



IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Held at Mbabane

Case No. 05/2014

In the matter between:

VIRGINIA MABUZA

FIRST APPELLANT

ISAAC GAMA

SECOND APPELLANT

THULASIZWE HLOPHE

THIRD APPELLANT

AND

CIVIL SERVICE COMMISSION

FIRST RESPONDENT

PRINCIPAL SECRETARY MINISTRY

OF NATURAL RESOURCES

SECOND RESPONDENT

PRINCIPAL SECRETARY MINISTRY

OF PUBLIC SERVICE

THIRD RESPONDENT

THE REGISTRAR OF DEEDS

FOURTH RESPONDENT

ATTORNEY GENERAL

FIFTH RESPONDENT

THE CHAIRMAN CIVIL SERVICE

COMMISSION

SIXTH RESPONDENT

Neutral Citation:

Virginia Mabuza & 2 Others vs Civil Service Commission & 5 Others (05/2014) [2014] SZICA 04 (30th September 2014)

Coram:

M.M. RAMODIBEDI JP

M.C.B. MAPHALALA AJA

J.P. ANNANDALE AJA

Heard : 16/09/2014

Delivered : 30/09/2014

SUMMARY

Labour Law – unfair labour practice – promotion dispute relating to failure to appoint existing employees to higher post on permanent basis – held that there is no evidence that the employer had taken a final decision on permanent appointment to the post at the time of instituting the application proceedings in the court a quo – employees failing to establish existence of decision – held further that the employees should have awaited the final decision to the fill post before initiating the proceedings – appeal dismissed with costs.

JUDGMENT

30 SEPTEMBER 2014

The Court

[1] The appellants brought an application in the court *a quo* on a certificate of urgency for an order in the following terms:

1.1 Dispensing with the Rules of this Honourable Court as relate to form or procedures, services and time limits, condoning the applicants' non-compliance with the Rules of this Honourable Court and enrolling this matter as one of urgency.

1.2 Pending finalisation of this application, the filling of the vacant post of

Deputy Registrar of Deeds otherwise than by promotion be suspended forthwith.

1.3 Review and setting aside the advertisement for the vacant position of Deputy Registrar of Deeds issued under Civil Service Commission Circular No. 6 /2013.

- 1.4 Review and setting aside the first respondent's decision to disqualify the first applicant from competing for the vacant position of Deputy Registrar of Deeds.
- 1.5 The recruitment of the Deputy Registrar of Deeds otherwise than by promotion be interdicted and restrained.
- 1.6 Directing the first respondent to restart the exercise of filling the vacant post of Deputy Registrar of Deeds in compliance with the Regulations under the Civil Service Board Order 16/1973 supplemented by the Swaziland Government General Orders.
- 1.7 Directing the first respondent and any of the other respondents who oppose the relief to pay the applicants' costs of suit.
- 1.8 Granting the applicants further and/or alternative relief.

[2] It is common cause that the appellants are employed by the Swaziland Government in the Deeds Office under the Ministry of Natural Resources and Energy. The first and second appellants are both Assistant Registrars, and, the third appellant is a Senior Assistant Registrar.

[3] The appellants were appointed in terms of section 4 of the Deeds Registry Act 37/1968 as amended, and, it provides the following:

“4. The Minister may appoint a Registrar of Deeds for Swaziland and such Assistant Registrar as may be necessary who shall have the power, subject to the regulations to do any act or thing which may lawfully be done under this act or any other law by the Registrar of Deeds, and such appointment shall be notified in the Gazette.”

[4] The facts which gave rise to this matter are not in dispute. In September 2013 the Civil Service Commission published an advertisement for a vacant position of Deputy Registrar of Deeds; and, this was done in terms of the Civil Service Commission Circular No. 6 of 2013. The advert stipulates that the candidate should have a Bachelor of Laws Degree (LLB) plus three (3) years experience as a practising conveyancer.

[5] The advert further stipulates that candidates who do not possess these qualifications should not apply. It is common cause that the appellants do not possess these qualifications; however, they contend that by virtue of being Assistant Registrars and Senior Assistant Registrar respectively, as well as their experience in the Deeds Office over many years performing the same functions as those of the vacant post of Deputy Registrar of Deeds, they are suitably qualified either to be promoted or to compete for the vacant post of Deputy Registrar of Deeds. They further contend that the advert is discriminatory in so far as it purports to exclude them from competing for the position of Deputy Registrar of Deeds. It is their contention that the qualifications in the advert have been set solely to exclude them from competing for

the position, and, that they consider themselves to be eligible candidates by virtue of their experience performing the functions of the advertised position.

[6] The appellants also contend that the qualifications set by the Civil Service Circular 6/2013 offend against the Swaziland General Order A.125 (2) which precludes the setting of qualifications so as to exclude otherwise eligible candidates in the Civil Service.

[7] On the contrary the respondents have denied that the minimum qualifications stipulated in the advertisement are arbitrary, discriminatory or that they offend against General Order A. 125 (2). They contend that the Swaziland Government as an employer does have the power to prescribe the qualifications for any post in the public service. They further contend that prescribing the minimum qualifications is objectively capable of furthering the purpose of management's prerogative to decide educational requirements for positions in the Civil Service. To that extent they argued that General Order A. 125 (2) only deals with additional and specific qualifications whereas the qualifications in the advertised post deal with minimum qualifications.

[8] It is apparent from the evidence that the appellants want to compete for the post of Deputy Registrar of Deeds, and, that the required minimum qualifications exclude them from applying for the post. The court *a quo* gave judgement in their favour and found that they are being discriminated against on the basis that the advert states that "candidates who do not possess the above stated qualifications should not apply".

At para 12 and 14 of the judgment, the learned Judge had this to say:

“12. The applicants’ main complaint is that the employer is discriminating against them by setting qualifications that the employer knows very well that they do not possess.

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. .

14. In the present application the discrimination is blatant. The vacancy announcement states that ‘candidates who do not possess the above-mentioned stated qualifications should not apply’. This is discriminatory against the candidates who, even though they may not have the degree, but they do have the requisite on the job experience. Every candidate who thinks that he/she has the capacity to carry out the advertised job, should not be prevented from competing for the job. The people who will select the right candidate are the interviewers or the panel. Further, to craft a job announcement in the manner that the Civil Service Commission did, that is by stating that those who do not possess the stated academic qualifications should not apply, opens room for nepotism. For example, the employer can simply state qualifications that he knows are possessed only by the candidate that he had already earmarked for the position. In the present case it is the court’s conclusion that for the Civil Service Commission to state in the advert that a certain category of people should not apply was clearly discriminatory.”

[9] It is not in dispute that the interviews for the post of Deputy Registrar of Deeds have not been held, and, that even the date for the interviews has not been set by the Civil Service Commission. In its judgment the Court *a quo* at para 18 held that the appellants had to succeed on the basis of discrimination. The court further made the following order at para 19:

“19. The recruitment exercise and the closing date of filing applications is extended by seven days from the date of this judgment to allow the applicants to file their applications as serving officers in order to be considered for the advertised post.

2. Each party to pay its own costs.”

[10] In light of the judgment in the Court *a quo* it is evident that this appeal was brought prematurely in the absence of a promotion dispute resulting from the appointment to the post of Deputy Registrar of Deeds. The appellants obtained judgment in their favour, and, their appeal was consequently ill-advised and certainly misconceived. The court *a quo* was correct in holding that the appellants should file their applications and compete for the post with other candidates.

[11] In the South African case of *Department of Justice v. Commission for Conciliation, Mediation & Arbitration & Others* (2004) 25 ILJ 248 (Labour Appeal Court), when the post of Chief State Law Advisor was advertised, the respondent employee Advocate Bruwer, a Deputy Chief State Law Adviser, applied for the post. The said employee and three other shortlisted candidates were interviewed by the Selection Committee which decided that it could not recommend any of the candidates for appointment and suggested that the Minister of Justice re-advertise the post. The post was advertised for a second time and the new candidates were perceived to be weaker than those who had already been interviewed.

11.1 One of the new candidates was a Special Adviser to the Minister; and, he did not meet the requirements of having an LLB degree and being an advocate; and for this reason, the Selection Committee turned down his application. The Minister's Special Adviser possessed qualifications of a BA Law and BProc. Notwithstanding the lack of requisite qualifications, the committee recommended to the Minister to appoint his Special Adviser for a fixed term of twelve months which was extended for a further twelve months period until the post could be filled on a permanent basis. Advocate Bruwer felt aggrieved by not being appointed to the post on a permanent basis, and, he applied for protective promotion. However, when he received no response from the department, he sought conciliation; this failed, and, the matter was referred to arbitration which found that the department had committed an unfair labour practice but refused to order that the employee be accorded protective promotion. Advocate Bruwer was awarded damages as compensation.

11.2 The department sought to review the award in the Labour Court which dismissed the application and further set aside the award. However, the court did not remit the matter or determine the appropriate remedy. The department appealed to the Labour Appeal Court and Advocate Bruwer cross-appealed against the order refusing to grant him protective promotion.

11.3 His Lordship Zondo JP at para 58 had this to say:

“58. ... if an employee’s appointment to a post would have amounted to such employee being appointed to a higher rank or position, that is promotion and a resultant dispute is a dispute relating to promotion.... I accept that where, as in this case, the employer has advertised the post both inside and outside his service, a member of the public who applies for appointment to such a post would not be said to be promoted if his application were successful. I accept, too, that the result is that the existing employee will have a dispute relating to promotion ... while an applicant for employment who has not been appointed will simply have a dispute relating to non-appointment. That difference arises from the fact that each one of the two candidates has a different relationship with the decision-maker in this regard. The one is an employee of the decision-maker whereas the other has no existing employment relationship with the decision-maker.”

11.4 The court accepted that Advocate Bruwer’s complaint was that the department had not appointed him to the post on a permanent basis and that this constituted an Unfair Labour Practice. It concluded that Advocate Bruwer had failed to show that the department had taken a final decision not to appoint him, and, that this was fatal to his case. It was common cause that the Minister’s Special Adviser was only appointed to a fixed-term contract at the time of the arbitration of the dispute, and, that Advocate Bruwer could still have been appointed to the position.

11.5 His Lordship Zondo JP at para 73 said the following:

“73. An employee who complains that the employer’s decision or conduct in not appointing him constitutes an unfair labour practice must

first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can follow.”

[12] The basis of the present proceedings is that the employer has not appointed the appellants to the position of Deputy Registrar of Deeds. Accordingly, they contend that such a failure constitutes an unfair labour practice. However, it is common cause that the employer has not appointed anybody to the vacant position, and, that the interviews for candidates are still pending. In addition the court *a quo* granted an order directing that “the recruitment exercise and the closing date of filing applications is extended by seven days from the date of this judgment to allow the applicants to file their applications as serving officers in order to be considered for the advertised post”. In the circumstances, as we repeat for emphasis, the appeal is premature, ill-advised and misconceived and ought to be dismissed with costs. The appellants should have waited for the final decision to fill the post before initiating the proceedings in the court *a quo*. In addition the appellants should not have lodged this appeal in view of the admitted fact that the judgment in the court *a quo* was in their favour.

[13] There is no reason for this Court to interfere with the order of costs made in the court *a quo*. However, the costs of this appeal should be borne by the appellants on the basis that the appeal is premature in the absence of a permanent appointment to the position of Deputy Registrar of Deeds made by the first respondent.

It is well-settled that the award of costs is a matter within the discretion of the court. In exercising that discretion, the court should have regard to the general rule that the party who succeeds should be awarded his costs, and, that the rule should not be departed from except on good grounds. This general rule is also expressed as “costs should follow the event”.

See Herbstein & Van Winsen, *The Practice of the Supreme Court of South Africa*, 4th edition by Louis De Villiers et al, Juta & Co., 1997 at pages 701-702.

- [14] Lewis AJP in the case *Dickson v. Minister of Water Development* 1971 (3) SA 71 (RDA) at 72 stated the following with regard to costs:

“It is trite law that in the exercise of a court’s undoubted discretion in regard to costs, the normal principle applied is that where a party has been substantially successful, costs follow the event, and it seems clear from the case of *Van der Merwe v. McGregor* 1913 C.P.D. 497 that the same normal principle is applicable to Water Court proceedings. That case laid down what is also a trite proposition, that an appeal court will be slow to interfere with the exercise of the discretion in the court *a quo*, but will interfere if the discretion has been exercised on a wrong principle or where, although there has been substantial success on the part of the appellant, he has been deprived of his costs on unreasonable ground.”

- [15] It is trite law that costs as between the parties is a matter of fairness to both sides. In the present case the respondents have been substantially successful in defending the appeal which was wholly unnecessary on the basis that the appellants had obtained a favourable judgment in the court *a quo*; hence, the appeal was misdirected. It is

evident that the respondents have incurred unwarranted legal costs by defending this appeal.

His Lordship De Villiers, JP in *Fripp v. Gibbon & Co.* 1913 AD at 363 stated the following:

“It is common cause that while, as a rule, there is no room for the discretion of a magistrate or a judge on the merits of a case as he is bound to decide the issues between the parties in accordance with their rights as established at the trial, on the matter of costs the law allows him a discretion, which, of course, is a judicial discretion.

Questions of costs are always important and sometimes complex and difficult to determine, and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion. The court of appeal assumes that the magistrate has exercised his discretion unless there are good reasons for holding that he has not done so. . . .

. . . as a rule it is fair and just that the costs should follow the event, whether of claim or of counterclaim.”

[16] Ackermann J when delivering the unanimous judgment of the South African Constitutional Court in the case of *Ferreira v. Levin NO And Others* 1996 (2) SA 621 (CC) at 624, para 3, had this to say:

“3. The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from the basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs without attempting either comprehensiveness or complete analytical accuracy; depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.”

[17] Mahomed CJ when delivering a unanimous judgment of the South African Supreme Court in the case of *Beinash v. Wixley* 1997 (3) SA 721(SCA) at 721 had this to say:

“The issue as to what order of costs would be appropriate in the circumstances of any particular case falls primarily within the discretion of the court of first instance. It is trite law that this court on appeal will not interfere with a costs order made by such a court, unless it had failed to exercise a proper and judicial discretion. . .”

[18] Accordingly, the following order is made:

19.1 The appeal is dismissed

19.2 The appellants are directed to pay costs of suit jointly and severally the one paying the others to be absolved.

DELIVERED IN OPEN COURT ON THIS THE 30th DAY OF SEPTEMBER 2014.

M. M. RAMODIBEDI——
JUDGE PRESIDENT

M.C.B. MAPHALALA——
ACTING JUSTICE OF APPEAL

J.P. ANNANDALE——
ACTING JUSTICE OF APPEAL

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