2) Orthopaedic Assistants and three (3) Orthopaedic Technicians. This, the review team observed, was a gross under deployment. It was also found that the unit was the only service centre in the country. Hence the recommendations for the creation of the senior posts of Senior Orthopaedic Technologist and Orthotist/Prosthetist.

20. 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 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 and

discretion of the Employer. (See *Mncedisi Mayisela & Others v Swaziland Government and 2 Others Unreported IC Case No 552/2010*).

21. 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 *Administrator Transvaal & 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.

22. Now, in this present matter of Peter Khanakhana Simelane, the evidence is that the position he occupied, that of Orthopaedic Technician, was the highest level in the cadre or unit. There was no other position above or higher in terms of levels. In terms of hierarchy, it was the highest in the structure. The Applicant was aware of this fact, hence his unrelenting push for the review of the unit so that senior positions could be created. Indeed, almost 20 years later, such a review was eventually commissioned and it made

recommendations to the effect that there was a need for such higher and senior positions. A question the Court asked itself in this regard is; if such senior positions had been created during Mr. Simelane's tenure in the civil service, would he have had an automatic right to promotion to such positions? Clearly the law is that he would not. At the least and at best, he would have had the right to be heard and considered for promotion to such senior and higher position, definitely not an absolute right. As things stand, and for the Applicant to succeed in this claim he should have shown that; *a)* a position higher than that which he occupied existed, which he has failed to do, and *b)* the employer must have been shown to have exercised its decision not to promote him capriciously, for unsubstantiated reasons, or that the decision not to promote him was based on a wrong principle or in a biased manner. This the Applicant has not been able to prove. In fact his claim fails in the very first hurdle in that the position he wants to be compensated for was and is still non-existent in the Orthopaedic unit. There can be no promotion to a non-existent position. Neither the Applicant nor this Court knows what the remuneration structure and benefits of these senior positions will be.

23. The Court though cannot ignore the lacklustre attitude exhibited by the Respondents in the commissioning of the review of the unit. The Applicant had been complaining since 1988 to no avail. It was only in 2006 that the Respondents finally relented and agreed to commission the review, whose recommendations were published a year later, in July of 2007. That was 7 months before Mr. Simelane was to retire. As fate would have it, he retired without the recommendations being implemented and to date same have still not been so implemented. He was put out of pocket pursuing justice. This is clearly unacceptable. Somebody, somewhere is not doing their job. Our government needs to be seen to be doing more in caring for its employees, which in turn will enhance their morale and performance. Even though the Applicant's claims have not been successful, it is the view of the Court that the Respondents be mulcted with an order to pay half of the Applicant's costs in respect of this matter for the lacklustre and unprofessional manner in which they dealt with the valid complaint of Mr. Simelane. That is the order of the Court.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DATED AT MBABANE ON THIS 10TH DAY OF SEPTEMBER 2015.

For the Applicant: Attorney V. Ndzinisa (Ndzinisa Attorneys)

For the Respondent: Attorney V. Kunene (Attorney General's Chambers)