

IN THE LABOUR COURT OF LESOTHO

LC 13/08

HELD AT MASERU

In the matter between:

PHEKO MAFANTIRI

APPLICANT

and

**LESOTHO REVENUE AUTHORITY
MOTHEBA KHUTO
TEBOHO MHLANGA
BOKANG MOKATI**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT**

JUDGMENT

Date: 14/09/09

Recruitment and Selection - Applicant alleging that he had been discriminated against in that his employer had decided to appoint candidates who did not meet the requisite qualifications set out in the advertisements when he was better qualified for the positions - According to him the selection process smacked of discrimination and also violated the employer's recruitment and selection procedures;

Relief sought - Whether restarting the selection process is practical in the circumstances of this case - our answer is in the negative.

BACKGROUND TO THE DISPUTE

1. The Applicant along with the 2nd to 4th respondents are all employees of the 1st respondent, the Lesotho Revenue Authority. It is common cause that sometime in

2007 the latter advertised several positions which included those of Project Management Consultant and Change Management Consultant both Grade D positions according to 1st respondent's grading structure. Following an expression of interest the four employees were short listed and interviewed. The 2nd to the 4th respondents were successfully appointed to the respective positions whilst the applicant was turned down. Dissatisfied, the applicant challenged his non - selection on the basis that the 2nd, 3rd and 4th respondents lacked the requisite educational qualifications and he was better qualified. He averred that they ought not to have even been considered for short listing. According to him, educational qualifications formed the underlying or fundamental criterion.

2. A glance at the specifications laid down for the respective positions will give us a better appreciation of the issue at hand. The requisite qualifications laid down for the position of Project Management Consultant were a post graduate degree in Business Administration/Management plus formal training in project management and four (4) years experience in a related field or a degree in Business Studies, management or commerce plus formal project management with five (5) years experience in a related field. The position of Change Management Consultant specified a commercial degree and or a minimum of two (2) years work experience in a project management environment or role.

APPLICANT'S CASE

3. According to the applicant, the selected candidates neither possessed a post graduate qualification in Business Administration/Management nor a Bachelor of Commerce Degree when he possessed the necessary educational qualifications by virtue of holding a post graduate degree in Business Administration following a Bachelor Commerce degree and therefore squarely met the set criteria. He contended that neither of the selected candidates possessed any formal training in project management at the date of their appointment.

4. He initially lodged a grievance with the 1st respondent's Human Resources Department maintaining that the office had failed to observe its ***“Resourcing Policy and Procedures Manual”*** in particular clause 6.1.2 which underpinned educational qualifications as a key criteria. The clause provides that;

The Resourcing Unit shall compare the applications with the key criteria in the job description: qualification, competencies, experience, training and achievements and sort them into 3 categories: potential/marginal/unsuitable candidates.

5. In response, the Acting Human Resources Director, pointed out that they had observed their recruitment and selection policies to the letter, and by being short listed it was an indication that he qualified for the positions. However, other candidates had performed better than him in the interviews.

6. Applicant's cause of action is premised upon the contention that by ignoring the key criteria which was educational qualifications and training the 1st respondent acted in violation of its manual, to his prejudice. He therefore claimed that 1st respondent's action be declared

a) discriminatory and contrary to the spirit of Section 5 of the Labour Code (as amended) read with the provisions of Section 19 of the Constitution and;

b) Discriminatory and unfair labour practice in terms of Section 196 (1) of the Labour Code 1992 (as amended);

c) Directing the respondent to restart the process and conduct it fairly;

ALTERNATIVELY

d) Directing the respondent to appoint the applicant into one of the remaining posts;

e) Granting applicant such further and/or alternative relief as the Court may deem fit;

f) Costs of suit.

RESPONDENT'S CASE

7. In reaction, the 1st respondent denies any discrimination against the applicant. It was submitted that the applicant had not performed well at the interview stage, and that even if the three hadn't qualified, the applicant would still have not made it. Substantiating this, it was contended on behalf of the 1st respondent that eight candidates had contested for the position of Change Management Consultant and seven, including the three candidates who were appointed, had outperformed the applicant, and in respect of the Project Management position twelve candidates had been interviewed and ten had scored higher than the applicant. According to the 1st

respondent educational qualifications possessed by the three appointed candidates had commercial implications, and the fact that the applicant possessed a post graduate degree was no guarantee that he would get the position. 1st respondent's Counsel implored the Court to be loath of readily intervening in the matter because recruitment and placement are a managerial prerogative.

THE COURT'S ANALYSIS

8. In the Court's assessment, applicant's claim is mainly premised on the allegation that the selection process was tainted from the onset. Applicant's Counsel contended that they appreciated that the selection process comprises various stages which contemplate, among others, a scoring system. He submitted that they are not saying that the other criteria such as performance at the interview are irrelevant, but aver that the process started on a wrong footing by the purported selection of candidates who otherwise did not meet the requisite job specifications in respect of educational qualifications. He insisted that when certain standards have been set, they must be complied with. In a nutshell, their case is that the 2nd to 4th respondent were not eligible to be selected for interviews. To him, they should never have been short listed in the first place, let alone be appointed. This according to him constituted discrimination, was unfair and infringed on the 1st respondent's recruitment and selection policies.

9. Having identified the crux of the dispute, the issue then becomes whether the 1st respondent's conduct can be said to have been discriminatory. Discrimination generally connotes the treatment of people differently and less favourably. In terms of the Concise Oxford Dictionary (8th ed.), discrimination means ***“unfavourable treatment based on prejudice, especially regarding race, colour, or sex.”*** In the context of the application before us, we have to look at discrimination in the recruitment and selection process. The Labour Code Order, 1992 (hereinafter referred to as 'the Code') prohibits discrimination in employment. It provides in Section 5 (1) that;

The application by any person of any distinction, exclusion or preference made on the basis of race, color, sex, marital status, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code.

10. This is surely a very narrow definition of discrimination as factors that give rise to discriminatory behaviour are manifold, and have tended to increase overtime. For instance, our labour law was amended to outlaw discrimination in employment on the basis of real or perceived HIV and AIDS status - the Labour Code (Amendment) Act, 2006. The Section envisages discrimination only on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

11. Applicant's Counsel prayed *inter alia* that respondent's conduct be declared discriminatory in terms of Section 196 (1) (b) of the Code as amended. The latter provides that ***"no person may discriminate against an employee, or a person applying for employment, for exercising any right conferred by this Act."*** The problem with this provision is that the applicant has not alleged any right conferred by the Labour Code. There is a critical need for us to streamline our laws on discrimination particularly in the area of access to employment or to occupations. He further relied on Section 19 of the Constitution which guarantees every person ***"equality before the law and to the equal protection of the law."*** We also have a problem with this provision as it anticipates protection under a certain law. Our law does not have a provision equivalent to the South African Employment Equity Act 55 of 1998 which permits applicants for employment to challenge their non – selection on the ground that they have been discriminated against.

11. On the international arena, the International Labour Organization (ILO) through one of its core Conventions, the Discrimination (Employment and Occupation) Convention, 1958 (No 111) calls for the elimination of discrimination and enjoins Member States to afford equal opportunity and treatment to all workers including equal access to employment irrespective of whether they have ratified this Convention or not. The Convention describes discrimination in Article 1(1) (a) and (b) as

any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction and social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

and goes further to include

such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined

by the Member (emphasis mine) concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

This definition is wider in that it makes provision for more grounds of discrimination. The definition contains three elements *viz*:

12. The ***factual element*** : which is the existence of a distinction, exclusion or preference originating in an act or omission which constitutes a difference in treatment; secondly, ***prohibited grounds*** on which the difference in treatment is based and thirdly, ***negative effect*** on equality of opportunity and treatment (whether or not intended) whose objective result is the nullification or impairment of equality of opportunity or treatment - See the Special Survey on Equality in Employment and Occupation, 1996 by the Committee of Experts on the Application of Conventions and Recommendations. Lesotho has ratified this Convention.

13. This has been a rather difficult matter to determine. For one, it relates to unexplored terrain as far as we are concerned. Secondly, 1st respondent failed to provide us with sufficient information regarding the appointed candidates' legibility to justify how they were short listed for us to make an informed decision. We are unfortunately not specialists in the human resources field, but in labour law and industrial relations. Our duty is to assess the fairness of the employer's decision and we can only do so if provided with sufficient information. We were only provided with educational certificates of the 2nd to 4th respondents and transcripts only in respect of the 2nd and 4th respondents. No evidence was led to explain the course contents, nor any training that the incumbents could have undergone. If we may, recap, the Project Management Consultant position required a:

Post graduate in Business Administration/ Management plus formal training in project management and 4 years experience in a related field

or

Degree in Business Studies, Management, or Commerce plus formal project management with 5 years experience in a related field.

14. In respect of the Change Management Consultant position, the requisite qualifications were;

A commercial degree and/or a minimum of 2 years of work experience in a project management environment or role

Experience in developing change management strategies would be an added advantage.

15. No satisfactory attempt was made to controvert applicant's assertion that the appointed candidates failed to meet this set criteria. It is worth noting at this juncture that the 1st respondent had ample opportunity to prepare itself. This matter was postponed twice, initially on 16th April, 2009 and again on 2nd June, 2009 as applicant's Counsel had pointed out that he be furnished with information on the qualifications of the appointed candidates in order to ascertain whether or not they met the minimum standards set out in the advertisements, and if they did he would simply withdraw the case. 1st Respondent's Counsel filed a supplementary answer in which he attached the 2nd to 4th respondent's educational certificates together with 2nd and 4th respondents' transcripts. It emerged that the 2nd respondent possessed a Bachelor of Arts degree in Public Administration and Political Science, whilst the 2nd and 3rd respondents both held a Bachelor of Arts degree in Economics, when the applicant held a Masters of Business Administration (MBA) following a Bachelor of Commerce (B. Comm.) degree.

16. Respondent's Counsel's defence revolved on the applicant's failure to perform satisfactorily at the interview stage. We agree with applicant's Counsel that the starting point was the screening process for short listing, this is not to undermine performance at the interview, but the former is a preliminary stage. We couldn't agree more with applicant's Counsel's analogy of 1st respondent's conduct to a situation where an advertisement is placed for a lawyer with a minimum of a Bachelor of Laws degree (LLB), and then the employer appoints someone possessing a Diploma in Law or a Bachelor of Arts in Law (BA Law) simply because he/she performed well at the interview. This clearly runs counter to the job specifications as advertised. It should be underscored that the Court is not necessarily concerned with the fact that the applicant held a post graduate degree, but with whether he possessed the relevant qualifications stipulated in the advertisements.

17. The Court discerns failure on the part of the 1st respondent to abide by the standards it had set for itself in the advertisements, and a lack of transparency in the selection process much to the prejudice of the applicant. The 1st respondent was not able to justify the selection for interview of the 2nd to the 4th respondents, and

struggled to convince us that they fitted within the ambit of the job specifications as advertised.

18. On the foregoing analysis, and in exercise of its powers conferred on it by Section 24 (2) (d) of the Code (as amended) which empowers the Court to ***“inquire into and make awards and decisions in any matters relating to industrial relations ... which may be referred to it”***, we come to the conclusion that the applicant was unfairly treated. The next question is then, what is the appropriate relief?

RELIEF

18. In his papers, the applicant is asking this Court to declare applicant’s conduct discriminatory, and to direct the respondent to restart the process and conduct it fairly. Is this possible? Our answer is in the negative due to the fact that the incumbents at the centre of this dispute have already been appointed to the said positions. As such they already hold them as of right. Ordering a restart of the selection process would render the 1st applicant susceptible to another legal challenge. Such an order would also be impractical in light of the passage of time. Section 24 of the Code (as amended) gives the Court power ***“to make any appropriate order...”*** The appropriate relief must be fair and just as well as practical in the circumstances of the particular case. Fairness requires a consideration of the interests of all those who might be affected by the order. In the employment context, this will require a consideration not only of the interests of the affected employee but also those of the employer. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; secondly, to deter future violations; and thirdly, to make an order that can be complied with - see generally ***Hoffman v South African Airways 2001 (1) SA 1***.

19. The applicant prayed in the alternative, for the Court to direct that the applicant be appointed into one of the remaining positions. It was not denied that such a position existed. However, one pauses to ponder, whether we are empowered to make such an order. This is certainly a prerogative of the employer. Courts cannot dictate to employers who to employ and in what position as this would be tantamount to running the undertaking, a duty we are not equipped to carry out. Applicant’s Counsel has not prayed for compensation, and the Court will true to form not order any – See the recent decision of the Labour Appeal Court in ***Phetang Mpota v Standard Lesotho Bank LAC/CIV/A/06/08*** which cited a

number of cases in support of this principle including *Nkuebe v Attorney General and Others 2000 – 2004 LAC 295 at 301 B - C*.

20. The applicant had prayed for costs of suit. The Court is inclined to grant them in light of having found respondent's conduct to have been unfair to the applicant. The Court therefore orders payment of applicant's costs.

THUS DONE AND DATED AT MASERU THIS 14TH DAY OF SEPTEMBER, 2009.

F.M. KHABO
DEPUTY PRESIDENT OF THE LABOUR COURT

L. MOFELEHETSI
MEMBER

I AGREE

M. MOSEHLE
MEMBER

I AGREE

REPRESENTATION:

FOR THE APPLICANT: ADV., M.E. TEELE
FOR THE RESPONDENT: ADV., T.D. MACHELI