

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.19/13

In the matter between

NTLENYANE THAANYANE

APPELLANT

And

THE PRINCIPAL SECRETARY

1ST RESPONDENT

HEALTH MINISTRY

THE PRINCIPAL SECRETARY PUBLIC

2ND RESPONDENT

SERVICE MINISTRY

THE HUMAN RESOURCE DIRECTOR

3RD RESPONDENT

MINISTRY OF HEALTH

THE MINISTER OF HEALTH

4TH RESPONDENT

THE MINISTER OF PUBLIC SERVICE

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

CORAM:

HOWIE JA

LOUW AJA

CLEAVER AJA

HEARD: 14 APRIL 2014

DELIVERED: 17 APRIL 2014

SUMMARY

Appellant an Accountant – whether as an employee of the Department of Health entitled to be paid on the same scale as applicable to Blue Cross Lesotho – Lesotho Government having in 1999 assumed full responsibility of the running costs of Blue Cross Lesotho clinic where appellant later rendered service.

JUDGMENT

HOWIE JA

[1] The appellant is an accountant. Documentary evidence shows his having worked for Blue Cross Lesotho (“BCL”) from July 2005 to 2009 as Senior Accountant on grade F. From April 2009 he was documented as an employee of the Ministry of Health on Grade E. The change in grades involved a diminution of salary.

[2] Alleging that BCL was in effect a department of the Ministry at all relevant times by reason of a written Memorandum of Understanding (MOU) signed by BCL and the Ministry in 1995, the appellant applied to the High Court for an order for payment to him of the difference between his salary and benefits as a Ministry employee and those payable by BCL on the grounds that the change in his rate of pay constituted demotion.

[3] The cited respondents included the respective Principal Secretaries and Ministers of Health and the Public Service.

[4] The application was heard by **Majara J** who dismissed it with costs, hence this appeal.

[5] The appellant alleges that when the change in his remuneration occurred he was forced, without having been given a hearing, to sign a document which purported to demote him. He says he was told that if he did not sign it

he would not be “*absorbed into the government pay system.*” These allegations the respondents deny.

[6] The appellant relies, in addition on the terms of article 4.1.1 of the MOU –

“MOH & SW [Ministry of Health and Social Welfare] shall, ensure that the terms and conditions of service of professional/technical staff assigned to BCL facilities are no less favourable than those of staff assigned to MOH & SW.”

[7] According to the appellant the effect of the MOU was that BCL was absorbed into the government of Lesotho under the health Ministry in 1995. He thus became an employee of BCL “*through the Ministry*” when he started with BCL in 2005 and, effectively, an employee in the public service. In terms of article 4.1.1 he was therefore a Ministry employee assigned to BCL and his service fell within the ambit of the article. He adds that prior to April 2009 he was paid by the government and this shows that he was then already a government employee.

[8] Consequently, so the appellant contends, he was effectively demoted unfairly and unlawfully.

[9] The respondents allege that the appellant was, from 2005 to April 2009, an employee of BCL; that BCL was never part of the public service; that the appellant resigned from the service of BCL and applied in April 2009 for employment with the Ministry, which application succeeded. The respondents assert that the MOU meant that BCL was no more than a parastatal. They go on to say as regards the applicability of article 4.1.1 of the MOU that the appellant was neither assigned by the Ministry nor a professional or technical member of the Ministry staff.

[10] The parties have annexed various items of documentary evidence to their papers. The appellant has annexed the MOU. Apart from the fact that it was clearly not intended to create rights enforceable by Lesotho citizens, it contains nothing which supports the appellant's contention that it resulted in BCL becoming "*absorbed*" into the ministry.

[11] The appellant has also annexed a later MOU of 1999 in terms of which the Lesotho government undertook to Blue Cross Norway to assume full responsibility for the running costs of “*Thaba Bosiu Centre Project currently funded by Blue Cross Norway*” from 2000. The appellant worked at the project’s clinic prior to April 2009. The later MOU explains why the appellant was paid by the government while he worked for BCL and shows that the mere fact of such payment did not make him a Ministry employee at that time.

[12] The appellant further annexed a Savingram dated 11 July 2008 which sets out the names of members of “*Blue Cross Staff*” and their respective salaries for that month. The appellant’s name appears on the list. This evidence therefore tends to defeat his case that he was always a public servant.

[13] Even more destructive of his case is the respondents’ having annexed a copy of a Public Service Commission minute of a meeting on 14 April 2009 at which

it was resolved that the appellant be offered “*appointment on probation to hold the vacant office of Accountant, Grade E*”, which appointment the appellant allegedly accepted.

[14] Having considered the documentary evidence, the facts which are common cause and the facts alleged by the respondents in contradiction of the appellant’s allegations (the respondents’ allegations prevailing on the Plascon Evans principle) the conclusion is unavoidable that the appellant failed to prove his case and that it was accordingly rightly dismissed.

[15] The appeal is dismissed with costs.

C.T HOWIE
JUSTICE OF APPEAL

I agree

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellant:

K. Metsing

For the Respondent:

R. Motsieloa