Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 970/17

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION ("POPCRU") obo T M NKUNA AND 11 OTHERS	**Applicants**

and

THE ACTING NATIONAL COMMISSIONER OF POLICE	**First Respondent**
DEPUTY NATIONAL COMMISSIONER OF SAPS HUMAN RESOURCE MANAGEMENT	**Second Respondent**
THE NATIONAL HEAD DIRECTORATE FOR PRIORITY CRIME INVESTIGATIONS	**Third Respondent**
THE PROVINCIAL COMMANDER DPCI ANTI-CORRUPTION INVESTIGATIONS-GAUTENG	**Fourth Respondent**

THE HEAD OF GAUTENG SAPS ANTI-CORRUPTION UNIT-DETECTIVES	**Fifth Respondent**
THE PROVINCIAL HEAD DPCI-GAUTENG	**Sixth Respondent**
THE PROVINCIAL COMMISSIONER OF POLICE SAPS-GAUTENG	**Seventh Respondent**
THE MINISTER OF POLICE	**Eighth Respondent**

Heard: 09 May 2017

Delivered: 31 May 2017

Summary: (Urgent – preservation of status quo pending outcome of review proceedings – legitimate interests or undertaking undermined by respondent – purported consultation prior to prejudicial step unrelated to reasons given for step)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent application launched on 3 May. By the date of the hearing, answering and replying affidavits had been filed.

[2] The application is brought by POPCRU on behalf of eleven SAPS constables and warrant officer detectives who were transferred from various police stations in Gauteng to the provincial anticorruption unit in April 2013.

[3] They claim that initially, they were located at a safe house with insufficient facilities and travelled long hours to and from work. Subsequently, in April 2016 they were instructed that the unit would be absorbed by the Directorate for Priority Crime Investigation Anticorruption Investigations

Unit (DPCI) to which they would be transferred with effect from 17 May 2016. On reporting for work at the new unit, they completed various forms and were then posted to offices in Germiston and Pretoria, whichever was closer to their personal residences.

[4] The detectives' salaries and benefits remained the same as they were previously, though they claimed to enjoy some additional benefits at DPCI including fully resourced offices and allocated cell phones with unlimited air time, which meant that they no longer had to pay for airtime or use their personal cell phones. They also received regular on-the-job training.

[5] On 25 November 2016, a meeting was held with the DPCI, the Gauteng Anti-corruption unit and the applicants to discuss their transfer back to the provincial unit. Only one member expressed willingness to return to the Gauteng provincial unit. The applicants, claim it was agreed at the meeting that they would not be compelled to return to the provincial units and that posts at DPCI would be advertised to enable them to apply for them. They claim that these representations were made by the delegates from the two units and that they developed a legitimate expectation that they would remain at DPCI and the posts they occupied would be advertised so they could apply for them.

[6] However, on 24 April 2017 they became aware of a letter dated 22 March 2017 which revoked or undermined the commitments made at the meeting on 25 November 2016. They were due to be transferred back to the province with effect from 28 April 2 017.

[7] The applicants seek to interdict the respondents from reversing a decision made in May 2016 as conveyed in a letter dated 22 March 2017 pending a review of that reversal of the May 2016 decision in terms of which they had originally been transferred from provincial anticorruption unit to the DPCI. At the time the application was heard, the review had yet to be launched. The interim nature of the relief sought is unclear. When the matter was argued, the applicants' heads of argument did not refer to a review application but more vaguely to the interim relief as "pending the disposal of the dispute as to whether this transfer was or was not effected in accordance with the SSSBC agreement. Alternatively, whether it is not

to be declared an unfair labour practice and challenged on those [*sic*] basis in part B." However, part B only refers to a review of the decision, which counsel for the applicants' said she was briefed to settle.

Have the requirements for interim relief been met?

[8] Before addressing the merits of the application, it is necessary to briefly deal with urgency. I am satisfied that the application was brought with sufficient urgency given the relatively short notice between the applicants being told of the decision to transfer them back to the provincial unit and the date of transfer on 2 May 2017. Moreover, from the unsigned minute of the November meeting, it does not appear they could have expected the outcome that was announced.

Existence of a Prima facie right?

[9] The applicants claim that they are currently posted at the provincial DPCI unit and are part and parcel of its structures since their transfer and, are entitled to terms and conditions of employment applicable to the DPCI staff which are better than those at the provincial anticorruption unit, to which they had originally been deployed. They also claim they had a legitimate expectation, or alternatively an agreement had been reached, that they would not be transferred back to their pre-May 2016 posts.

[10] The respondents replies that the reason for the decision on 22 March 2017 to transfer the applicants from the DPCI back to the provincial Department of the SAPS was because the original transfer was done without the authority of the provincial Commissioner and without following due processes in terms of Transfer Policy SSSBC 5/1999. The Respondents claimed that in terms of the resolution, it was simply necessary to consult with the applicants which was done on 25 November 2016, and accordingly, there was consultation before they were transferred back to the province. This was certainly the justification in the letter of 22 March, but there was no elaboration on this reason in the answering affidavit.

[11] The respondents also contend that the rights asserted by the applicants are unclear at best. On the most generous interpretation, the applicants seem to be asserting a legitimate expectation or agreement that they would not be transferred back and that the status quo should be preserved pending whatever form of final relief they seek. Although the unsigned minute of the November meeting seems to provide some support for their contention, the respondent disputes that any undertaking was made to the majority of the detectives who did not want to revert to the provincial unit. Whether or not that is true, the letter of 22 March does even not purport to rely on compliance with a consultation process: it relies purely on a contention that the original letter authorizing their transfer to DPCI was invalid and that proper transfer procedures in compliance with the Transfer Policy SSSBC 5/1999 were not followed.

[12] The applicants did not base their claim directly on the validity of the original transfer but argued that the letter of 22 March was contrary to their expectation and, or alternatively, an undertaking arising from the 25 November meeting. However, they do say as a collateral matter that if it was invalid, it was for the respondents to have it set it aside and the respondents cannot simply act on the basis that they have decided it was invalid. Accordingly, the applicants contend the original transfer in May 2016 remains valid and in effect.

[13] On the basis of the actual right asserted, namely that it was agreed, except in the case of one member who was happy to be transferred back to the provincial unit that the applicants would remain in their current posts and that posts would be advertised, I believe they at least had a reasonable expectation that what was discussed at the meeting would be followed through by the respondents and that the status quo would remain the same at least unless the issue was reopened. The letter of 22 March 2017 was completely at odds with the previous undertakings given and at the very least, should have been proceeded by a further meeting explaining why circumstances had changed.

[14] I am aware that the respondents contend that the meeting constituted a consultation meeting and therefore submit they complied with the

obligation to consult in relation to the transfer, which could only refer to the decision to send the applicants back to their previous posting. However, they make no attempt to explain why the consultation recorded in the unsigned minute did not accurately reflect what transpired at the meeting. If the representations made by the employer in that meeting were what they appear to be then the employer's stance in March amounted to a complete *volte face* at best or a complete repudiation of the content of that meeting at worst. in the absence of any alternative version of events at that meeting, I do not understand how the respondents can claim with any credibility that the November meeting constituted a consultation preceding its decision in March, because there is absolutely no correspondence between the only pleaded version of what transpired at that meeting and the reason given for the step taken by the respondents in March.

[15] In the circumstances, it seems that even though there may have been other rights the applicants might have sought to assert, they had at the very least a legitimate expectation that in the absence of further discussion and consultation, they would not be transferred back to the provincial unit and that they were materially and adversely affected by the decision in the 22 March letter. As such, they do have a *prima facie* right, even if open to doubt, not to be subject to such a measure in the absence of proper procedures for lawful administrative action being followed.

Well-grounded apprehension of harm

[16] The applicants contend that, they would lose the gains they had made in relation to the conditions of employment as well as the benefit of their latest postings in the DPCI which place them in closer proximity to their families.

[17] Respondents dispute that the applicants have set out clearly the conditions of employment and benefits they would lose as a result of the transfer and in any event as it is already taken place, the apprehension of irreparable injury is moot. Of course, that does not necessarily dispose of the matter if the harm is ongoing. I accept that the applicants may be more advantageously placed in the DPCI postings and that reverting to the provincial unit would make familial ties harder and costlier to maintain.

There is also the question of the added expense of cellphones which they were relieved of when they were posted to the DPCI. These are not insignificant issues bearing in mind the salaries of most of the applicants. I am satisfied they will suffer some material prejudice in being relocated and being deprived of official cellphones.

Absence of alternative remedies

[18] The applicants contend that the arbitrariness of the reversal of the undertaking given on 25 November 2016 makes their situation uncertain and hence the most suitable and appropriate remedy is to restore the status quo. The respondents argue that the only right the applicants could assert is the right to be consulted and if they have a dispute relating to the transfer they could refer them through the internal grievance procedure and ultimately to mediation or arbitration in terms of the SSSBC 5 of 1999 agreement. The agreement provided by the respondents only sets out the procedures to be followed when transfers are made and no specific dispute procedures are contained in the document, but as it seems to be common cause, it is a collective agreement, then obviously any dispute over its application or interpretation ought to be referred to arbitration.

[19] However, the complaint raised by the applicants does not relate to non-compliance with the policy as such. Rather, the claim is that, there was an agreement reached in November 2016 and, or alternatively, an expectation was created that the status quo would prevail, which the respondents reneged on or undermined to the applicants' detriment when the 22 March decision was taken. Nowhere in their papers did they claim that March 2017 decision amounted to an unauthorized transfer or a transfer in breach of the policy. They also did not bring this urgent application on the basis that the May 2016 transfer was valid and remained so, even though this was implied in the letter from their attorneys dated 25 April 2017. It was only in reply that the applicants expressly raised a collateral defence that the May 2016 transfer remained in effect until and unless a court set it aside.

[20] In terms of the right asserted in the interim application, I am not persuaded that the transfer procedure would offer suitable alternative redress for the

complaint that the decision of 22 March undermined the undertakings made or the legitimate expectations created in November 2016.

Balance of convenience

[21] The respondents only advanced vague reasons from the bar why the balance of convenience should favour them. The prejudice to the respondents was mentioned in the letter of 22 March 2017, but not confirmed under oath. In the short term, there is no self-evident prejudice the respondents would suffer by retaining the applicants with the DPCI, whereas there is evidence of tangible prejudice to the applicants relating to their living and working conditions. In my view, the prejudice to the respondents of affording the applicants interim relief, even if the respondents are ultimately proven correct outweighs any unstated interim prejudice to the respondents.

Relief

[22] On the basis of the above, the applicants are entitled to interim relief, though in the absence of having launched proceedings to finalise the dispute by the time the matter was heard, it is necessary to ensure that the interim relief is not open ended and the interim order has been fashioned to cater for this issue.

Order

[1] The application is dealt with as one of urgency and the rules governing forms of service, and time periods in the Labour Court rules are dispensed with.

[2] Pending the outcome of review proceedings in respect of the decisions communicated in the letter dated 22 March 2017 from the Deputy National Commissioner : Human Resource Management:

2.1 the respondents are interdicted and prohibited from reversing the decision communicated in the letter dated 16 May 2016 from the Gauteng Provincial Commander: Serious Corruption Investigations;

2.2 the respondents are interdicted and prohibited from giving effect to the decisions communicated in the letter of 22 March 2017;

2.3 in particular, the respondents are interdicted and prohibited from:

2.3.1 directing the applicants to return to the posts they occupied at the Gauteng Provincial Anti-Corruption Unit – Detectives prior to 16 May 2016, or from continuing to give effect to such a step to the extent it has been implemented, and

2.3.2 commencing or continuing with any process pursuant to or connected with the contents of the letter dated 22 March 2017;

[3] The applicants must launch any review proceedings referred to in paragraph [2] of this order within 5 days of the date of this order, failing which the relief ordered in paragraph [2] shall lapse automatically.

[4] The respondents are jointly and severally liable for the applicants' costs, the one paying, the others to be absolved.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS :	S Gaba instructed by Makgahlela Mashaba Attorneys
RESPONDENTS:	L A Makua instructed by the State Attorney