REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 595/13

In the matter between:

RUDMAN, JANET **Applicant**

and

MAQUASSI HILLS LOCAL MUNICIPALITY **First Respondent**

JONAS RONALD (*N.O.*) **Second Respondent**

Heard: 11 April 2013

Delivered: 15 April 2013

Summary: (Urgent application – Transfer to another department).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application to declare the applicant's transfer from her position of Manager: Administration to the Housing Department of the Maquassi Hills Local Municipality a breach of the applicable Disciplinary Code collective agreement and the applicant's conditions of service and accordingly, of no legal force and effect. In effect, the applicant is claiming an order of specific performance as a remedy to the local authority's alleged breach of her contract. My brief reasons for the judgment are set out below.

[2] The applicant was placed on precautionary suspension on 2 November 2012 pending a disciplinary enquiry. In terms of clause 14.6 of the disciplinary code and collective agreement governing the applicant a precautionary suspension may not exceed the period of three months. Accordingly, she announced her intention to return to work on 4 February 2013, which she did. The investigation into the applicant's alleged misconduct was concluded by 21 January 2013. She returned to work on 4 February 2013, on the basis that the period of precautionary suspension had expired. Some six weeks later, the applicant was issued with a letter notifying her of her transfer to the Department of Housing (Community Service) "...for a period not exceeding three months pending the finalisation of the disciplinary hearing". In terms of the notice, the applicant was invited to make oral representations why she should not be transferred.

[3] Even though she maintained that the local authority had already exercised its election to suspend her previously, pending an investigation into her alleged misconduct, and therefore could not now rely on the alternative step of utilising her temporarily in another position, she nonetheless did report to the offices of the municipal manager on 15 March 2013 at the time designated for her to make oral representations, but the municipal manager was not present and after half an hour she left.

[4] This application was launched on 28 March 2013 and was postponed by agreement on 4 April 2013. Shortly prior to this application the applicant had failed to interdict the disciplinary enquiry from proceeding. The respondent contends that any agency that might have existed fell away when the applicant failed to interdict the enquiry from proceeding. It also contends that the applicant can obtain substantial redress later under the unfair labour provisions of section 186 (2) of the Labour Relations Act 66 of 1995 or in a claim for damages.

[5] Insofar as the previous application to interdict the disciplinary enquiry, might have rendered the notice of transfer academic, I accept that it was not necessary to launch this application and that the applicant acted with sufficient speed to bring this application, when the previous one failed.

[6] The respondent claims that the transfer of the applicant is done pursuant to a common law prerogative of the employer to do so. However, it is clear from the terms of the notice such as the reference to the three month period and the reasons for the transfer, which are, in short, to prevent the applicant in some way meddling or prejudicing the conduct of the disciplinary enquiry, that the purpose of the transfer is essentially the same as a transfer in terms of clause 14.1 of the collective agreement, which provides that:

> *"The Employer may suspend the Employee or utilising temporarily in another capacity pending an investigation into alleged misconduct if the municipal manager or his authorised representative is of the opinion that it would be detrimental to the interest of the Employer if the Employee remains in active service."*

[7] The effect of the respondent's argument would be that despite dealing specifically with the conditions under which a transfer may be implemented in relation to a disciplinary enquiry, the collective agreement intended to leave the employer with an unfettered discretion to implement a transfer for a precautionary purpose even when an investigation into alleged misconduct was completed. It seems that a primary object of the code is to ensure that the expeditious conduct of disciplinary proceedings

and to avoid, or minimise, the length of time during which an employee can be removed from their normal duties for a reason relating to pending disciplinary action. It would be entirely anomalous, in my view, to interpret the agreement in such a way that an employer could implement a transfer for precisely the same reason as envisaged in the code, without coming within the ambit of the code, and having the effect that a period of removal of the employee from their workplace could effectively be extended to 6 months, by effecting a transfer on the expiry of a period of suspension, or vice versa.

[8] I am not persuaded that there are suitable alternative remedies to a breach of contract of this nature. The benefit of a contractual right to a fixed period of removal from one's ordinary place of work, is difficult to remedy retrospectively, and an order of specific performance is not an inappropriate way of addressing the situation.

[9] Consequently, I am satisfied that the applicant has demonstrated sufficient urgency and a clear right to the relief she seeks.

Order

[10] The applicant’s transfer to the first respondent's housing department in terms of the notice dated 14 March 2013 is in breach of clause 14.1 of the Disciplinary Procedure And Code collective agreement and the applicant’s contract of employment and is therefore unlawful, invalid and of no legal force and effect.

[11] Accordingly, the respondents are interdicted from transferring the applicant to the first respondent's housing department in terms of the aforesaid notice.

[12] The first respondent must pay the applicant’s costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	F Scholtz of Scholtz Attorneys
FIRST RESPONDENT:	AT Ncongwane, SC instructed by Phambane Mokone Inc.