



**REPUBLIC OF SOUTH AFRICA**

Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Case no: D1170/11

In the matter between:

**HOSPERSA**

**FIRST APPLICANT**

**M.PILLAY**

**SECOND APPLICANT**

and

**THE MEMBER OF THE EXECUTIVE COUNCIL**

**RESPONSIBLE FOR HEALTH: KZN**

**FIRST RESPONDENT**

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT**

**SECTORAL BARGAINING COUNCIL**

**SECOND RESPONDENT**

**G.GERTENBACH N.O**

**THIRD RESPONDENT**

**Heard:** 2 June 2015

**Delivered:** 3 June 2015

**Summary:** Review- Jurisdictional rulings- unfair labour practice

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**JUDGMENT**

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WHITCHER J

Introduction

- [1] The Applicants ask for an order reviewing and setting aside the ruling of the Third Respondent in which the Third Respondent ruled that the Second Respondent lacked jurisdiction to deal with the referred dispute. They further ask for substitution for such ruling an award declaring the First Respondent committed an unfair labour practice in demoting the Second Applicant and an award directing the First Respondent to pay to the Second Applicant an amount of R41 223.25, being the amount of the additional income the Second Respondent would have received, but for the unfair withdrawal of his appointment to the post of Senior Systems Management Officer which unfair withdrawal occurred on 4 February 2008 and an order that such amount (together with interest thereon at 15,5% from the date of this order until date of payment) is to be paid to the Second Applicant within 30 days of this order.
- [2] The Second Applicant initially held the post of Finance and Systems Manager at the Mahatma Ghandi Hospital (a Level 7 post). In 2007 the Second Applicant applied for the post of Senior Systems Management Officer (a level 8 post). The Second Applicant was shortlisted and interviewed with other candidates. The Second Applicant was informed in writing by Dr WL Ndlovu, the Hospital Manager, on 27 December 2007 that he had been appointed to the post.
- [3] The Applicants contend that at this stage the Hospital Manager was also the person to whom the MEC for Health, KwaZulu-Natal had delegated the authority to make appointments in terms of the regulations governing the Public Service. There is no evidence on record which disproves this contention. The Hospital Manager, acting as the executing authority responsible for appointments, duly appointed the Second Applicant to the post and the Second Applicant took up the post. No disputes or grievances were lodged by the other candidates or any union against the appointment.

- [4] One Dr Persad succeeded Dr Ndlovu as the Hospital Manager. On 4 February 2008 Dr Persad informed the Second Applicant in writing that the letter of appointment “was erroneously issued” and that it was withdrawn with immediate effect from 1 January 2008.
- [5] The Second Applicant lodged a grievance but this was not satisfactorily dealt with. The Applicants then referred an unfair labour practice dispute concerning the demotion of the Second Respondent based on the grounds that Dr Persad (i) furnished no proper reasons for his decision to withdraw the post. The bald statement “was erroneously issued” did not constitute clear and proper reasons; (ii) provided no proof in legislation or relevant policy or collective agreement that he had authority to withdraw the appointment; and (iii) made a unilateral decision to withdraw the appointment without first consulting the Second Applicant or giving him an opportunity to make representations.
- [6] The parties at the arbitration filed affidavits containing the evidence each wished to adduce and closing argument.
- [7] On 10 November 2011 the Third Respondent issued a ruling that he lacked jurisdiction to determine the dispute. The crux of the Third Respondent's reasoning that led him to conclude that he lacked jurisdiction is contained in paragraph 10 of his Ruling. It reads:
- “I am of the view that the lawfulness or not of the applicant's appointment needs to be determined before fairness or legality of any of the other issues and/or actions and it can only be determined by way of the interpretation and analysis of the Regulation and the RSSP. In this regard I need to establish whether I have the required jurisdiction to determine the said lawfulness of the applicant's appointment. The jurisdiction of Commissioners to adjudicate disputes is primarily derived from the LRA, and in respect of promotional disputes, our jurisdiction is limited to the determination of alleged unfair labour practices in terms of the aforesaid section 186 (2) (a) of the LRA. Scrutiny and due consideration of this section leads me to conclude that the question of the lawfulness of the applicant's appointment does not fall within the scope of this section and I find that I do not have the required jurisdiction

to interpret and analyse the Regulation and the RSSP. This finding in turn leads me to conclude that there is no further need for me to determine any other aforesaid issues in dispute between the parties, for it is only once a decision has been made on whether or not the Applicant's appointment was lawful or not, that one can decide whether the withdrawal of the appointment constituted any unfair conduct by the respondent. The Labour Court is in my view the appropriate forum where this dispute needs to be heard and decided".

- [8] The reference in this passage to "RSSP" is a reference to the employer's Recruitment and Selection Policy, and the reference to "the Regulations" is a reference to the Regulation D7 in Part VII of the Public Service Regulations.
- [9] The review test as set out in *Sidumo* does not apply to the review of a jurisdictional ruling. In such a review the question is not whether the finding of the arbitrator was justifiable, rational or reasonable. The issue is simply whether objectively speaking, the facts which could give the forum jurisdiction to entertain the dispute existed.
- [10] I accept the Applicants' contention's that this reasoning is incorrect because in the arbitration there were in existence objective facts giving the Council jurisdiction to entertain the dispute. In the arbitration the Applicant pleaded that the Department's conduct constituted an unfair labour practice in relation to demotion. This type of complaint falls within the jurisdiction of the Second Respondent. The mere fact that provisions of the Public Service Regulation or the RSSP may have been relevant to the dispute and had to be considered (and/or interpreted) in determining the dispute did not render the dispute one concerning "the interpretation of a provision of the Public Service Regulations or the RSSP". It remained an unfair labour practice dispute in relation to a demotion/promotion. The Third Respondent accordingly had jurisdiction to deal with that.
- [11] The issue before the Third Respondent was whether the First Respondent had acted fairly in demoting the Second Applicant.

- [12] The First Respondent's case at the arbitration was based solely on the contention that the appointment of the Second Applicant to the post was unlawful because Dr Ndlovu did not choose the person recommended by the Selection Committee. They contended that in terms of the employer's Recruitment Strategy and Selection Policy, if Dr Ndlovu did not support the recommendations of the Selection Committee she was obliged to request the Selection Committee to recommend another candidate instead of making her own appointment from the list of candidates. On the face of things this procedure seems appropriate and would obviate abuse of the process. However, at the arbitration, the Applicant referred the arbitrator to regulations D6 and D7 of the Public Service Regulations which showed that the executing authority did not need to send the matter back to the selection committee but had the authority to make the appointment, as long as she gave reasons for her decision and had applied her mind to all the relevant requirements of the post when making the appointment. The Applicant noted that the First Respondent provided no legislation or competent document which established that this internal policy overrode the regulations.
- [13] The Second Applicant was formally appointed and already performing in the post and being remunerated accordingly when the post was suddenly withdrawn without warning. There was no suggestion that the Second Applicant was complicit in any irregular conduct in this process. In these circumstances, fairness dictates that such appointed persons should be entitled to rely on their appointment being valid until the act in question is found to be unlawful by a competent court or body acting in terms of a valid, clear and known policy and in terms of a fair procedure. This results in certainty and avoids a situation where decision makers can chop and change their minds resulting in affected parties never knowing where they stand or when a decision will be reversed by some official who made it.
- [14] The manner in which the First Respondent withdrew the appointment was clearly unfair. The First Respondent failed at the arbitration proceedings to establish that the new Hospital Manager had the authority

to unilaterally withdraw the appointment. There was no evidence that he had acted in terms of a withdrawal process provided for in specified legislation, regulations or a collective agreement. Nothing contained in the Public Service Regulations or even the policies referred to by the Department vests power in any official, let alone the acting Hospital Manager, to reverse an appointment, as the Acting Hospital Manager purported to do so on 4 February 2008. If the Department had no regulations or valid collective agreements permitting such action, it was open to the Department to have approached a competent court in order to seek to obtain a valid and binding order of nullity in relation to the Second Applicant's appointment.<sup>1</sup>

- [15] Fairness, at its basic level, entitled the Second Applicant to procedural fairness. However in this matter, the decision to withdraw the appointment was taken without consulting or giving the Second Applicant an opportunity to make any representations prior to a final decision being made. In this regard the conduct of the First Respondent was procedurally unfair. The First Respondent also failed to provide the Second Applicant with reasons for the withdrawal. As contended by the Applicants, the statement "erroneously issued" does not constitute proper reasons. The provision of proper reasons is central to the affected person being able to make meaningful representations when on called to do so.
- [16] The evidence of the Second Applicant at the arbitration was that the unfairness was exacerbated by the fact that, as a consequence of the First Respondent's conduct, he suffered depression and loss of standing in the eyes of her colleagues and was forced to "repay" to the Department remuneration paid to him after his salary level was increased due to his appointment. These factual allegations were not disputed by the First Respondent at the arbitration.

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<sup>1</sup> See: *MEC for Finance, KwaZulu-Natal and Another v Darkin N.O. and Another* (2008) 6 BLLR 540 (LAC).

[17] In all these circumstances there was evidence before the Third Respondent that the First Respondent committed an unfair labour practice relating to the demotion of the Second Applicant.

[18] Order

The ruling of the Third Respondent dated 19 November 2011 under case number PSHS 47/08-09 is reviewed and set aside and substituted with an award that:

- (i) The Second Respondent had jurisdiction to determine the unfair labour practice dispute referred to the Council by the Applicants.
- (ii) The First Respondent committed an unfair labour practice.
- (iii) The First Respondent is directed to pay to the Second Applicant an amount of R41 223.25, being the amount of the additional income the Second Respondent would have received, but for the unfair withdrawal of his appointment to the post of Senior Systems Management Officer which unfair withdrawal occurred on 4 February 2008. Such amount (together with interest thereon at 15,5% from the date of this order until date of payment) is to be paid to the Second Applicant within 30 days of this order.

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B M Witcher

Judge of the Labour Court in South Africa

APPEARANCES

FOR THE APPLICANTS:

Adv.P.J Blomkamp instructed by  
Llewellyn Cain Attorneys

FOR THE FIRST RESPONDENT:

Adv. S Giba instructed by State  
Attorney, Durban.