



Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D321/12 and D322/12

In the matter between:

DEENADAYALAN MOODLEY	First Applicant
SITHEMBISO OLIPHANT NDLOVU	Second Applicant
and	
MINISTER OF POLICE	First Respondent
ACTING NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
PROVINCIAL COMMISSIONER: KWAZULU-NATAL SOUTH AFRICAN POLICE SERVICE	Third Respondent
DIVISIONAL COMMISSIONER: CRIME INTELLIGENCE: SOUTH AFRICAN POLICE SERVICE	Fourth Respondent

Heard: 2 November 2012

Delivered: 31 January 2014

Summary: Application to set aside transfer. Collective agreement regulates procedure for transfer. Employer not complying. Application granted.

JUDGMENT

GUSH J

- [1] The applicants in these matters each filed an application seeking an order reviewing and setting aside the decision of the second and or third and or fourth respondent to transfer the applicants, in the case of:
- (a) Moodley: case number D 321/12 from his post of provincial head: crime intelligence Kwazulu-Natal to that of cluster commander: Pinetown; and
 - (b) Ndlovu, Case no D 322/12 from his post of section head: crime intelligence, Kwazulu-Natal to that of station commander Inanda.
- [2] The two applicants initially sought an urgent rule *nisi* directing the respondents to show cause why it should not be ordered that the respondents' decision to transfer the applicants be reviewed and set aside. The urgent application was dismissed for lack of urgency.
- [3] Subsequently, it was agreed and ordered by this Court that the two applications were to be consolidated and that the pleadings and notices were to be re-indexed and paginated for this purpose. Neither party filed any further affidavits. The application was duly enrolled to be heard on the opposed roll.
- [4] When the matter was argued, the relief the applicants sought was for the second and/or third and/or fourth respondents' decision to transfer the applicants from their posts of provincial head: crime intelligence Kwazulu-Natal to that of cluster commander: Pinetown and section head: crime intelligence, Kwazulu-Natal to that of station commander Inanda, respectively,

to be reviewed and set aside (whether allegedly pending the final determination of such transfer, or on a permanent basis).(sic).

- [5] The background and circumstances that led to this application are set out below.
- [6] On 7 February 2012, the fourth respondent issued the first applicant with a "NOTICE OF INTENDED SUSPENSION IN TERMS OF REGULATION 13 (1) OF THE SOUTH AFRICAN POLICE SERVICE DISCIPLINE REGULATIONS, 2006".
- [7] This notice alleged that the first applicant had contravened regulation 20 (a) of the Police Service Discipline Regulations and invited the first applicant to submit representations regarding his possible suspension. The first applicant's attorney responded to this notice by firstly indicating his intention to make representations on behalf the applicant opposing the suspension and secondly setting out to all intents and purposes a request for further particulars.
- [8] The fourth respondent replied to the effect that he was of the opinion that the applicant had sufficient information to make representations and called upon the applicant to make such representations by Thursday, 23 February 2012. He complied with this request and made representations to which he attached affidavits by colleagues, who purportedly were witnesses to the alleged misconduct that formed the subject matter of the proposed suspension, denying the allegations of misconduct.
- [9] On 2 March 2012, the fourth respondent, "based on the submissions ... And the affidavits" decided not to suspend the first applicant.
- [10] On 5 March 2012, however the second respondent addressed a letter to the first applicant headed "Lateral Transfer". In this letter, the second respondent advised the first applicant as follows:

1. In the interests of the service delivery needs of the South African police service, your lateral transfer to Cluster Commander: Pinetown **is under consideration**.
2. You are instructed to assume duty in the new post immediately, whereafter you may submit a representation within 21 days, **stating reasons why this transfer should not be made final**.
(my emphasis)¹

[11] On 9 March 2012, the first applicant's attorneys responded to this notice. In this letter, it is recorded firstly that the first applicant did not consent to the transfer; and secondly challenged the instruction to assume duty immediately on the grounds that such instruction was unlawful, constituted an unfair Labour practice and was in breach of the policies and procedures of the South African Police Services. In addition, the first applicant's attorney as he had done before set out a list of "further particulars" he required in order to make further representations. It is common cause that the first applicant received no written response to his "representations".²

[12] The first applicant avers that he has been permanently transferred and that he has not been consulted regarding his transfer, nor have the respondents complied with policies and procedures relating to transfers.

[13] In his founding affidavit, the first applicant avers that the court had jurisdiction to hear the matter in terms of section 158(1)(8) of the Labour Relations Act 66 of 1995 and that the grounds upon which he alleges that the decision to transfer him is reviewable are that the second and further respondents have failed to comply with the provisions of the South African Police Services Act 68 of 1995 read with the South African Police Service Employment Regulations 2008 and the South African Police Service Discipline Regulations 2006 and a collective agreement governing the transfer of employees of the South African Police services.

¹ founding affidavit annexure L page 70.

² See founding affidavit paragraph 33 and the answering affidavit paragraph 32. Pages 27 and 107 respectively.

[14] The first applicant has referred to a litany of sections and regulations from the aforementioned Acts and regulations with which he avers the respondents have not complied with. I am not persuaded that these sections are relevant to the applicants' application and I do not find it necessary to consider in any detail the extent to which the respondents failed to comply with the list of provisions of the South African Police Services Act 68 of 1995 read with the South African Police Service Employment Regulations 2008 and the South African Police Service Discipline Regulations 2006.

[15] However the situation pertaining to the the collective agreement is a different matter. The first applicant relies on the second respondent's failure to comply with the provisions of a collective agreement entered concluded under the auspices of the Safety and Security Sectoral Bargaining Council. This agreement regulates the "Transfer Policy and Procedures" in the South African Police Service.³ This agreement provides, *inter alia*, for the following procedures to be followed by the employer when effecting a transfer:

1. The purpose of this agreement is to create a framework in which to address transfers and service arrangements (hereafter only referred to as transfer) in the South African police service in a reasonable and just manner.
2. In principle every employee can be transferred. In considering a transfer, irrespective of the origin of the request, there are certain considerations that must be taken into account before a final decision is reached. These considerations include the following:
 - 2.1 there must be a valid and sufficient reason to transfer ...
 - 2.2 the interests of the service.
 - 2.3 the interests of the individual employee whose transfer is being considered.
- ...

³ The collective agreement is attached to the first applicant's founding affidavit as Annexure A pages 38 to 51.

- 10 The following procedure will apply in respect of transfers:
- 10.1.3 employee whose transfers being considered must be informed that the transfers being considered, and given reasons for the proposed transfer. He or she must be allowed a reasonable opportunity to make representations concerning the transfer that he or she wishes to do so. ... The final decision must be communicated to the employee concerned within 21 days after his or her representation. ...
- 10.1.4 if the employee makes representations Commissioner responsible for considering the transfer must consider the representations of the site the matter. ...
- 10.1.5 after the representations of the employee have been considered, the employee concerned must be informed in writing that the representations were considered, and outcome must be stated. If the representations were not have been considered, the reasons why the representations are rejected must be sent out in brief.
- 10.1.6 In urgent cases in the interests of the service require that an employee immediately assumes duty at another component –
- 10.1.6.1 the employee may, if he agrees to the transfer provided paragraph 10.1.2 above has been complied with, the instructed to assume duty at the new component immediately on the necessary notices in writing maybe appear and submitted thereafter; or
- 10.1.6.2 the employee must, if he does not consent to the transfer, be allowed an opportunity to advance reasons why he should not be ordered to assume duty at the new component immediately and be informed that the interests of the service require that he was she assumes duty of new component immediately but that he will nevertheless, after the assumption of duty at the new component, still have the opportunity to make representations concerning the placement within 21 days in the final decision concerning his placement will only be taken after the representations have been considered. The final decision must be communicated employee concerned within 21 days after his representations had been received.

[16] It is important to reiterate the sequence of events that led to the first respondent' transfer.

- (a) The first applicant was issued with a notice of intended suspension on 7 February 2012 and invited to make representations.
- (b) The first applicant having requested further information in order to make such representations was advised to submit his representations by Thursday, 23 February 2012.
- (c) The first applicant complied and apparently his representations were successful and the fourth respondent decided not to suspend him.
- (d) Three days later the second respondent advised the first applicant "in the interests of service delivery needs" his lateral transfer was being considered; he was instructed to assume duty in the new post; and he was invited to submit representations stating reasons why this transfer should not be made final. The mere reference to "the interests of service delivery needs" does not constitute sufficient "reasons for the proposed transfer" taking into account the fact that the purpose for giving reasons is obviously to enable the employee to make representations regarding the proposed transfer.
- (e) The first applicant recorded that he did not consent to the transfer. He then set out the general basis upon which he objected to the transfer , and indicated he wished to make representations and understandably requested information in order to do so.
- (f) The respondents did not reply to this communication.
- (g) The second respondent purported, somewhat startlingly in the circumstances, to make the transfer on the grounds that he was entitled to do so in the absence of representations by the first applicant.

[17] It is abundantly clear from the above that the respondents have patently failed to comply with the collective agreement governing transfers in the South African Police Services.

[18] The second applicant's application is to all intents and purposes identical to that of the first applicant. The parties argued the matter as one application and the founding and answering affidavits in each application are virtually identical. Neither the applicants nor the respondents at any time made any distinction between the two applications. Accordingly I do not intend to traverse the affidavits filed and indexed under the heading of case number D321/12.

[19] In response to the applicants' application, the second respondent filed an answering affidavit setting out respondents' opposition thereto.

[20] Before responding in detail to the applicants founding affidavit, the second respondent records the following "factual background". He states, *inter alia*, that it is necessary that the people who are at the helm of the fight against crime should enjoy the confidence of the management of the South African Police Services (SAPS), and that the SAPS will never be able to combat the growing level of criminality if some of its members who are suspected of being involved in criminal activities are not effectively dealt with⁴. Although the second respondent studiously avoids mentioning the applicant the only these paragraphs are only relevant if the deponent to the affidavit is referring to the first applicant.

[21] The second respondent then specifically refers to the first applicant and his transfer as follows:

In the applicant's case, it was indicated in his letter that he was in the interest of service delivery as applicant be transferred to a different position. It may not be possible for me to deal openly with the reasons why it was decided that interest of the SAPS as well as service delivery that the applicant did not continue to occupy the position of Head of Crime Intelligence, KwaZulu-Natal. This is a result of information which, I as the head of SAPS received which clearly demonstrated to me that it was not the interests of SAPS and the members of the public that the applicant should continue in his position. Our

⁴ Answering affidavit paragraphs 17 19 and 20 pages 102/3

failure to deal with certain specific allegations which are raised by the applicant should not be interpreted as an admission of those allegations.⁵

[22] It appears clear from this, although this is specifically denied, by the respondents, that the reason behind the respondents attempted transfer of the first applicant is in some way connected to the alleged misconduct set out in the notice of intended suspension or at least is related to conduct by the first applicant that has led to the suspicion that the first applicant is “suspected of being involved in criminal activities”.⁶

[23] None of these reasons are contained in the notice handed to the first applicant advising him of the proposed intention to transfer him.

[24] The respondents did not take issue with the first applicant’s averment regarding the collective agreement and its applicability to the first applicant.⁷

[25] The second respondent confirms that he had taken the decision to transfer the first applicant and avers variously that the first applicant had not made representations regarding his transfer, denies that there was non-compliance with the collective agreement and suggests that he was not required to comply with the collective agreement.⁸

[26] The essence of the respondents opposition to the applicants’ application is that, firstly, the second respondent was entitled to make a decision to transfer the applicants and/or that he did comply with the requisite procedures; secondly that the court did not have jurisdiction to consider the dispute in question as it involved an unfair labour practice which should have been referred to the Bargaining Council for adjudication; and thirdly that the applicants had not discharged the *onus* of proving their case.

[27] Dealing with these issues in turn:

- (a) The second respondent admits the existence and applicability of the collective agreement relating to the transfer of personnel. There is

⁵ Answering affidavit paragraph 21 page 103.

⁶ Answering affidavit paragraph 19 page 102 read with paragraph 31.2 page 106.

⁷ See founding affidavit paragraphs 11 to 21 pages 17 – 22 and the respondents’ answering affidavit paragraph 29 page 106.

⁸ Answering affidavit paragraph 32 34 41 and 42 page 107 108 and 111.

nothing however contained in the answering affidavit to support the contention that the second respondent had complied with this agreement. There is no doubt that the second respondent is empowered to make such decisions but in doing so, he is required to comply with the terms of the collective agreement;

- (b) It is so that in the papers, the applicants refer to "unfair labour practices". It is not their case however that the dispute falls within the definition of an unfair Labour practice as defined in the Act or that the dispute involves an interpretation of the collective agreement. In either event had this been the applicants' case this Court would not have jurisdiction to entertain the dispute. The applicants simply aver that the second respondent has not complied with the collective agreement and accordingly their contracts of employment.
- (c) The third averment is that the applicants have failed to discharge the *onus*. The facts relating to the circumstances that led to the decision to transfer the applicants as set out by the applicants in their founding affidavits are not denied by the respondents. It is common cause that the collective agreement prescribes a procedure to be followed in effecting a transfer, even should such transfer be required urgently. Apart from the simple averment by the second respondent that he had complied with the procedures prescribed by the collective agreement, the second respondent does not take issue with the sequence of events set out in the applicants founding affidavits.

[28] As far as jurisdiction is concerned, the first applicant expressly relied on the provisions of section 158(1)(h) of the Labour Relations Act and on section 77 of the Basic Conditions of Employment Act 75 of 1997 which provides the basis upon which the court has jurisdiction to consider this application.⁹

[29] The second respondent deals with this averment in his answering affidavit as follows:

'I admit that the court jurisdiction in terms of the provisions of section 158(1) of the Labour relations act to review any decision taken or any act performed

⁹ Founding affidavit paragraph 8.2 page 10.

by the State in its capacity as employer on any ground that are permissible in law.¹⁰

[30] Turning then to the effect of the collective agreement it is so that collective agreements not only specifically bind the parties to such agreements, but that they vary the employee's contract of employment in accordance with the terms thereof. This is provided for in section 23 of the Labour Relations Act.

'(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.'

[31] The respondents in opposing the application seemingly have ignored the effect of the collective agreement governing transfers in the South African Police Services on the applicant's contracts of employment. Reduced to its essential elements the applicants application is simply this: the applicants' contract of employment are, in accordance with the provisions of section 23 of the Labour Relations Act, varied by the incorporation of provisions of the collective agreement governing transfers and that the second respondents decided to transfer them, in breach of the contracts of employment by failing to comply with the procedures set in that collective agreement.

[32] In the circumstances, and for the reasons set out above, I am satisfied firstly that this Court has jurisdiction to consider the matter and secondly that the decision to transfer the first and second applicants by the second respondent is reviewable on the grounds of the second respondent's failure to comply with the provisions of the collective agreement governing the transfer of personnel in the South African Police Service. This however does not preclude the second respondent from effecting the transfer of the first and second applicants if such transfer is undertaken in compliance with the collective agreement.

[33] It was made abundantly clear by the second respondent that neither the third and fourth respondents were in any way connected with the decision to transfer the applicants and that the decision was purely his. Accordingly as regards costs it is appropriate that the award of costs be confined only to the

¹⁰ Answering affidavit paragraph 27 page 105.

second respondent and that the second respondent only pays the costs of the application heard on 2 November 2012.

[34] I grant the following order:

- (a) the first respondent's decision to transfer the first and second applicants from the post of provincial head: crime intelligence Kwazulu-Natal to that of cluster commander: Pinetown; and from the post of section head: crime intelligence, Kwazulu-Natal to that of station commander Inanda, respectively is hereby reviewed and set aside for so long as the second respondent fails to comply with the collective agreement governing the transfer of personnel within the employ of the South African police services;
- (b) the second respondent is ordered to pay the costs of the application heard on 2 November 2012.

D H Gush

Judge

APPEARANCES

FOR THE APPLICANTS: Adv C A Nel

Instructed by Carl van der Merwe Attorneys.

FOR THE FIRST SECOND and THIRD

RESPONDENTS: Adv W Mokhari SC (with him M Zulu)

Instructed by The State Attorney