

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

REPORTABLE

CASE NO: **D102/08**

In the matter between:

HEALTH & OTHER SERVICES PERSONNEL

First Applicant

TRADE UNION OF SA ("HOSPERSA")

ROBIN GARTH WESTWOOD

Second Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

First Respondent

FOR HEALTH, KWAZULU-NATAL

DEPARTMENT OF HEALTH, KWAZULU-NATAL

Second Respondent

JUDGMENT

CONRADIE AJ

INTRODUCTION

1. In this matter the Applicants have approached this court for an order in the following terms:

1.1. *"That the decision to advertise the post of Chief Technical Advisor: Engineering Advisory Service in Respondents' Infrastructure Development Component is set aside.*

- 1.2. *That Respondents are ordered to appoint Second Applicant to the said post of Chief Technical Advisor: Engineering Advisory Service.*
- 1.3. *Alternatively to paragraph 1.2 above, that Respondents are ordered to act in terms of Chapter 1, Part V C.6 of the Public Service Regulations, and exercising the power conferred by that regulation, to continue to employ Second Applicant in his present post, the name of which has been changed to "Chief Technical Advisor: Engineering Advisory Service" without advertising the post or holding any selection and appointment procedures.*
- 1.4. *Alternatively to paras 1.1, 1.2 and 1.3 above, granting Applicants such further and or alternative relief as to the above Honourable Court may seem fitting.*
- 1.5. *Ordering Respondents to pay Applicants' costs of this application.*

That pending the final determination of the rule nisi, Respondents are:

- 1.6. *restrained and interdicted from continuing with the advertising, selection, and appointment process in respect of the said post of Chief Technical Advisor: Engineering Advisory Service;*
- 1.7. *restrained and interdicted from retrenching Second Applicant;*
- 1.8. *restrained and interdicted from removing Second Applicant from his presently held job."*

BACKGROUND

2. The Applicant has been employed with the Second Respondent since March 1991, with the exception of a period of three years when he was employed by the Provincial Health Authorities in the Western Cape.

3. The Applicant is of the view that since taking up his employment in March 1991 he has faithfully and diligently served the Second Respondent and has given it more than satisfactory service.
4. During the period 1991 to 1995 the Applicant held the post of Chief Works Inspector. After returning from the Western Cape he took up the post of Control Works Inspector (Electrical and Mechanical) with the Second Respondent and held this post until November 1999.
5. In December 1999 the Applicant was appointed to his present post of Deputy Manager: Engineering Services although at that point in time the post had the title of Deputy Director: Works Inspections. At the time of his appointment to the post it was a level 11 post. However, in 2003 the post was upgraded to level 12.
6. The Applicant is of the view that he has performed more than satisfactorily in the post. In respect of the four quarters of the assessment period 1 April 2006 to 31 March 2007, he received performance assessments of 72%, 80%, 76% and 84% respectively resulting in an average of 78%. This score is apparently considered superior performance in terms of the performance assessment system used by the Second Respondent. It is according to the Applicant also above the level of satisfactory performance which is attributed to scores in the range from 60% to 74%. It is not in dispute that the Applicant's performance in his current post has been consistently at this level.
7. At some point the Second Respondent advertised a position of Chief Technical Advisor: Engineering Advisory Service at level 13. The Applicant contends that this post was created as part of a "purported" restructuring of the Second Respondent. It appears that the job descriptions for the two posts are identical with the only change being to the name and salary levels. The Applicant is of the view that he has effectively been performing the functions, carrying out the duties and bearing the responsibilities of the post of Chief Technical Advisor: Engineering Advisory Service ever since he was appointed to the post Deputy Manager:

Engineering Services in December 1999. He further claims that he was not consulted about the decision to re-arrange the structure in the manner that it has been.

8. The Applicant is of the view that although he is entitled to apply for the post of Chief Technical Advisor: Engineering Advisory Service, it is highly unfair that he should be required to apply for what is in effect his own job, and is the job that he has been doing to the satisfaction of the Second Respondent for approximately 9 (nine) years.
9. The Applicants also rely on the provisions of Chapter 1, Part V, C.6 of the Public Service Regulations, which they argue enables the Respondents' to appoint the Second Applicant directly to the "vacant post" of Chief Technical Advisor: Engineering Advisory Service. The Second Applicant is of the view that he meets all the requirements referred to in the regulation in that he performs the duties of the post; has received a more than satisfactory rating in his most recent performance assessment and is quite prepared if appointed to start at the minimum notch of the salary range for level 13.
10. Chapter 1, Part V, C.6 of the Public Service Regulations states as follows:
 - 10.1. *"If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –*
 - (a) *already performs the duties of the post;*
 - (b) *has received a satisfactory rating in her or his most recent performance assessment; and*
 - (c) *starts employment at the minimum notch of the higher salary range."*
11. The Applicants contend that the Second Applicant meets the requirements of (a) and (b) and is quite prepared to be remunerated at the minimum notch of level 13. It is therefore within

the Respondents power to leave him in the post, the title of which has simply been changed to Chief Technical Advisor: Engineering Advisory Service.

12. According to the Applicants, if the post is to be advertised and a selection exercise done and the Second Applicant is not appointed to the post after having applied for it, this would result in him losing the position in which he had diligently served the Respondents for many years. He would also be liable to lose his employment altogether. If not appointed to the post following the advertisement and the subsequent selection process, he will then fall into a pool of employees who are in excess to the department's needs. If no suitable alternative post can be found for him, he will be retrenched.

13. The Respondent's version is that the restructuring process *"has been decided upon and there is an agreement that no employee will be redundant and/or possibly retrenched."* Reference is made to a circular, which the Respondents' say took the form of an agreement, which provides the following in respect of restructuring:
 - (a) *"Any employee occupying a post, that is similar to the duties of a newly created post, but is on the same post level, may be absorbed into the new post;*

 - (b) *Any new post created, which is of the post level, higher to an existing post, must first be advertised internally, and if not filled, be advertised externally;*

 - (c) *There will be no retrenchments as a result of restructuring, as no employee will be made redundant;*

 - (d) *All excess employees will remain in their current post levels;*

 - (e) *The agreement supersedes the previous guidelines that provide for retrenchment."*

14. Insofar as the Applicants' allegation that the posts are identical is concerned, the Respondents submit that the new post has a range of duties that is substantially different to the Second Applicant's present position. In his present position his duties are essentially to

manage and control the existing infrastructure within the engineering and maintenance divisions. To this end the Second Applicant was expected to provide technical expertise and support to facilitate the provision of facilities at all institutions in the province of KwaZulu-Natal. The new post however is substantially different in that, over and above providing technical expertise in the existing infrastructure, the incumbent is required to manage the process to develop specialized specifications for proposed development initiatives. The incumbent is also required to develop innovative engineering solutions in identification of deficiencies. It is obvious that the new post is focused on more than just providing technical assistance, but is aimed at development. The incumbent must therefore have engineering / technical experience and expertise in the area of development and the environment of the health industry. It is for this reason that the post was evaluated at a higher level and fell in the category of Senior Management Services (SMS). The Respondents are therefore obliged to advertise the post as required by the regulations and the Second Applicant is welcome to apply for the post.

15. Further, the process is not unfair in that the Second Applicant is given an opportunity to apply for a post on a higher post level like any other person who wishes to apply. There can be no prejudice to the Second Applicant as he will have the full opportunity to express and display his capability, capacity and suitability for the post.
16. The Respondents also submit that as the new post is regarded as a SMS post it is subject to Chapter 1, Part VII, C.2.3. of the Public Service Regulations. This provision is peremptory in that any vacant post in the SMS must be advertised nationally. The Second Applicant is therefore not entitled to be absorbed into the new post.
17. The Respondents are also of the view that in the event that the Second Respondent feels that an injustice has occurred after the selection process, he has remedies available to him. Further, that it may very well be that the Second Applicant is appointed to the new post after due process is followed. As the Second Applicant has not followed this route this application may be premature.

Regulation C.6 of Part V

18. At the heart of this dispute is whether or not Regulation C.6 of Part V should be applied in this case. This will depend on whether or not the Second Applicant's post has indeed been upgraded.
19. Regulation C of Part V of the Public Service Regulations of 2001 is focused on the issue of grading and remuneration. Regulation C envisages circumstances in which an executing authority, following on a job evaluation exercise, decides to increase the salary of a post to a higher salary range in order to accord with the job weight as determined by a job evaluation.
20. In the present matter the Applicants argue that the position of Chief Technical Advisor: Engineering Advisory Services is in effect the same post which the Second Applicant currently occupies (Deputy Manager: Engineering Services). As far as the Applicants are concerned the Second Applicant's post has merely been renamed and the level increased from 12 to 13. On this basis the argument is that the Second Applicant's post has merely been upgraded and as such the provisions of Chapter 1, Part V, C.6 should apply.
21. The Respondents however dispute that the Second Applicant's post has been upgraded but rather argue that the post of Chief Technical Advisor: Engineering Advisory Services is a newly created post. The Respondents argue that the new post is a substantive post, which, although similar in some respects to the duties of the Second Applicant's present post has a managerial component, related to development, attached to it. In other words the new post requires a higher level of managerial skill in the area of development. This is not a requirement in the Second Applicant's present position. The establishment of the new post was not an arbitrary decision and has been subjected to a rigorous evaluation process.
22. In support of their position that the old post has not simply been renamed the Respondents indicate in their affidavits that the new post was created as a result of a rigorous evaluation process. Qualified job analysts were required to evaluate the proposed posts and attach appropriate weight levels to such posts. These analysts are experts and the recommendations are not arbitrary in nature.
23. The Respondents further submit that the new post is described as a SMS post and as such is subject to the provisions of the Public Service Regulations Chapter 1, Part VII, C.2.3. The Answering Affidavit filed on behalf of the Respondents does not provide any detail which assists the court in understanding the circumstances in which this position was upgraded or newly created as the case may be. While there are references to restructuring and certain respects in which the new post differs from the old post, there is no explanation as to the context in which the new position was created. Was the position created along with other

positions as part of a restructuring? When was the decision taken to create the new position? What were the reasons for the need to create the new position? Such information would have assisted the court in determining whether or not this is in fact a newly created post on the Respondent's establishment as opposed to an upgraded one. If this conclusion could be reached then it may have been possible for the Respondents to argue that the provisions of Chapter 1, Part V, C.6 do not apply in this instance. In respect of the Founding Affidavit of the Second Applicant, the Respondents have simply not pleaded to any of the allegations contained in that affidavit leaving his version undisputed.

24. Based on the papers before me it therefore appears that the Second Applicant's post was in fact upgraded to that of Chief Technical Advisor: Engineering Advisory Service. This is however not the end of the matter in the sense that the Second Applicant can't merely lay claim to the post as requested in the Notice of Motion.
25. In the case of *South African Police Service v Public Servants Association* 2007 3 SA 521 CC the Constitutional Court, in dealing with the equivalent provisions under the SAPS regulations to that contained in Chapter 1, Part V, C.6, held that the Police Commissioner has a discretion to either advertise the post or to retain the incumbent in the post. This discretion is, however, qualified in the sense that the executing authority must exercise the discretion in a manner which does not place an incumbent who is performing satisfactorily in jeopardy of losing his or her job in the public service simply because his or her post has been upgraded. The executing authority in this case will therefore have to exercise his or her discretion as to whether or not to advertise the position or to retain the Second Applicant in the post.
26. I do not agree with the Respondent's argument that the post must be advertised because it is a SMS position. Chapter 1, Part VII, C.2.3 states that "*any vacant post in the SMS shall be advertised nationwide.*" The fact that a post after being upgraded results in that post now becoming a post on the SMS cannot mean that the executing authority now no longer needs to decide between advertising the post and retaining the incumbent and may simply proceed to advertise the position. Chapter 1, Part V, C.6 applies to all upgraded posts in order to protect the incumbents of such posts against possibly losing their employment. It would be arbitrary to exclude posts at levels 13 and above on this basis and there is nothing in the regulation which supports such an interpretation. To interpret the regulation on this basis would exclude SMS employees from protection against job losses as a result of their posts having been upgraded which would be contrary to the decision of the Constitutional Court in the *SAPS* case.
27. In the circumstances, I make the following order:

27.1. The Respondents are called upon to show cause, if any, before this Court, on a date to be determined by the Registrar, why an order should not be made in the following terms:

- (a) That the decision to advertise the post of Chief Technical Advisor: Engineering Advisory Service in Respondents Infrastructure Development Component is set aside;
- (b) That the Respondents are ordered to act in terms of Chapter 1, Part V, C.6 of the Public Service Regulations by either advertising the post of Chief Technical Advisor: Engineering Advisory Service or by retaining the incumbent in the post;
- (c) The Respondents are to pay Applicants' costs of this application.

28. Pending the final determination of the rule *nisi*, Respondents are:

- 28.1. Restrained and interdicted from continuing with the advertising, selection, and appointment process in respect of the post of Chief Technical Advisor: Engineering Advisory Services;
- 28.2. Restrained and interdicted from retrenching Second Applicant;
- 28.3. Restrained and interdicted from removing Second Applicant from his presently held post.

.....

Conradie AJ

Date of hearing	1 December 2009
Appearance for Applicants	P J Blomkamp instructed by Llewellyn Cain Attorneys
Appearance for Respondents	N G Winfred instructed by the State Attorney

Date of judgment

5 February 2010