REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA18/12

In the matter between:

THE MINISTER FOR PUBLIC SERVICE

AND ADMINISTRATION **First Appellant**

THE DIRECTOR-GENERAL OF

PALAMA NO **Second Appellant**

and

GAYLE SHERYL KAYLOR **Respondent**

Heard: **07 May 2013**

Delivered: **11 June 2013**

Summary: Unilateral change of conditions of employment- Employer unilaterally placing employee in new post- not permissible for employer to place an employee in a new post without any meaningful consultation.

Authority to create a new post in terms of the Public Service Act- necessary delegation needed by employer to create a new post- delegation lies with the executive authority, the Minister responsible for the particular department. No proof that the Minister has delegated to employer any power to create new post- employer exceeding his powers in creating the new post without the necessary delegation of powers.

Appeal dismissed with costs - Labour Court decision set aside and substituted- appointment of respondent to the position of Chief Director: Quality Assurance reviewed and set aside. Appellants ordered to engage in meaningful consultation within 90 days of the judgment with the respondent.

Coram: Tlaletsi ADJP, Davis JA and Coppin AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against a judgment of Steenkamp J in the Labour Court, in terms of which he reviewed and set aside the respondent's appointment to the position of Chief Director: Quality Assurance, in the Public Administration Leadership and Management Academy ('PALAMA'). The appointment had been made by second appellant on 8 July 2011 with respect from 1 April 2011.

[2] It is common cause that, prior to this appointment, respondent had been employed by PALAMA in the position of Chief Director: Business Development with effect from 1 July 2009. The respondent worked from Cape Town. The appointment from 8 July 2011 was to take up a post in Pretoria, the relevance of which will become apparent after an examination of the key facts relating to the dispute.

The factual matrix

[3] Many of the facts in the dispute are common cause and consequently can be set out briefly. Respondent applied for two Chief Director positions which were advertised by PALAMA during February 2009. The advertisements for these

positions indicated that, while it was envisaged that 'most' appointees would work in the Pretoria head office, appointments were also considered for Cape Town, Durban and Johannesburg. Applicants, who were only available to be appointed in any or one of these three locations, had to indicate accordingly.

[4] During the employment interviews, respondent indicated to the selection panel that, as a result of personal circumstances, she could only be based in Cape Town and relocation to Pretoria was not an option for her. She was appointed to the position of Chief Director: Business Development Provincial and Local Government with effect from 1 July 2009. In terms of her employment contract she was to serve 'the employer at such place as may from time to time be directed by the employer or any other officer duly authorized thereto in this respect'.

[5] On 12 November 2010, respondent received a directive from the second appellant instructing her to relocate to the head office of PALAMA in Pretoria. She made certain representations to second appellant in relation to this decision. For example, in a letter of 23 November 2010, she wrote to second appellant:

> 'I believe that your decision to direct me to relocate is unfortunately not reasonable nor is it arrived at in a procedurally fair manner. Aside from the two meetings in which 'relocation' was raised, there has been no proper consultation with me so as to allow me an opportunity to make any meaningful representation to you on these very important terms and conditions of my employment at PALAMA.'

[6] Notwithstanding these representations, she received another instruction from the second appellant on 14 January 2011 to relocate to Pretoria, failing which she would be disciplined for insubordination. Further representations to the second appellant followed, in which respondent requested that a proper consultation process be initiated in relation to the relocation directive. In this letter, she reiterated her view that the decision to relocate her was unreasonable and that there had been unilateral change in the condition upon which she had accepted

employment at PALAMA. Notwithstanding this representation, a further instruction was received from second appellant on 28 January 2011 to relocate to Pretoria in four days upon receipt thereof, failing which she would face disciplinary proceedings.

[7] On 1 February 2011, she lodged a formal grievance in relation to the decision to relocate her with first appellant, in which she complained that the decision to relocate her had been made without due and proper consultation. On 30 March 2011, before any decision had been taken by first appellant in respect of this grievance, second appellant announced a new organisational structure for PALAMA with effect from 1 April 2011. In terms of this new structure, respondent's existing position was abolished and she was appointed to the new position of Chief Director: Quality Assurance based in Pretoria with effect from 1 April 2011.

[8] Respondent avers, in uncontested evidence that she found out about this new position by way of a conversation with a junior staff member who attended the meeting in Pretoria where the general restructuring and her placement into the new position had been announced on 30 March 2011.

[9] In his answering affidavit second appellant provides the following explanation for the appointment to the new post:

> 'When I did the matching and placement applicant was found to be the best candidate for the position of Chief Directorate: Quality Assurance. But the fact is that consultative meetings were held with employees where the changes were discussed. People were informed that they could be affected with this by different placements. The consultative meetings were open to everyone. If the applicant had attended those meetings she would know about this.'

[10] On 18 April 2011, respondent received a response to her grievance in relation to the initial decision to relocate her. In terms thereof, first appellant wrote that he had instructed second appellant to consult with respondent and to consider her personal circumstances.

[11] On 25 and 30 May 2011, second appellant met and consulted with the respondent in relation to the relocation directive and the restructuring of PALAMA which had already taken effect on 1 April 2011. Following these meetings, respondent made further representations to the second appellant in relation to the relocation directive and directed certain inquiries to the Head of Corporate Services, in relation to the restructuring process, enquiries which were never responded to by the Head of Corporate Services.

[12] Dissatisfied with this impasse, respondent wrote to first appellant requesting his intervention on 4 August 2011. When by 16 August 2011 she had received no response, she lodged a grievance with the General Public Service Sectorial Bargaining Council ('GPSSB') complaining about the relocation directive as well as the directive placing her in a new post which she contested amounted to a unilateral change of terms and conditions of her employment.

[13] On 16 September 2011, first appellant confirmed that he was satisfied with the process of consultation in relation to the relocation issue and, further, that he was in agreement with second appellant's directive that respondent should relocate to Pretoria. On 30 September 2011 second appellant directed the respondent to relocate to Pretoria on 1 November 2011.

[14] On 18 October 2011 the GPSSBC advised that matters concerning an alleged unilateral change to terms and conditions of employment could not be arbitrated by it and that it would therefore be 'closing the case'.

[15] Pursuant thereto, on 19 October 2011, respondent obtained an urgent interim interdict in the Labour Court in which the court ordered a stay of the implementation of the relocation and placement directives, pending the determination of the application for review of that relocation directive and her appointment into the position as Chief Director: Quality Assurance.

The decision of the court *a quo*

[16] By the time the respondent sought final relief by way of a review in terms of s 158 (1)(h) of the Labour Relations Act 66 of 1995 ('LRA') from the Labour Court, she no longer sought any order from the court in relation to the first directive, in terms of which she had initially been ordered to relocate to Pretoria. That directive, and the relief which was sought as a result thereof, had effectively been rendered moot by second appellant's second directive that she take up the position of Chief Director: Quality Assurance in Pretoria. In short, the court *a quo* was solely concerned with whether this placement directive should be reviewed and set aside.

[17] In interpreting s 158(1)(h) of the LRA, Steenkamp J found that the review jurisdiction within this section was based on the doctrine of a legality which implied that public officials could only exercise their powers and perform their functions as is permissible and conferred upon them by law. Furthermore, any exercise of a power conferred by law had to be exercised in a manner which was not arbitrary, unreasonable, irrational and which was not procedurally unfair.

[18] Applying these concepts to the present dispute, the learned judge found that the second appellant had not consulted the respondent before he issued the directive which appointed her to the new position of Chief Director: Quality Assurance at the PALAMA head office in Pretoria.

[19] In addition Steenkamp J found that in terms of s 9 of the Public Service Act of 1994, the 'executive authority' was the authority, which was granted the power to appoint any person in accordance with the Act, in such a manner and in such conditions that may be prescribed. Executive authority was defined in this case as first appellant. While s 42A(1) (a) of the Public Service Act provided that the first appellant could delegate to the second appellant any power conferred on the first appellant by the Act, appellants had provided no proof of such delegation. Accordingly, Steenkamp J found that the placement directive had not been

lawfully issued and therefore stood to be set aside in terms of s 158(1)(h) of the LRA.

[20] For these reasons, he ordered that the respondent's appointment to the position of Chief Director: Quality Assurance should be reviewed and set aside and that the second appellant should be ordered to engage in a full consultation process with the appellant within one month of the judgment 'with regard to suitable alternative positions either in PALAMA or in another department in Cape Town'. If a suitable alternative position was available in another department, Steenkamp J ordered second appellant to do all things necessary to engage with the respondent, the Minister and/or the head of the relevant department with regard to the transfer of the respondent from that department. In the event that no suitable alternative position was available, second appellant was directed to engage in a consultation process in accordance with section 189 of the LRA.

The appeal

[21] In the heads of argument prepared by Mr Tokota and Mr Gwala, on behalf of the appellants, the submission was made that, as the cause of action by the respondent was based on an alleged breach of contract in that the second appellant had allegedly breached the terms and conditions of the contract in a unilateral fashion, his conduct had not amounted to administrative action and therefore was not subject to judicial review. Further, as respondent had relied on contract and eschewed any reliance on the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), her remedy did not rely in a review of the decision of the second appellant. When the matter was argued before this Court, Mr Dukada, who appeared together with Mr Gwala on behalf of first and second appellants, did not persist with this line of attack.

[22] This was a decision wisely made. Section 158(1)(h) empowers the Labour Court to review any decision taken or any act performed by the State in its capacity as an employer on such grounds as are permissible in law. The respondent's case was that a decision had been taken which was not permissible in law for two

reasons: there had been no proper consultation and secondly the post which she had been offered had not been properly constituted, in that it was created in breach of the relevant provisions of the Public Service Act.

[23] The case thus had nothing to do with PAJA. It fell squarely within the scope of an employment dispute. See *Gcaba v Minister for Safety and Security* 2010 (1) SA 2038 (CC) at para 68. See also the instructive article of Halton Cheadle "*Deconstructing Chirwa v Transnet*" 2009 (30) ILJ 741, where the learned author emphasizes the important distinction between the right to administrative action in terms of s 33 of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') and labour relations dealt with in terms of s 23 of the Constitution and given express content by the LRA.

[24] It is not permissible in terms of the LRA for an employer, such as first and second appellant, to decide to place an employee in a new post without any meaningful consultation. See *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Service and others* (2008) 29 ILJ 2708 (LAC) at para 61 and 69, where Zondo JP (as he then was) said: 'A decision to transfer an employee that is made before the employee can be heard is generally speaking unlawful and invalid in law.'

[25] An examination of respondent's answering affidavit shows devastatingly that no proper consultation took place between the appellants and respondent prior to the appointment of the new post on 1 April 2011. All that was said is that two meetings took place on 25 and 30 May 2011. At those meetings second appellant avers:

> 'I pertinently pointed out the operational needs and the strategic imperatives of the Academy which dictated that she be stationed at Pretoria for her to effectively, efficiently and economically contribute towards the achievement of the strategic as well as the financial objects of the Academy.'

Second appellant then refers to the second meeting in which the respondent presented two options which were designed to ensure that she remained in Cape

Town. No mention was made in these paragraphs or anywhere else in second appellant's answering affidavit as to the new post which had been created and as to any meaningful engagement which had taken place between second appellant and respondent, pursuant to the decision to abolish the position of Chief Director: Business Development and appoint the respondent to the newly created post of Chief Director: Quality Assurance in Pretoria.

[26] In short, there was no consultation which was sufficient to justify the conclusion that the appellants had acted fairly and in a manner which is permissible in law, which term incorporates the right to procedural fairness and the concomitant right to be consulted in such circumstances. Given that no consultation took place regarding respondent's ability to function in the new post, or where it was to be located, this case can hardly fall within the limited exception referred to by Zondo JP in *Nxele, supra* at para 59.

[27] The second argument concerned the question of the establishment of the post of Chief Director: Quality Assurance which had been found to have been created unlawfully and in an invalid fashion by the court *a quo*.

[28] The power to appoint public servants to departments in the public service and transfer employees from one post or position to another post or position in the same or any other department is a power which, in terms of the Public Service Act, resides with the 'executive authority', which as was already noted, means the Minister responsible for the particular department. In terms of s 42A(1) (a) of the Public Service Act, first appellant may delegate to second appellant any powers which had conferred upon him by the Act. In terms of s 42A(7), any delegation of such a power shall be in writing.

[29] In the founding affidavit, respondent challenged second appellant's authority to create the new post of Chief Director: Quality Assurance. In response to this challenge, second appellant alleged that he was 'responsible' for the efficient management and administration of PALAMA, which included the effective utilization and training of staff. No proof in writing was provided by second

respondent as to how the authority to create new post had been delegated to him by first appellant.

[30] To the extent that second appellant claimed that his powers were derived from the terms of the delegation of authority, which he annexed to his answering affidavit, it was clear that this delegation had been made by the then Minister of Public Service and Administration in 2007, in respect of PALAMA's predecessor, the South African Management Development Institute (SAMDI), and did not constitute proof of a delegation of authority to the second appellant to make appointments to PALAMA.

[31] In the light thereof, I find, on both grounds, that the court *a quo* was correct in finding, pursuant to s 158(1)(h), that the placement directive fell to be reviewed and set aside in terms of this section. There were no prior consultation with the respondent and further second appellant had exceeded his powers in creating the new post, if he acted on the basis of the delegations that he relied upon in his answering papers.

Relief

[32] The further question that arose relates to the relief which should have been ordered. In my view, the court *a quo* overreached the scope of appropriate relief when it granted an order for the second appellant to engage in a consultation process with the applicant for a suitable alternative position in Cape Town, either in its department or another department. No evidence was provided to the court, which would have shown how second appellant could comply with such a specific order. Furthermore, the purport of this order served to circumscribe the essential purpose of the consultation process, which was to ensure that negotiations took place between the parties which could resolve the dispute. If second appellant was constrained by an order of court to create a post in Cape Town which was beyond his power, such as in another department government or, arguably, within the department but within the Cape Town area where no such post could be

created, this would render significant a component of the consultation process to be meaningless.

[33] For these reasons therefore, the order of the court *a quo* is set aside and replaced with the following order:

1. The appeal is dismissed with costs.

2. The order of the court *a quo* is set aside and replaced with the following order.

   2.1 The applicants' appointment to the position of Chief Director: Quality Assurance is reviewed and set aside.

   2.2 The second respondent is ordered to engage in the full consultation process with the applicant within 90 days of this judgment with regard to a suitable position in PALAMA or in another department.

   2.3 The respondents are ordered to pay the applicant's cost.

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Davis JA

I agree

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Tlaletsi ADJP

I agree

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Coppin AJA

APPEARANCES:

FOR THE APPELLANTS:	BR Tokota SC and Adv M Gwala
	Instructed by the State Attorneys
FOR THE RESPONDENT:	Adv ML Sher
	Instructed by Bowman Gilfillan Attoneys