

REVISED/ REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D550/2000

DATE OF JUDGMENT: 2001/04/17

DATE OF EDITING: 2001/05/30

In the matter between:

M PERUMAL

Applicant

and

THE MINISTER OF SAFETY AND SECURITY
THE NATIONAL COMMISSIONER,
SOUTH AFRICAN POLICE SERVICE
THE PROVINCIAL COMMISSIONER,
SOUTH AFRICAN POLICE SERVICE
N.T. JANSE VAN RENSBURG

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE
PILLAY ON 17 APRIL 2001**

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

PILLAY J

- 1] This is an application to declare the transfer of the applicant from his position as Station Commissioner of the Chatsworth Police Station to the office of the Area Commissioner Durban South as being unconstitutional and unlawful. The applicant further seeks to set aside the decision to transfer him and to be reinstated as the Station Commissioner of Chatsworth Police Station.
- 2] The first point raised *in limine* is whether the Court has jurisdiction in terms of section 157(2) of the Labour Relations Act No 66 of 1995, (the LRA), as the respondent when taking the decision to transfer the applicant acted in terms of the South African Police Service Discipline Regulations GNR 2086 promulgated on 27 December 1996 (hereafter referred to as "the Regulations") read with the south African Police Service Act No 68 of 1995.
- 3] In support of the submission that the Court does not have jurisdiction, Mr Moodley for the respondent, relied on an interpretation of section 157(2). He advocated that paragraphs (a) and (c) and paragraphs (b) and (c) of subsection 157(2) should be read conjunctively. A wholly conjunctive interpretation would lead to absurdity and various unintended consequences. So it was submitted.

Section 157(2) provides:

"The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa and arising from-

- (a) employment and from labour relations;
- (b) any *dispute* over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the *Minister* is responsible."

The omission of the word "and" at the end of paragraph (b) of subsection 157(2) in the *South African Labour Law* by Thompson and Benjamin (Juta) has contributed to some of the controversy in interpreting the subsection.

- 5] Subsection 157(2) confers jurisdiction on the Labour Court to hear any dispute about the violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution"). The fundamental constitutional rights that may be adjudicated in terms of this subsection are not restricted only to the labour rights referred to in section 23 of the Constitution. *Mcosini v Mancotywa and Another* [1998] 19 ILJ 1413 TK at 1414 D-E, *Walters v Transitional Local Council of Port Elizabeth and Another* [2000] 21 ILJ 2723 LC at 2726 F to 2728 B.

- 6] The element that brings a constitutional rights dispute within the purview of the Labour Court and not any other Court in terms of the LRA, is the connection between a violation of rights and employment, labour relations and labour law. (*Naptosa and Others v Minister of Education, Western Cape Government and Others* 2001 (4) BCLR 388 (c)). Each paragraph of subsection 157(2) has such a connection independently of the other paragraphs. (See, for example, *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others* [1999] 20 ILJ 1018 T. Contrast with *Fourways Mall (Pty) Limited and Another v South African Commercial Catering and Allied Workers Union and Another* [1999] 20 ILJ 1008. *Food and General Workers Union and Others v Minister of Safety and Security and Others* [1999] 20 ILJ 1258 LC.)
- 7] Each paragraph has a distinct purpose. Paragraph (a) ensures that employment in the private sector is covered. It also enables effect to be given to the horizontal application of the constitutional right. Paragraph (b) manifests an appreciation for the complexity of the State acting as an employer. Its actions or conduct which could be the subject of a dispute, could be both executive and administrative. This paragraph enables both types of actions or conduct to be adjudicated before the same forum. It also minimizes jurisdictional disputes as to whether the actions or conduct are in the executive or administrative. Paragraph (c) enables the Labour Court to adjudicate in matters involving employment and labour legislation other than the LRA, i.e. Basic Conditions of Employment and the Employment Equity Laws. As each paragraph has a distinct purpose it can stand independently of the others. The effect of each paragraph individually is enabling, logical and consistent with the primary objectives of the Act.
- 8] Section 157(2) is therefore not superfluous to section 3(b) of the LRA. The latter clarifies the ambit of the jurisdiction of the Labour Court. In this regard I respectfully disagree with my brother NGWENYA in *C N Ndumo v The Minister of Correctional Services and Others* D873/1999 (unreported) at paragraph 20.
- 9] A wholly conjunctive interpretation would be restrictive and would defeat the purpose of each paragraph. For instance, section 157(2) would not be applicable to private employment at all. A wholly conjunctive interpretation could also lead to absurdity. Support for a disjunctive approach can be found in *Walters* above at 2727 E-G.
- 10] More than one paragraph of subsection 157(2) may apply to a violation. However, more than one paragraph need not be present in order to confer jurisdiction of the Court. Neither is it necessary for all three paragraphs to prevail before the Court has jurisdiction. In the circumstances, Mr Moodley's approach to section 157(2) is rejected.
- 11] In this case the Court can have jurisdiction because the circumstances described in paragraphs

(a) and (b) of subsection 157(2) obtain. The jurisdiction of the Court is not ousted by paragraph (c). Terms and conditions of public employment are usually founded in legislation applicable to the service, industry or administration. The LRA provides the machinery through which the application of such legislation in so far as they relate to employment, labour relations and labour law can be tested. The provisions of the LRA therefore apply to test whether the application of the regulations in transferring the applicant were lawful and fair. The first point *in limine* is accordingly dismissed.

12] The second and alternative point pleaded *in limine* was that the dispute should have been referred to arbitration in terms of Item 2(1)(c) of Part B of Schedule 7 of the LRA. Accordingly, it was submitted that section 157(5) precluded the Court from having jurisdiction. Section 157(5) of the LRA provides:

"Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved *dispute* if *this Act* requires a *dispute* to be resolved through arbitration."

Item 2(1)(c) of Part B of Schedule 7 of the LRA provides:

"For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an *employee*, involving...

the unfair suspension of an *employee* or any other disciplinary action short of dismissal in respect of an *employee*."

14] A suspension is always disciplinary action, irrespective of whether it is implemented as a temporary measure to maintain the employee's status or as a sanction for misconduct. The words "any other" fortifies this interpretation. The phrase "disciplinary action" is also not restricted to mean "disciplinary sanction". (*Koka v Director-General: Provincial Administration North West Government* [1997] 7 BLLR 874 LC.) A transfer can be effected for disciplinary and for non-disciplinary purposes. If the transfer amounts to disciplinary action in this case then the dispute should have been referred to arbitration.

15] Turning to the facts of the case, the applicant was informed by letter dated 10 March 2000 as follows:

"1. Notice of contemplated suspension or transfer:

It is alleged: YOU CONTRAVENED THE UNDERMENTIONED REGULATIONS OF THE SAPS DISCIPLINE REGULATIONS:

1.1 REG.18(4) in that you failed to comply with or Contravened a National or Provincial Order or other Lawful Order or instruction, TO WIT: you failed to attend the queries raised by National Inspectorate satisfactorily or did not attend to them at all (Inspection Report 23/1/6/225 dated 98/07/17 refers)

1.2 REG 18(21) in that you neglected your duty or performed your functions in an improper manner, TO WIT you cannot account for fifteen (15) firearms which are reflected on your Station

Inventory.

Disciplinary proceedings have been instituted against you.

3. As a result of the allegations against you, the Area Commissioner is contemplating either suspending you from duty, or temporarily transferring you.
4. Before he makes a decision he wishes to hear your version of the allegation within three (3) working days after receipt of this notice."

After the hearing the applicant was informed as follows:

"You are hereby informed that your client NR 0161733-8 Snr Supt M Perumal will be temporarily transferred from Chatsworth to the office of the Area Commissioner Durban South until such time as the disciplinary steps have been concluded.

The transfer is with immediate effect and your client must report to the Area Commissioner Durban South Assistant Commissioner Ntanjana not later than 16:00 on 2000-04-03.

17] In response to a request for reasons for the transfer the fourth respondent replied on 20 April 2000:

"The decision to transfer Senior Superintendent Perumal was based on the evidence placed before me at the time. It is in the interests of the S A Police to have transferred the officer as Regulated by the Disciplinary Regulations.

Please be advised that your attendance on 31ST March 2000 was not a disciplinary hearing but merely an opportunity for the officer or his representative to make a representation to the possible suspension or temporary transfer of the latter.

As you are aware, the National Commissioner has subsequently ordered the immediate transfer of all the officers at Chatsworth."

18] The transfer in this case was undoubtedly disciplinary action as contemplated in Item 2(1)(c). In the circumstances the dispute should have been referred to arbitration. The Court has no jurisdiction to hear the dispute. Accordingly, the second and alternative point pleaded *in limine* succeeds.

19] In so far as I may be wrong in declining jurisdiction, I turn to the merits of the matter. The basis on which the decision to transfer the applicant was challenged on the merits was pleaded as follows in paragraph 38 of the founding affidavit:

"The decision by the Fourth Respondent to transfer me is an administrative act as contemplated in Section 33 of the Constitution of the Republic of South Africa. I have been advised, that at the very least, the decision of the fourth respondent must be "reasonable". I respectfully submit that, having regard to the information properly before him, the decision of the Fourth Respondent does not meet this test. Consequently, it was unconstitutional and unlawful. In the premises, it falls to be set aside."

- 20] According to the applicant, the only information before the fourth respondent who took the decision to transfer him were the written (MP6) and oral representations (JVR1) made by him or on his behalf at the hearing. In deciding to transfer the applicant the fourth respondent had taken into account four documents which the applicant had filed with his founding affidavit (MP1 to MP4 inclusive), the oral submissions made by or on behalf of the applicant (JVR1), the applicant's response to MP1 (JVR2), an affidavit by the Area Commissioner dated 8 March 2000 (JVR3), a logistical audit inspection report dated 9 March 2000 (JVR4) and policy procedure for suspension and temporary transfer in the South African Police Service (JVR5).
- 21] In his reply the applicant expanded the basis of his complaint by pleading:
"The approach of Van Rensburg resulted in a fundamental breach of my rights to fair administrative action as contemplated by the Constitution. There was a violation of my rights to a fair hearing, as contemplated in the Respondents own procedure as envisaged in Annexure 'JVR5'."
- 22] This was provoked by the fourth respondent's disclosure that he had taken into account documents JVR3 and JVR4. The applicant alleged that he had no knowledge of the existence of these documents, nor was he aware that they would be taken into account when deciding what action should be taken against him.
- 23] >From the founding affidavit it would appear that the applicant had not placed Annexures MP1 to MP4 before the fourth respondent in order that they be considered when the latter made his decision. The fourth respondent had nevertheless taken these documents into account. The applicant's criticism of the fourth respondent does not relate to his having taken into account documents about which he had knowledge but only about considering documents about which he alleged he had no knowledge.
- 24] It must be remembered that the administrative act complained of is the decision to transfer the applicant. It is not a dismissal. The applicant is not deprived of his remuneration nor is he denied employment. Consequently, the form of hearing contemplated prior to the transfer may be far more attenuated than a hearing preceding a dismissal. [See Baxter *Administrative Law* Pages 542 to 550 and 596 to 597.]
- 25] The requirements for a fair hearing prior to transfer are far less onerous for the employer than a dismissal hearing. What is not expected of the employer at a hearing prior to transfer is a full scale trial of the charges. Not every issue relevant to the charges needs to be canvassed. Whether a hearing prior to a transfer is fair or not would depend on the circumstances of each case.
- 26] In this case the applicant was informed of the charges that were being investigated against

him. He was invited to make representations about them. He did so with the assistance of an attorney. No restrictions were placed on the content of his representation. He was free to place any information he wished in order to influence the decision of the fourth respondent. The fourth respondent was entitled to consider all material that was relevant to the charges and to his decision as to whether the applicant should be suspended or transferred. He was not obliged to disclose the material to the applicant beforehand. The purpose of the hearing was not to test the truth of the allegations against the applicant. All the material that the fourth respondent considered related to the charges and were relevant to his decision. For this reason the fourth respondent's decision was rationally connected to the material before him. The applicant ought to have been aware that the fourth respondent would be considering all material relevant to the charges and the decision to transfer or suspend him. He appears to have tacitly accepted that the fourth respondent was entitled to do so in relation to material of which he, the applicant, was aware. The complaint was not that the fourth respondent took into account material other than that to which the applicant had referred him.

[27] The applicant also criticized the fourth respondent at length for giving as a reason for the transfer "the interests of the South African Police Service" without raising it first as an issue at the hearing. It is implicit when disciplinary action is taken that the interests of the service would be an important consideration. As a Station Commissioner, which is a managerial position, the applicant ought to know this.

[28] Having regard to the charges, they are serious. The prejudice that the respondents would suffer if the applicant had not been transferred outweighs any inconvenience or prejudice that the applicant may suffer as a result of the transfer. In this regard, the only prejudice it seems that the applicant may endure as a result of the transfer is that the transfer may be a slight on his integrity. However, Mr Soni, for the applicant, pointed out in his address that the applicant had still not been charged for misconduct despite the lapse of about a year since the transfer. While this is disturbing, there were no supplementary affidavits filed to include the delay in finalising the disciplinary action as a further ground in support of the application. The reasons for the delay would also have had to be placed properly before the Court before they could be considered.

[29] The applicant further submitted that his transfer was also unfair because the National Commissioner had decided to transfer all the officers at Chatsworth, which must have included him. The basis for the transfer of the applicant relied upon by the respondents is a decision of the fourth respondent. The fourth respondent denied that the National Commissioner's decision had applied to the applicant. The National Commissioner's decision "was contemplated and announced" after the disciplinary action against the applicant was contemplated. This is a dispute of fact which must be decided in favour of the respondent.

In the circumstances the application is dismissed with costs.

JUDGE D, PILLAY

Advocate V. Soni
Attorneys R. Bandulalla
Advocate I. Moodley
State Attorney - Durban