IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 352/2017**

In the matter between:

LINDIWE H. DLAMINI-NEE MADZINANE **APPLICANT**

And

CMAC & ANOTHER **RESPONDENT**

Neutral citation : *Lindiwe H. Dlamini-nee Madzinane v CMAC and Another(352/2017) [2017] SZIC 115 (2017)*

CORAM:

XOLISA HLATSHWAYO : ACTING JUDGE

MUSA P. DLAMINI : MEMBER

NICHOLAS R. MANANA : MEMBER

DATE HEARD : 30 OCTOBER 2017

DATE DELIVERED : 31 OCTOBER 2017

JUDGEMENT

Background

The application was brought under Certificate of Urgency on the 18th October 2017 for the following prayers;

> *"1. Dispensing with the normal forms of service and time limits provided by the Rules of this Honourable Court and hearing this matter urgently in terms of rule 15 of the rules of this Honourable Court.*
>
> *2. Reviewing and Setting aside the appointment of the second Respondent into the position of accounts Clerk as irregular, unlawful and unreasonable for the reasons set out in the Applicants founding affidavit.*
>
> *3. Declaring that Applicant has a right to be heard and to refute the reasons for her exclusion from (sic) appointment into the position of Accounts Clerk as she is the most senior legible for the appointment into the same.*

4. Declaring that Applicant has a legally recognizable legitimate expectation to be promoted into the position of Accounts Clerk and if not promoted to be informed of the cogent reasons for her exclusion from appointment into the position.

5. Directing the First Respondent to start the exercise (sic) for the filling of the vacant post of Accounts Clerk de novo.

6. Staying and suspending all processes of appointment, upgrading of salary and resumption of duty of the second Respondent in the position of Accounts Clerk pending the finalization of this application.

7. Costs of the application.

8. Further and or Alternative relief as this Court deems just and expedient"

The application provided for a Notice of Intention to Oppose to be filed within 3 days of the receipt of the Urgent application and for an Answering Affidavit to be filed within 3 days of the expiry of the day of filing of the Notice of Intention to Oppose. The application appeared in the court roll on the 20th October 2017 and it was heard as unopposed.

A rule nisi was granted by the court, returnable on the 26th October 2017, in terms of prayer 6 of the Notice of Application, i.e.

> *"6. Staying and suspending all processes of appointment, upgrading of salary and resumption of duty of the second Respondent into the position of Accounts Clerk pending the finalization of this application."*

Notice to Raise Points of Law

It appeared on the record of the 26th October 2017, that a Notice of Intention to Oppose together with a Notice to Raise points of Law had been filed on the 20th October 2017 and served on the Applicant at about 1051 hours.

The points *in limine* raised, by the Applicant, were;

> "Incompetence of Enrolment…
>
> Lack of Urgency…"

The Applicant further filed a Notice of Intention to Anticipate Rule to be heard on the 26th October 2017, which was the return date.

The Applicant sought a postponement of the matter to a date to be allocated by the court to enable it to enable it to file a Replying Affidavit, which it undertook to have filed by the 27th October 2017.

The 1st Respondent vigorously opposed the application for postponement because of the urgent approach which the Applicant had adopted when it brought the matter before the court.

Further support of the opposition was that the Applicant had failed to serve the 2nd Respondent, only serving it to the 1st Respondent's office without abiding by the rules of service i.e. serving on the 2nd Respondent or a supervisor having authority over her.

On the points of law raised, the 1st Respondent argued that the matter was not urgent because the Applicant had come into the knowledge of the alleged potential prejudice to her, on the 4th October 2017 and did nothing about it until about 2 weeks had elapsed, then rushed to court under Certificate of Urgency. It was argued that, it was for that reason that there was argument that the urgency was self-created.

It was, further, argued that in the absence of a Certificate of Unresolved Dispute, the Applicant had to meet the requirements of Rule 15 of the Rules of Court, which it had failed to inadequately satisfy.

The 1st Respondent argued that it was ready to argue the matter and the Applicant ought to be ready too, since it was served with the Answering Affidavit on the 24th October 2017.

The 1st Respondent also argued that the Applicant had to abandon the rule nisi granted on the 20th October 2017 and in the absence of such abandonment, the court should discharge the same because of the court's incompetence to hear the matter on the date on which the rule was granted i.e. the 20th October 2017.

The 2nd Respondent filed from the bar its Notice of Intention to Oppose the application together with its Answering Affidavit.

The 2nd Respondent aligned itself with all the arguments made on behalf of the 1st Respondent. The 2nd Respondent emphasised the point on lack of urgency, introducing only the argument that the actual date on which the Applicant had been aware of the competition for the job was the 29th September 2017, being the date of the interview. That argument was said to mean that Applicant had a month to bring the application to halt all the processes of the recruitment.

The 2nd Respondent also opposed the prayer for postponement on the ground that there was an order prejudicial to her interests, with which she had not been served, which made it unfair on her. The prayer was for the *rule nisi* to be discharged if the Applicant was not ready to argue the matter.

The Applicant conceded that time limits and manner of service of the process were not abided by, and argued that the reason was the extra-ordinary nature of urgent application which called for that. The argument was that the urgency was not self-created as the Applicant had not been aware of the memorandum informing members of staff of the recruitment of the 2nd Respondent to the position, which the memorandum had not been circulated to even date. Further that, as far as she was concerned the matter was still urgent.

Applicant argued that this Court being a court of equity ought to relax the rules and forgot the rigors of the stringent rules of the civil court.

Applicant conceded that she could be granted sufficient redress in due course.

The application for postponement was reiterated because of the 2nd Respondent's last minute filing of its Answering Affidavit, which Applicant wanted to read through and possibly file replies to.

Discharge of the Rule Nisi

The rule nisi was discharged as it became apparent that the court had been incompetent the hear the matter on the 20th October 2017, when it appeared unopposed. It was apparent from the papers that, when the court had granted the *rule nisi*, the days provided in the Notice of Application for filing of opposition had not lapsed hence the matter was erroneously on the roll.

Further, the prejudice occasioned to the Respondents far outweighs that of the Applicant, in that the Applicant can have recourse in due course, as correctly pointed out by it, whereas the Respondent cannot be sufficiently redressed for the prejudice it would suffer if the recruitment process continues as unsolved.

More importantly, the application was expected to be heard on the 30th October 2017 before the resumption of duty of 2nd Respondent.

Arguments

Unfair labour practice

The Applicant's arguments on the merits of the case were that a judicial review ought to be granted and the 1st Respondent's decision be set aside as unfair labour practice and irregular.

The argument was that, despite the laws of Swaziland not specifically defining the concept of "unfair labour practice", the same may be gleaned from other jurisdictions. Further that the court cases from other jurisdictions are persuasive in this jurisdiction because of the fact that all labour laws are formulated to be in line with the provisions of the ILO Convention.

The 1st Respondent discarded any unfair labour practice and argued that the crux of the matter is squared set as managerial prerogative. It was argued that the filling of vacant posts was the sole prerogative of the employer, and the case of **Pinky Sibandze v Swaziland Electricity Company Limited IC 126/2008** was referred to.

It was argued that the discretion rests on the employer and in the absence of any evidence that the employer fettered its discretion, the allegation of unfair labour practice stands to fail.

The 2nd Respondent did not get into the merit or demerit of unfair labour practice allegation much but averred that she is an innocent by-stander, who rightly applied for an advertised job, for which, had she been deemed unqualified and disqualified from applying for, she would not have been entertained by the 1st Respondent. Further, it was argued that the Applicant has failed to explicitly state which part of the process was unfair and unreasonable.

Internal Advertisements

Further argument was to the fact that the internal advertisement was meant for internal employees, and not the 2nd Respondent who had only just joined the 1st Respondent a couple of weeks prior to the advertisement. That means that she does not qualify as an employee, the benefits do not extend to her. The argument is that she is temporal and not even on probation.

It was argued that, even if she was to be deemed to be internal for the purposes of the advertisement, she was too "fresh and new" to be promoted to the promotion post to the disadvantage of other officers who had long been there, who may have been interested in the post.

The 1st Respondent argued that the 2nd Respondent was considered an internal employee as deposed to by the executive director, who stated that there is no distinction in their organization between permanent and fixed term employees. It was argued that the Applicant has failed to demonstrate or bring proof that it is not the case, hence her allegation stands to fail.

It was argued that the Applicant is in essence estopped from even raising the issue of the participation of the 2nd Respondent because she became aware of the same on the day of the interviews. She conducted herself in a way which gave the 1st Respondent an impression that she was in acquiescence to the process including the 2nd Respondent, and as such it went all the way to conclusion.

The 2nd Respondent argued that, had she been disqualified from applying for the position by virtue of being an outsider, the 1st Respondent would have not considered her application for the recruitment process.

It was further argued that the Applicant did not contest the inclusion of the 2nd Respondent in the recruitment process until she was informed that she was unsuccessful, which is an after-thought and not an honest belief.

Higher/ better qualification

It was argued that the Applicant is qualified for the position, if not better qualified than the 2nd Respondent. It was submitted that the Applicant is a holder of a diploma in Accounting and is better qualified than the 2nd Respondent who holds AAT 2.

The 1st Respondent argued that the assertion by the Applicant must not even be considered because they are mere statements which are not backed by any expert evidence as to their veracity. They are the beliefs of the Applicant and nothing more.

The 2nd Respondent argued that she is better qualified by virtue of having obtained he AAT 2 in 2004, whilst the Applicant obtained her diploma in 2008.

Failure to consider relevant factors and consideration of irrelevant factors

The extra qualification which the 2nd Respondent has, being ACCPAC, the Applicant also has. In any case it was not a requirement for the position, if the advertisement was to be looked at.

Further qualification of procurement, which the Applicant was said to have, was also not a requirement for the position. The Applicant does not have it.

It was argued that the 1st respondent is aware of the accounts qualifications of the Applicant. She has always coveted a position in the accounts section, but there was no vacancy so she continued working as a receptionist for a continuous 3 years.

It was argued that her curriculum vitae shows that she did work with accounts at her previous employment at Isambulo Insurance Brokers, whereat she even used the ACCPAC system. She has also been exposed to a newer and more advanced system called Quickbook. She submitted that she worked there for 3 years.

One of the grounds for seeking a review of the decision was that the 1st respondent considered irrelevant factors in reaching its decision, whilst ignoring relevant ones. The irrelevant factors were the further qualifications; ACCPAC and procurement, when the advertisement did not call for them as a requirement for the position.

The relevant factor which was not considered was the fact that the Applicant had been in continuous employment of the 1st Respondent as receptionist, whilst the 2nd Respondent had been in and out of there, having been engaged for stints as a relief employee, with a total of about 9 months of brief liaisons.

It is argued that a reasonable person's choice between the party who had been in employ for 3 years, on one hand, and the other who has 9 months sporadic liaisons, would be a given, and in favour of the former. It was argued that the decision to appoint the 2nd Respondent to the promotional position was jumping the line and wrong.

The 1st Respondent argued that the 2nd Respondent's experience went beyond the brief stints with it. Her curriculum vitae has a long history of accounting experience dating from 2002 at Kharafa Trading (Pty) Ltd. It was submitted that made the assertion of less experience devoid of substance.

Further that the 2nd Respondent had the added advantage of ACCPAC which was not specified in the advertisement but is an accounts system. It was argued that the ACCPAC was only an additional factor but it was not what had decided the decision. It was submitted that the Applicant's assertion contained in its Replying affidavit that she also has experience using ACCPAC must be rejected

by the court as an afterthought because her curriculum vitae only shows Quick-book. Further that in all the alleged sporadic stints with the 1st Respondent, when I required someone to hold forte in the accounts section, the Applicant has never been called as a relief officer.

It was further submitted that there was no jumping the line for a promotional post because the Applicant is a receptionist who is not a subordinate in the accounts office.

Suspicion of bias

The decision reached by the 1st Respondent leads the Applicant to have a "suspicion of bias" in that the head of the department to recruit, being the Chief Financial Officer (CFO) is a personal friend and cousin to the 2nd Respondent, who had previously tried to secure the 2nd Respondent employment but failed.

Further exacerbating the suspicion of bias was that the requirements for the position had been lowered to accommodate the 2nd Respondent.

It is submitted that the court should hold the process irregular, especially in light of the fact that the CFO sat as a panellist in the interviewed, without disclosing their close relationship. The argument is that there are authorities to that suspicion requires no fact or proof for it to be considered. Even though the CFO had filed an affidavit denying the relationship, the suspicion of bias is enough to have the decision held irregular and set aside.

Both of the Respondents argued that the assertion of a possible bias is fallible in light of the fact that there were three other panellists who did not grade the Applicant as the better candidate during both oral and written interviews.

Further argument for Respondents was that the Applicant failed to bring in any evidence to disprove the denial of the relationship (friendship or cousin) by the CFO. The "friendship" was qualified in her affidavit, as not being a close one to prevent objectivity.

The 2nd respondent's concern was the late stage at which the Applicant seems to have realized the alleged relationship, when she always knew that the recruitment was for the CFO's subordinate and that she would sit in the panel, but choose to wait until the outcome of the interviews.

The court's intervention in employer's decisions

The 1st Respondent's decision is not a reasonable one and the court has been held as justified in intervening. The court was referred to ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223*** in that regard.

It was argued that the application to have the court interfere must fail because the matter is not argued for interim relief but for permanent relief and she has failed to establish a clear right to the relief she seeks.

It was argued that the decision is a fair one as both parties were called heard and a decision reached after all procedures were abided by.

Legitimate expectation

It was further argued that the Applicant had legitimate expectation to promotion. It was submitted that a person who has a legitimate expectation has the right to be heard when such expectation does not yield the expected fruit. The right is procedural and arises in exceptional cases. Reference was made to some cases in which expectation is explained as legitimate.

In casu, the expectation is said to arise from a trend, which has been established by 1st Respondent, in terms of which the next senior officer is promoted to a recently vacated position. The Applicant pointed to examples to establish the

trend/ practice. The establishment of the trend is argued to make the expectation legitimate and capable of protection by the law. Further strengthening the assertion of the trend would be the fact that the 1st Respondent has never brought in an "outsider" to be promoted and hold a senior position.

It was further argued that the Civil Service Board (General) Regulations, specifically Regulation 28(2) states the position relating to promotion of the most senior officer and provides that there should be an explanation in any event of divergence therefrom. The Applicant submits that the 1st Respondent is not the civil service, it is a public entity, and as such the regulation should be extended to it, any divergence from it is reviewable.

The Civil Service Board (General) Regulations have no relevance *in casu* as it relates to the civil service. In any case the Applicant was invited by the Human Resources Office to view the performance, but she did not go.

The Respondents argued that the Applicant has failed to bring evidence to disprove that no such trend or practice exists in 1st Respondent's organization. There was a list of officers who were brought as examples to dispute, both that outsiders are not recruited to hold high positions and that subordinates can beat

their superiors and get higher positions. The submission was that recruitment at 1st Respondent's organisation was not per succession planning but managerial prerogative.

The purpose of the Industrial Court

The final argument of the Applicant was that, as provided in Section 4 of the Industrial Relations Act, the statute is there to promote fairness, good relations and promote harmony, hence allowing the decision to stand would be allowing distasteful conduct which would breed anarchy.

The Respondent submitted that there was no breach of the provisions of the statute because she was afforded an opportunity at interview stage but was defeated.

Conclusion

Having heard all arguments in the matter the following factors were considered;

(a) That the 2nd Respondent indeed is considered an employee by the 1st Respondent. This is based on the assertion by the Executive Director and in the absence of a policy excluding her being produced in court. That addresses the issue of internal advertisement not being open to the 2nd Respondent.

(b) It is clear that the qualifications of all parties were satisfactory enough for the 1st Respondent to shortlist them, hence it their weight has an effect only on their application in the interview, their performance thereat, and during application in the office responsibilities. Whether they are unequal or not is basically solved by the results at the interview. The court would be loathe getting into that as it serves no purpose at all. This also applies to the issue of seniority and experience.

(c) It is trite that the court can intervene when the employer is committing unlawful, unjust and unfair labour acts and practices.

JV Du Plessis; A Practical Guide to LabourLaw (8th ed) at page 357 it reads;

> *"The employer's unfair conduct relating to promotion constitutes an unfair labour practice. "Unfair conduct" implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. Applied in context of promotion this means that mere unhappiness or a perception of unfairness does not necessarily equal unfair conduct"*

In casu, it has been argued that since the Applicant is a reception and not under the accounts portfolio, the recruitment cannot be said to be to a promotional position. In the strict sense, it may be so, but this being a court of equity, it will be taken in the broad sense of the Oxford Dictionary which defines "promotion" as "raise to a higher rank or office" **Mashengoane & Another v University of North [1998]1BLLR** the Labour Court held that *an appointment to a position which carries greater status amounts to promotion.*

There is, however evidence of the 1st Respondent following its own procedures, treating the advertisement, interviews, election and communication process in a clear and transparent manner. That then finds the allegation of unfair labour practice wanting. The court discards the assertion of unfair labour practice as unfounded and rather sees an aggrieved Applicant who did not make it this time around. This court interferes in exceptional circumstances. If an employer is acting in violation of its own internal rules and regulations, the port of first call for the affected employee is the Industrial Court, as stated in **Cleopas S Dlamini v Aveng Infraset Swazi (Pty) Ltd 183/17** at page 6. In **SAMWU obo Damon v Cape Metropolitan Council (1999)20 ILJ 714 (CCMA)** the court stated that *" the process of selection inevitably results in a candidate being appointed and the unsuccessful candidate(s) being disappointed. This is not unfair"*

(d) It is established law in our jurisdiction that as soon as the court finds no wrong warranting intervention in the placement of officers in the place of employment.

"promotion is a managerial prerogative and an employer can promote whoever it sees fit for the position but the employer is required to act fairly when promoting or not promoting. The managerial prerogative must be exercised both procedural and substantively fair…" see **page 357** A Practical Guide to Labour Law (supra)

(e) Having heard the arguments advanced in relation to the concept of legitimate expectation, the evidence uncontroverted is to the effect that a decision which was not in favour of Applicant was reached, and she was invited to a meeting which she did not attend. In **Grogan J Workplace Law (9th ed) 2007** at page 112 it is stated that "the notion of reasonable expectation suggests an objective test; the employee must prove the existence of facts which, in the ordinary course, would lead a reasonable person to anticipate …"

(f) The suspicion of bias would have afforded the Applicant the relief of having matter referred back to start afresh if the panellist suspected of bias had a different outcome than the rest of the panellist. From a wholesome overview of the results, there is consistency in all the four panellists grading. When the court views the results in exclusion of the CFO's grades the results are the same, hence the court will not interfere in their decision.

(g) It is for the aforegoing that the application stands to be dismissed.

(h) Costs granted to the 2nd Respondent at party and party scale.

The Members agree.

XOLISA HLATSHWAYO
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR THE APPLICANT	:	MR. P.K. MSIBI (DLAMINI KUNENE ATTORNEYS)
FOR 1ST RESPONDENT	:	MR. S.K. DLAMINI (MAGAGULA HLOPHE ATTORNEYS)
FOR 2ND RESPONDENT	:	MR. Z. M. MAGAGULA (NDZ NGCAMPHALALA ATTORNEYS)