



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1296/13

In the matter between:

Kedibone Laucadia SEKWELE

Applicant

and

MINISTER OF COMUNICATIONS

First Respondent

DIRECTOR GENERAL:

Second Respondent

DEPT OF COMMUNICATIONS

Heard: 19 July 2013

Delivered: 30 July 2013

Summary: Urgent application to declare transfer unlawful and reinstate employee to previous post.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant has been transferred to another post in the same department by the first respondent (the Minister)¹. She seeks an urgent order declaring that transfer unlawful and reinstating her to her previous post. She also seeks an order that the Minister and the Director-General withdraw advertisements for her previous post that have been placed in national newspapers.

Background facts

- [2] The applicant is employed as a Chief Director in the Department of Communications. On 11 June 2013 the Minister informed her in writing that she had decided to transfer her to the position of Chief Director: ISAD Institutional Coordination in the Information Society and Development branch “whilst I identify a suitable area to deploy you”. She continued:

“Please note that your placement does not have any effect on the terms and conditions of your employment. Your immediate supervisor will in consultation with HRM assign you the responsibilities attached to the post.”

- [3] The applicant lodged a grievance on 14 June 2013 and she launched this urgent application on 18 June 2013.
- [4] The Minister’s letter was preceded by a meeting with the applicant on 10 June 2013. The applicant’s supervisor, Dr Sam Vilakazi (the Deputy Director General), and the acting chief of staff, Mr Sunil Gopal, consulted with her about her re-assignment. She did not object at that stage. Messrs Vilakazi and Gopal invited her to a further meeting on 18 June 2013 in order to discuss the reasons for the transfer. That meeting did not take place, as the applicant lodged a grievance on 14 June and launched this application on 18 June.
- [5] On 14 June 2013 the position of chief director: human resources management in the Department of Communications was advertised in the *Mail & Guardian* newspaper.

¹ Minister Dina Pule at the time.

- [6] The applicant wants to have her transfer declared as unlawful and she seeks to be reinstated to her previous position.

Evaluation / Analysis

- [7] In considering the merits of the application the Court needs to consider whether the applicant has satisfied the requirements for final relief.

A clear right?

- [8] Mr *Lekala*, for the applicant, based his main argument on the principle of legality. He argued that the Minister had not followed the prescribed procedure in transferring the applicant and that the transfer was therefore unlawful.
- [9] The parties are governed by the provisions of the Public Service Act.² Sections 14, 32 and 34 are relevant to this dispute.

“14. Transfers within public service.—(1) Subject to subsections (2), (3) and (4), any employee of a department may be transferred—

(a) within the department, by its executive authority;

(b) to another department by the executive authorities of the two relevant departments.

(2) Such transfer shall be made in such manner and on such conditions as may be prescribed.

(3) An employee may be transferred under subsection (1) only if—

(a) the employee requests the transfer or consents to the transfer; or

(b) in the absence of such request or consent, after due consideration of any representations by the employee, the transfer is in the public interest.

(4) Before employees may be transferred in terms of subsection (3) (b) as a result of a determination regarding an allocation, abolition or transfer of a function, contemplated in section 3 (4) (b) or (c) or 3A (b), consultation shall take place in the applicable bargaining council established in terms of the Labour Relations Act for the public service as a whole or for a particular sector in the public service.

² Proclamation 103 of 1994.

“32. Direction to perform other functions or to act in another post.—(1)

Subject to such conditions as may be prescribed, an executive authority or the head of a department may direct an employee under his or her control temporarily to perform any functions other than those ordinarily assigned to the employee or appropriate to his or her grade or post.

(2) (a) An employee may be directed in writing to act in a post subject to such conditions as may be prescribed.

(b) Such acting appointment shall be made—

(i) in the case of the post of head of department, by the relevant executive authority;

(ii) in the case of any other post, by the employee occupying the post, unless otherwise determined by the head of department.

(3) The performance evaluation of the relevant employee shall take place with due regard to a direction in terms of subsection (1) or (2).

“34. Non-reduction of salaries.—The salary of an employee shall not be reduced without his or her consent except in terms of section 38, an Act of Parliament or a collective agreement.”

[10] It cannot be disputed that the Minister had the power to transfer the employee in terms of section 14 of the Public Service Act. And the Minister, as the executive authority, also had the power to direct the employee temporarily to perform other functions in terms of section 32 of that Act. The respondents have motivated why the transfer was in the public interest. They explained that it formed part of a migration plan to which the applicant was a party and that was the subject of consultation with the relevant trade unions. They have also provided the employee with an opportunity to make representations on 10 and 18 June 2013. She elected not to make use of that opportunity and to bring this application instead. And it is common cause that she has suffered no reduction in salary. Unlike the position in *Nxele*³, the applicant in this case was not demoted; and she did have the opportunity to make representations concerning her transfer.

³ *Nxele v Deputy Commissioner, Corporate Services, Department of Correctional Services* (2008) 29 ILJ 2708 (LAC).

[11] The applicant's contract of employment also provides that she may be required to perform other duties or to work at other places that may reasonably be required by the Department. Her transfer does not amount to a breach of contract.

[12] The applicant has not established a clear right to remain in her previous post.

Irreparable harm?

[13] The applicant has not shown that she will suffer irreparable harm as a result of the transfer. She has lodged a grievance in terms of the regulations dealing with senior managers.⁴ That grievance is still pending. Should she be dissatisfied with the outcome, she can pursue her remedies under the Labour Relations Act.⁵

Alternative remedy?

[14] The applicant has already lodged a grievance. The grievance is in the process of being considered by the respondents. Should she be dissatisfied with the outcome, she may pursue it in the Public Service Coordinating Bargaining Council (PSCBC). That is the proper forum to deal with the dispute.⁶

Conclusion

[15] The applicant has not made out a case to satisfy the requirements for an interdict. With regard to costs, I take into account that there is an ongoing relationship between the parties; that the applicant is still employed by the Department; and that her grievance still needs to be resolved. In these circumstances, a costs order would be inappropriate.

⁴ Public Service Regulations, 2001.

⁵ Act 66 of 1995.

⁶ Cf *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) para [46]; *Breytenbach v National Prosecuting Authority* (unreported, case no J 1359/13, 19 July 2013).

Order

[16] The application is dismissed. There is no order as to costs.

Steenkamp J

APPEARANCES

APPLICANT:

R Lekala

Instructed by Tjale attorneys, Pretoria.

RESPONDENTS:

E Mokutu

Instructed by the State Attorney, Pretoria.