

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

THAANYANE NTLENYANE

APPLICANT

And

THE PRINCIPAL SECRETARY

MINISTRY OF HEALTH

1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF PUBLIC SERVICE

2ND RESPONDENT

THE HUMAN RESOURCES DIRECTOR

MINISTRY OF HEALTH

3RD RESPONDENT

THE MINISTER OF HEALTH

4TH RESPONDENT

THE MINISTER OF PUBLIC SERVICE

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

JUDGMENT

Coram : Hon. Majara J

Date of hearing : 5th November 2011

Date of judgment : 12th February 2013

Summary

Application for declarator that respondents' act of demoting applicant and reducing his salary is wrongful and unlawful and that applicant is entitled to payment under a higher grade – whether the applicant was employed by the Government of Lesotho in 2005 – whether Blue Cross of Lesotho had been absorbed by and was a department of the government at the time applicant was employed – whether Memorandum of understanding is a legally enforceable agreement – Blue Cross of Lesotho not absorbed by nor a department of the Government of Lesotho – applicant not employed by the 1st respondent in 2005 but in 2009 – MoU not a legally enforceable contract – application dismissed.

ANNOTATIONS

BOOKS

1. Concise Oxford English Dictionary p 1139

STATUTES

1. The Public Service Act of 2005

CASES

1. South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534
2. Pillay v Krishna and Another 1946 A.D. 946

[1] This is an opposed application for a declarator that the respondents' act of demoting the applicant and reducing his salary from Grade F to E is wrongful and illegal and that the applicant is entitled to payment under Grade F 61 and a matching salary. The applicant further prays for an order directing the respondents to pay all arrear salaries occasioned as a result of demoting him in the amount of Ninety Four Thousand One Hundred and Eighty Eight Maloti (M94, 188.00); directing the respondents to pay the amount of Twelve Thousand Three Hundred and Forty Eight Maloti (M12, 348.00); directing the respondents to continue to afford him the terms and conditions of service which are not less favourable than those of staff assigned to the 4th respondent; interest at the rate of 6% per annum from the 1st April 2009 and costs of suit.

[2] In his founding affidavit to the Notice of Motion, the applicant avers that he was permanently employed by the Blue Cross of Lesotho through the 4th respondent as a Senior Accountant at Grade F with effect from 1st July 2005. He adds that on the 24th April 2009 he was coerced to sign a form which purported to demote him in that he was told that if he did not sign it he would not be absorbed into the Government of Lesotho's payment system. Further that this was done under the guise that he was being re-designated when he was in effect demoted to the position of Accountant and his salary reduced from Grade F to E.

[3] It is his case that when all this took place he was never afforded a fair hearing and he has been advised that his salary forms part of his property and that any move to interfere with it must be preceded with him being afforded a fair hearing and that there must be valid reasons for interfering with it.

[4] Further that aside from having been initially employed as a Senior Accountant he holds a Graduate Diploma in Marketing which he contends is an

equivalent of a degree according to the South African Qualification Authority SAQA. In addition, it is the applicant's contention that once he entered the service at level F 55 it means he ought to have notched every year and it is his submission that the respondents owe him the amounts of Twelve Thousand Three Hundred and Forty Eight Maloti (M12, 348.00) for not notching his salary and Ninety Four Thousand One Hundred Eighty Eight Maloti (M94, 188.00) for bringing his salary down in the year 2009 to grade E43 while and when he was supposed to be at Grade F59 by then, Grade F60 in 2010/11 and Grade F61 in 2011/12 respectively.

[5] Per the papers before the Court, the applicant's case rests by and large on the Memorandum of Understanding between Blue Cross of Lesotho and the Lesotho Government (Ministry of Health and Social Welfare) which the parties signed in 1995 especially Articles 4.1.1 and 4.1.2 thereof respectively.

[6] The application is opposed and the answering affidavit is deposed to by one 'Malerato Khoeli who is described as the Principal Secretary in the Ministry of Health and Social Welfare namely the 1st respondent in this matter. She disputes, per her averments in paragraph 5, that the applicant was employed by the Blue Cross of Lesotho (BCL) through the Ministry of Health and Social Welfare (MOHSW) and states that the latter was engaged on terms of employment different to those of the Public Service. That Grade F at which he was employed at the BCL was not compatible and identified in the Government's terms of employment as a person who held the applicant's qualifications did not qualify for the same grade in government.

[7] She further disputes the applicant's assertion that he was forced to sign a form in terms of which he was demoted and adds that if this was so he could have provided it as proof. The deponent adds that the applicant applied for the post of

an accountant in the Public Service which the Public Service Commission (PSC) offered him as evinced by the **Annexure 2**. She also disputes that the applicant was demoted.

[8] It is her further assertion that the applicant would only be entitled to a hearing if he was a civil servant and that his resignation from his previous employer BCL and appointment in MOHSW does not entitle him to a hearing pursuant to the Public Service law as he was not a public servant.

[9] That in addition there was no interference with his salary because the salaries were issued by two different employers. Further that in terms of **Annexure 2** the applicant was absorbed into government as an accountant at Grade E and for that reason the respondents did not tamper with his salary when he was offered an appointment as such.

[10] The deponent adds that the letter that was received by the Ministry on the 12th July 2011 i.e. **Annexure 3** is a circular from the Ministry of Finance which showed that there was re-structuring of the accounting cadre which means that no recruitment, employment and promotions would be made for all accounting officers. Further that no demotion occurred as the applicant was employed by government in 2009 after he had been previously employed by another employer.

[11] She also adds that the applicant was paid by means of vouchers because that is how his previous employer paid its employees and that the salaries or remuneration and other terms of employment would differ with those of the government as the latter was previously not his employer.

[12] The deponent also disputes that the applicant is a professional or technical officer per the contents of Article 4.1.1 of the MOU and adds that those include doctors, nurses, nursing assistants, lab technicians etc and not accountants. She

further denies that the applicant is entitled to the amounts that he claims either for non-notching of his salary or for a reduction of his salary for the reason that he resigned as a Senior Accountant at BCL and re-applied for a post as an Accountant in the government.

[13] These averments are disputed by the applicant in his reply who also contends that BCL was absorbed into the government of Lesotho under MOHSW in 1995 per contents of a savingram annexure “SAV” dated 11th July 2008 which is a communication between two Ministries and that BCL was no longer a parastatal. To this end he referred the Court to annexure “PAF3” namely a pay advice form dated the 20th January 2006. It is his submission that per this annexure, he was an employee under the Ministry of Health in the department of BCL at that time.

[14] He adds that when he was appointed into the civil service the panelists at his interview were the Deputy Director of Human Resources, the Financial Controller and the Director of Social Welfare all of whom he contends would not have been involved in the affairs of a parastatal. He adds that annexure 1 and 2 do not apply as he never resigned from any Ministry and denies that annexure 2 is his engagement letter.

[15] With respect to his having been paid with vouchers as reflected by “PAFS 2” it is the applicant’s assertion that this was prior to 2009 which means at that time he was already an employee of the government as the vouchers are the government’s and that these stopped from 2009 when he was included into the pay system and his salary was automatically transferred to his bank.

[16] Since most of the facts herein are common cause namely that at the time of his initial employment i.e. in 2005 the applicant was employed by BCL till 2009

when he was absorbed into the government, the main issue for my determination is whether in 2009 the applicant was freshly employed by the government or whether by virtue of being an employee of BCL he was already an employee of government.

[17] In my opinion, the starting point is the document that the applicant relies on for his assertion that BCL had since been absorbed into MOHSW, namely the MoU that was signed by the two parties in 1995. An MoU is defined as follows in Wikipedia, the free encyclopedia;

*“A memorandum of understanding (MoU) is a [document](#) describing a [bilateral](#) or [multilateral](#) agreement between parties. It expresses a convergence of will between the parties, indicating an intended common line of action. **It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement.** It is a more formal alternative to a [gentlemen's agreement](#). Whether or not a document constitutes a binding contract depends only on the presence or absence of well-defined legal elements in the text proper of the document (the so-called "[four corners](#)"). The required elements are: offer, consideration, and acceptance.”* (emphasis mine)

[18] In terms of the above definition, it is clear that a MoU is an agreement that is not legally enforceable. Put differently, any undertakings by parties to a MoU do not create a legally binding agreement and are not legally enforceable in law. Per the preamble of the MoU that is relied upon in the present case, the first page contains the following terms:-

“Whereas the Ministry of Health and Social Welfare of The Government of Lesotho (hereafter called MOH & SW), is responsible

for the overall health and social wellbeing of all the inhabitants of Lesotho,

Whereas The Thaba Bosiu Prevention and Treatment Centre (hereafter called TBC), owned by Blue Cross of Lesotho (hereafter called BCL), provides complimentary health and social services within the established policies, authority, guidelines and technical supervision of The Ministry of Health and Social Welfare,

AND

*Whereas both MOH & SW and BCL **have agreed to cooperate** in all respects of this endeavour,*

Now the parties agree as follows: ...” (my emphasis)

[19] This preamble is followed by terms and conditions of both parties. Perusal of the entire document does not reveal anywhere where the parties agreed that the BCL is or will be absorbed by MOHSW. Rather, some of the articles, such as Article 2 make reference to compliance by all health care delivery facilities under, but not limited to the jurisdiction of BCL, with statutory requirements and/or MOH & SW guidelines in force and as amended from time to time. The article goes on to list those matters to which it specifically refers to.

[20] In my view, the MoU in question was only meant to forge relations between the two parties and to by and large standardize the facilities and services provided by BCL so that they would become more or less in line with those of the Ministry towards the achievement of a common purpose, namely as the preamble stipulates, to cooperate as the two share a common goal. This can also be read from the language and/or choice of terminology i.e. cooperation, jointly established, variation by mutual agreement, etc. It is therefore incorrect for the applicant to

interpret the signing and or contents of the MoU as denoting absorption of BCL into the Government of Lesotho at that time or at all.

[21] That being the case, Article 4.1.1 of the MoU on which the applicant seeks to rely for part of his claim, i.e. non-notching, does not take his case anywhere for the reason that although it reads that MOHSW 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 Ministry of Health, as I have already stated, the MoU did not create any legally binding obligations between the parties which can be enforced in law even though it is not disputed that he was not notching between 2005 and 2009. This is equally so even if I were to accept his submission that he is one of the professional/technical staff for the very reason that the MoU is not a legally binding contract.

[22] If the applicant however relies on some other document that BCL was absorbed by the Government of Lesotho at some other time, he has failed to attach it as proof. In terms of the evidence before me, he clearly relies on the MoU and I have already shown that no absorption took place nor was same intended at the time it was signed. The two parties agreed on cooperation and standardization *inter alia*.

[23] It therefore stands to reason that the onus rested on the applicant throughout to show that he was as a matter of fact employed by BCL through the 1st respondent in 2005 and is for that reason entitled to succeed in his claim. As

Corbett J.A. said ¹ in quoting with approval Davis A.J.A in **Pillay v Krishna & Another:-**².

“the word onus has often been used to denote, inter alia, two distinct concepts: (1) the duty which is case on the particular litigant, in order to be successful, of final satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be;... .”

[24] I have already stated that the applicant in this case has not succeeded to prove that BCL was ever absorbed by MOHSW. For this reason, his assertion that he was permanently employed by the BCL through the Ministry has no sound basis. The fact that he was at some stage paid by the Ministry is not sufficient proof that it is because he was employed by the latter. Instead, it is my opinion that this was one of the ways by which the two parties to the MoU were cooperating as agreed.

[25] Unfortunately, even some of the documents that he attached to his founding affidavit which are communication from the Ministry of Public Service addressed to all Principal Secretaries, Heads of Departments and District Administrators with respect to revision of salaries, wages and pensions do not assist him in this regard. Over and above this, the savingram that he has attached to his replying affidavit, dated the 11th July 2008 from the P.S Health And Social Welfare to the Accountant General regarding Payment of Blue Cross Staff Salaries, is further indication in my view that BCL was not regarded as a department within the government Ministry hence reference in its main contents to the MoU.

¹ South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd. 1977 (3) SA at 548

² 1946 A.D. 946

[26] For the same reasons, I cannot accept the submission that in 2009 the applicant was absorbed into the Government of Lesotho's pay roll and was demoted and his salary reduced because it is only at that time that he was employed by MOHSW. This my finding, is further borne out by contents of two documents, namely a savingram dated 29th January 2009 from the Ministry of the Public Service to MOHSW regarding Funding of Vacant Positions per whose itemized Job Titles/Grades, appear two vacant positions of Accountant. The document does not say anything about re-designation of officers that are already within the relevant ministry.

[27] The second one i.e. annexure 2 is a copy of the Minutes of the Public Service Commission dated 14th April, 2009 per whose terms it is my view that I can safely to conclude that it came subsequent to the above savingram. It makes reference to Mr. N. Thaanyane and it reads as follows in relevant parts:-

“Arising out of the 6558th Minutes, item 576/09, the Commission resolved that the candidate be offered appointment on probation to hold the vacant office of Accountant, Grade E, with effect from a date not earlier than the date of these minutes.”

[28] These contents are self-explanatory in my opinion and need no interpretation safe for me to state that an employee is not ordinarily offered an appointment on probation if he was already employed in an institution/organization including the government. This fact is so notorious that I take judicial notice of. Further, the term probation is defined as ³ insofar as it is relevant to this point:-

³ Concise Oxford English Dectionary p 1139

“... the process of testing the character or abilities of a person in a certain role.”

[29] In light of this definition, it cannot be correct that a person who had already been in the employ of Government as the applicant contends he was and who held a more senior position would be offered an appointment on probation. This was definitely a new appointment. Therefore, the submission that the deponent to the answering affidavit has failed to attach proof that the applicant resigned from BCL is not helpful. What is important in this respect is that the applicant was being offered a new appointment by the Public Service Commission in 2009.

[30] In the result, I accordingly accept the submission that was made on behalf of the respondents that in terms of the law ⁴ the applicant was not appointed by the Public Service Commission in 2005 which is the body that is empowered to appoint persons to hold or act in the public service but was appointed by BCL which I have already found was and is not a department within MOHSW.

[31] It is therefore on the same basis that the applicant's other claim for compensation which he is basing on the submission that his salary was reduced in 2009 as he was demoted cannot stand. There was no demotion because his appointment in the Ministry was new.

For all the foregoing reasons, this application is dismissed with costs.

N. MAJARA
JUDGE

⁴ Section 6 of the Public Service Act No.1 of 2005

For the applicant : Adv. Metsing

For the respondent : Adv. T. Molise