

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION MTHATHA]**

CASE NO.2448/21

In the matter between:

LWANDILE NYEBEVU

Applicant

And

**KING SABATA DALINDYEBO LOCAL
MUNICIPALITY**

Respondent

JUDGMENT

TOKOTA J

Introduction:

[1] The applicant seeks in substance a declaratory order that he is a Law Enforcement Officer Grade 12 in the respondent's department of Public Safety and for this reason he should be placed in that position. Further he seeks an order declaring that his placement in the department of Community Services as a General Worker is unlawful. The application is opposed.

Factual Background:

[2] The applicant was appointed by the respondent on 18 June 2009 as a General Worker Grade 19 in the Community Services of the respondent.

[3] During November 2012 the applicant completed an undated form and applied for transfer from his section (Community Services) to Public Safety section in order to develop himself. His application was recommended by the Commander Law Enforcement on 12 December 2012. It was recommended that he be transferred to access control posts. According the memorandum dated 10 November 2012 one T N

Tyala either recommended or approved the transfer. The transfer has no particulars of the change of rank and/or status of the applicant.

[4] The applicant alleges that on 13 December 2012 he received communication that he should report for duty as a Law Enforcement Officer grade 12 at the Public Safety division. He avers that he reported in this division on 15 December 2012 and was introduced to the Head of the Public Safety one Mr Hintsa. From that date he commenced performing the duties of a Law Enforcement Officer. These allegations are denied by the respondent and the applicant has neither attached any document nor attached any confirmatory affidavit by either Mr Hintsa or someone else in support of these allegations. He claims that he could not find supporting documents.

[5] The applicant further claims that in January 2013 he was given the official uniform of a Law Enforcement Officer and was taken to various forms of rehearsals. In his opinion this conduct was tantamount to a promotion from the General Worker Grade 19 to the rank of a Law Enforcement Officer Grade 12. The applicant claims that he was deployed to various points within the division as a Law Enforcement Officer. These allegations are challenged by the respondent and the applicant has placed no evidence to substantiate the allegations not even a confirmatory affidavit from this division except his say so.

[6] During April 2016 the applicant launched an application in this court seeking an order compelling the respondent to pay him a salary commensurate with his rank of Law Enforcement Officer and to pay him the benefits accruing therefrom with effect from 15 December 2012. On 2 February 2017 Notununu AJ granted an order by consent in terms of which the applicant was reinstated to the position of a General Worker: Community Services. However, the court ordered the respondent to pay the applicant a salary of a Law Enforcement Officer from 12 December 2012 pursuant to his 'promotion' to that rank and further that the respondent should hold an enquiry to determine the validity of his 'promotion.' It was ordered that the applicant be paid a salary notch of a Law Enforcement Officer until the finalisation of that enquiry. The respondent was further order to compensate the applicant a salary equivalent to 8 months as a Law Enforcement Officer grade 12 in respect of his 'dismissal'.

[7] The court order of 2 February 2017 was obtained consequent to a settlement agreement. The applicant contends that the court order demonstrates that the respondent acknowledged that the applicant was transferred and promoted to Law Enforcement Officer. I cannot agree. The order actually reinstated the applicant to his position in terms of the contract of employment, namely General Worker: Community Services. The decision to promote him was the subject of investigation to enquire into its validity. Furthermore there is no proof of such promotion to the rank of Law Enforcement Officer Grade 12.

[8] Subsequent to the court order of Notununu AJ and on 27 June 2017 the respondent addressed a letter to the applicant reinstating him to the post of a General Worker: Community Services with retrospective effect from 1 November 2015. The letter informed him that he would be paid an acting allowance at the Grade 12 rank from 1 December 2012 to 31 October 2015. Further that the respondent was to hold an enquiry into the validity of the alleged promotion.

[9] The substance of this application is a dispute relating to the promotion of the applicant from the post of General Worker Grade 19 to the post of Law Enforcement Officer Grade 12. The applicant prays that this court should declare his placement in the post of General Worker as unlawful and promote him to the post of Law Enforcement Officer Grade 12. The respondent disputes that the applicant was ever promoted to the rank of Law Enforcement Officer. That being the case the gravamen of the dispute therefore is that of an unfair Labour Practice relating to promotion.

Appointments

[10] The power to appoint the respondent's staff is vested in the Municipal Manager in terms of section 55(1)(e) of Local Government: Municipal Systems Act 32 of 2000 subject to the policy directions of the Municipal Council. Employment of staff is vacancy driven and all appointments and promotions are only made to existing approved vacancies.¹ As a general rule administrative and auxiliary support posts must be advertised internally and externally only in the event there is no

¹ Clause 4.3.1 Human Resources Policies and Procedures

suitable candidate internally.² The selection committee for appointment of posts levels 19 to 15 consists of Head of Department responsible for Human Resources; Head of Department concerned; Head of department of Human Resources and any other Head nominated by Head of Division where applicable and Chairperson of Unions as observers.³ For post Levels 14 to 12 the Committee consists of General Manager: Human Resources; Relevant General Manager in the Department in which the post is located (Chairperson) and any other General Manager nominated by the General Manager responsible for Human Resources or Director Human Resources; Chairperson of Unions or shop stewards nominated by the Chairperson as observers.

Promotions

[11] An employee may only be promoted to a vacant post in the higher grading if he is suitably qualified for that post. The Manager responsible for Human Resources must cause the post to be advertised on the Municipal notice boards, internal newsletter or other electronic means and call for suitably qualified employees to submit applications in the prescribed format. After the closing date the selection committee will interview the candidates accordingly.

[12] The respondent has argued that this court has no jurisdiction to entertain this application. It contends that this is a dispute of unfair Labour Practice as envisaged in section 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA).

[13] Mr *Zono* appearing for the applicant submitted that this is an application based on contract and therefore does not fall under section 186 of the LRA. The problem with this argument is that the respondent denies that the applicant was ever promoted to the post of Law Enforcement Officer. The applicant is unable to say who promoted him and whether the prescripts referred to above were complied with. Mr *Zono* submitted that the denial by the respondent cannot stand in that it has recognised that the applicant had in fact been promoted but only challenges the validity of that promotion. He referred me to the court order of Notununu AJ

² Ibid clause 4.3.2 (a)(i)

³ Ibid clause 4.4

paragraph 3 thereof and paragraph 3 of a letter dated 27 June 2017 and submitted that the contents thereof indicate recognition of the existence of the promotion.

[14] It is expedient to quote the relevant paragraph of the letter dated 27 June 2017: It reads: “*The Municipality will hold an enquiry to determine the validity or otherwise of your alleged promotion from General Worker to Law Enforcement Officer*”.

Paragraph 3 of the court order reads: “*That the respondent shall hold an enquiry to determine the validity or otherwise of the applicant’s promotion from General Worker: Community Services to Law Enforcement Office: Public Safety*”. Mr Zono argued that the wording of these sentences signify an acknowledgement of the existence of the promotion. The only aspect to be investigated was the validity thereof. This argument flies in the face of a denial by the respondent that the applicant was ever promoted. For that matter the order of Notununu AJ reinstated the applicant to the post of General Worker. The applicant consented to that order.

[15] Furthermore the applicant made no attempt to establish that the procedure set out above in terms of the prescripts was followed. As a matter of fact, there is no evidence that the Municipal Manager was ever involved in the so-called promotion. For a declarator of an existing right the applicant must show the jurisdictional facts establishing that right. The mere fact that he was promised a promotion by certain officials who have no authority to promote him does not help the applicant. I am satisfied that this is a dispute of unfair labour practice relating to promotion as envisaged in section 186(2)(a) of the LRA.

[16] The Constitutional Court⁴ has held that where the true nature of a dispute is one that concerns the breach of an obligation established by the LRA, a remedy must be sought in terms of that Act and in accordance with the dispute resolution mechanisms established by the LRA. At paragraph [137] of the judgment, the court said the following:

⁴ Steenkamp and others v Edcon Limited [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (30 April 2019) [1]

[137] The second basis for my conclusion is that the applicant's appeal should be dismissed is a principle that, for convenience, I call 'LRA remedy for an LRA breach'. The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.

[17] The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right. The right not to be subjected to unfair labour practice is located in section 186(2) of the LRA.

[18] It is well-established that jurisdiction is to be determined from the pleadings. The parties usually characterise the nature of the dispute and the court is bound by that. However, in *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC) para. 68 It has been held that *"[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the commissioner's jurisdiction and to require argument thereon."*⁵

[19] In *casu* and before the hearing date of this matter I issued a directive seeking, *inter alia*, additional submissions addressing me as to "(d) *Whether the applicant*

⁵*CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC); (2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461; [2008] ZACC 15) para. 68. There is a plethora of decisions that approved this approach including cases from the Constitutional court.

relies on the contract for his cause of action, if so, which contract and the relevant clause in the contract must be identified;

(e) Whether the cause of action in this application is not covered by unfair labour practice relating to promotion, if not, what is precisely the cause of action?

Mr Zono maintained that this matter is concerned with a contract of employment. The fallacy of this argument is that the contract attached to the founding affidavit is that of a General Worker: Community Services. Furthermore, there is a court order directing that the applicant be reinstated to the post of a General Worker. The less is said about the court order the better because it also contains an order of compensation for 8 months in respect of the dismissal of the applicant (whatever that means remains a mystery to me). Furthermore, this aspect of promotion was to be investigated in terms of the court order. I could not get an answer from Mr Zono as to why the applicant approached this court instead of following the court order which he sought and obtained.

[20] I agree with Mr Metu appearing for the respondent that the applicant has not established a cause of action emanating from any contract either in terms of common law or otherwise. In the circumstances the applicant has not only failed to make out a case for declaratory order but failed to establish that this court has jurisdiction to entertain the relief sought. His remedy lies in the LRA.

[21] In the result the following order is made:

The application is dismissed with costs.

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Mr A S Zono

Of A S Zono & Associates

For the respondent:

B Metu

Instructed by Nosindwa Attorneys Inc.

Date of Hearing:

5 May 2022.

Date delivered:

17 May 2022.