

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**HELD AT:**

JOHANNESBURG

**CASE NO:** JA02/09

**DATE:** 2010-05-20

10 In the matter between

**MOPANI DISTRICT MUNICIPALITY**

**Appellant**

And

**SOUTH AFRICAN LOCAL GOVERNMENT**

**First Respondent**

**BARGAININGCOUNCIL**

**FATIMA CACHALIA N.O.**

**Second Respondent**

**JACOBUS DANIEL VISSER**

**Third Respondent**

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20 **Coram: DAVIS JA, TLALETSI JA, HENDRICKS AJA**

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**J U D G M E N T**

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**DAVIS JA:** This is an appeal against the judgment of Cele AJ, in the court *a quo*, of 13 August 2008, leave having being granted on 22 December 2008.

In the court *a quo*, Cele AJ, having reviewed the decision of the second respondent, dismissed the review application with costs and made the arbitration award of the second respondent an order of costs. It is against that order that the appellant has proceeded to this court.

Briefly, the facts of the case can be summarised thus:

The appellant is a municipality established in terms of Section 12 of the Local Government Municipal Structures Act, 117 of 1998 (the Municipal Structures Act).

The third respondent, Mr Jacobus Daniel Visser (Visser) was  
10 employed as regional director, fire emergency services by the then Northern District Council. He conducted his employment at the Tzaneen Fire Station.

According to the evidence, during 2000, major structural changes took place in the area of local government. A number of municipalities were disestablished and new municipalities were created. It was pursuant to this restructuring process that the Tzaneen Fire Station, where Visser was fire chief, was transferred to the appellant. It appears that this transfer took place on 1 July 2003, in terms of section 197 of the Labour Relations Act, 66 of 1995 (LRA). During the process of negotiation  
20 leading to the transfer, as I have outlined it, it appears that the various representative trade unions, including the union to which Visser was a member, IMATU, participated in this process which included the placement of Visser from the Tzaneen to the Giyani Fire Station, the latter being some 115 kilometres away from Tzaneen.

On 12 November 2003, Visser was informed about the new policy and his new place of employment. To the extent that it is relevant, the letter which was sent to Visser by Mr Maake, director, corporate services of appellant, reads:

“It is with great pleasure to inform that you have now been placed into the organogram of Mopani district as a Chief Fire Officer under Emergency Services. Your placement is with effect from 10 November 2003, subject to your acceptance”.

10        It appears that Mr Visser greeted this offer with somewhat less pleasure than it had been articulated by Mr Maake. He responded *inter alia* as follows, in a letter dated 17 November 2003:

“I hereby conditionally accept the offer for placement as Chief Fire Officer (Job Level 3) ... with the explicit understanding that the following benefits and privileges be maintained to the remaining period of my service contract with the Mopani District municipality (sic) ... Payment of travelling and subsistence allowance for official  
20        trips. I also placed on record that for various practical reasons, that I cannot relocate to Giyani. Therefore an undertaking is request (sic) for the finalisation of additional travelling arrangements or for the continued payment of travelling costs generated from the change of workplace ...”

The evidence was that a further letter of 17 December 2003 was generated by Mr Maake in which he stated:

“You will be expected to move to the offices of the district in Giyani whereby your removal costs will be borne by the municipality upon submission of 3 quotations ... Whilst still sorting out issues of accommodation, the municipality will either pay for your travelling or accommodation for a period not exceeding three (3) months”.

10        There is no dispute that this letter was written by Maake. What was placed in dispute was that this letter was never received by Visser and accordingly both the second respondent and the court *a quo* accepted correctly in my view, that this letter had not been received by Visser, hence he was never apprised in writing of the approach which the appellant had adopted towards his so called conditional offer.

Visser tendered his services at the Giyani Fire Station from November 2003 until 10 February 2004. He then took sick leave until 28 February 2004. On 1 March 2004, he addressed a letter to his employer pointing out, as from the beginning of February 2004, his  
20 travelling expenses had no longer been paid. The non payment of his travelling claims, had the effect of jeopardising his placement and henceforth he said that he would be reporting to the Tzaneen Fire Station “until the breach” had been corrected.

On 10 March 2004, his superior Ms Mathebula, the director of community services of the appellant, wrote a letter to Visser enquiring as

to how he intended execute his duties whilst he was stationed at Tzaneen. On 6 April 2004, Visser was invited to attend a grievance hearing which was scheduled to be heard on 13 April 2004. On 13 April 2004, he wrote a letter to Ms Mathebula indicating “the locks to his office in Tzaneen had been changed”. At the grievance hearing, it was pointed out to Visser that he was stationed in Giyani and he was accordingly not entitled to occupy his office in Tzaneen. The very point of the transfer was that there was no longer to be a fire station in Tzaneen and that if he was to occupy a position as fire chief, it had to be where there was a fire station, namely in  
10 Giyani.

On 20 April 2004, Visser addressed a letter to his supervisor, stating that he would be willing to accept the placement in Giyani as a chief fire officer with the proviso to that previously been articulated, that adequate travelling arrangements be made or alternatively the costs of such travelling be negotiated. It appears that he put up an alternative that he be placed in Tzaneen as station commander of fire prevention officer on a contractual basis.

On 26 April 2004, Visser sent a telefax to Ms Mathebula informing her that he was available in Tzaneen for “any administrative work and  
20 orders given from your office”. Ms Mathebula informed him that a follow up meeting to the one held on 13 April would be convened on 10 May 2004. On 20 May 2004, IMATU sent a letter to appellant requesting an official response to issues which had been raised by Visser as well as apparently other employees. In relation to Visser, the appellant was called upon to indicate whether it was prepared to enter into negotiations with respect to

the travel costs. In this connection, the letter invoked clause 7.6 of the so called placement policy; that is the agreement which had been entered into with the South African Local Government Association 'SALGA' with regard to questions of placement. Clause 7.6 thereof provides:

“In the case where the employee does not move his place of residence, additional travelling arrangements or costs may be negotiated with the Municipality”.

On 21 May 2004, the appellant issued a letter terminating Visser's  
10 employment on the ground of desertion. He was informed that if he reported back to duty, the employer would convene an enquiry to determine the reasons for his absence and if satisfied with the explanation, there was a possibility of reinstatement.

Of relevance, is the following passage:

“According to our records you failed to report to your working station in Giyani since your placement. The municipality, being your employer is currently not aware of your whereabouts and/or your activities since then.

20 This letter therefore serves to advise you that your services have been terminated with immediate effect on the ground of desertion”.

On 1 June 2004, Visser referred an unfair dismissal dispute, to conciliation. On 16 July 2004, the unresolved matter was referred to

arbitration under the auspices of the South African Local Bargaining Council.

The second respondent, being the arbitrator, found that the dismissal had been both substantively and procedurally unfair. That finding was then upheld by the court *a quo* and it is on those two decisions that this appeal turns.

The crux of second respondent's findings was that Visser's acceptance of his placement was conditional and should have become the subject of negotiation and perhaps thereafter arbitration in terms of the placement policy to which I have made reference. In particular, second  
10 respondent referred to the SALGA agreement and clauses 3.1.10 and 4.1 thereof which read thus:

Clause 3.1.10:

“Employees that cannot be placed in any of the categories of posts or are not offered an alternative post that is not reasonable will remain the pool of the transferred employees for a period of at least six months from the expiry of the period referred to in paragraph 3.5, unless  
20 otherwise agreed, whereafter the employees shall be dealt with in terms of existing redundancy policies or Section 189 of the Labour Relations Act”.

Clause 4.1 reads:

“Every individual employee and or trade union on behalf of their members shall have the right to refer a dispute about a placement or non-placement to arbitration. Such dispute shall be referred to arbitration within 5 working days of the date of receipt of a decision by an individual employee”.

On this particular legal edifice, the second respondent analysed the evidence and concluded thus:

10           “The evidence further indicates that the applicant had at all times indicated his willingness to render his services as Chief Fire Officer. “Desertion” presupposes an intention not to return to work. In this matter, the evidence indicates that the intention of the applicant at all times, as evidenced from his conduct and correspondence, indicate an intention to render his services to the employer”.

20           In short, the essential finding of the second respondent was that, given the conditional approach that the second respondent had taken to the initial placement and given the non response of the appellant to this correspondence, the placement of Visser had not yet been finalised. Because it had not yet been finalised, it could not be suggested that the SALGA agreement had come into operation. Coupled with the uncertainty of the placement, as viewed by second respondent, was the further finding,

to which I have already made reference, that desertion could not be justified in this case because in the first place, Visser had tendered his services at the Tzaneen Fire Station. Secondly, the evidence, particularly of Ms Mathebula on behalf of the appellant, indicated, contrary to the letter of dismissal, that the appellant, or at least certain of the appellant's officials, knew well that Visser was at Tzaneen and consequently knew about his whereabouts.

The court *a quo* dismissed the review application, as I have already noted. In particular, Cele AJ held that the conduct of Visser were such as  
10 to gainsay the arguments of the appellant that the only options which were available to Visser pursuant to the decision of transfer, was to invoke one or other of the provisions of SALGA agreement. The following passage from this judgment of Cele AJ's judgment is particularly relevant:

“It is common cause between the parties that  
Mr Visser conditionally accepted his geographical  
relocation to Giyani. In the consideration of his  
transfer, he had a right to be consulted and to  
agree to such transfer. If he did not agree to the  
transfer, he might probably have ended in the  
20 pool, in terms of clause 3.1.10 unless an  
alternative reasonable post was agreed upon by  
him and the applicant. Mr Visser was clearly  
entitled to a response to the conditional  
acceptance of a geographical relocation. The  
letter which the applicant issued to limit the

travelling claim payment to 3 months was certainly not a response to the conditional acceptance of a transfer (that refers to the letter of Mr Maake of 17 December 2003).

10 There appears to be merit in the second respondent's finding that Mr Visser did not receive that letter. Apart from the absence of proof of its delivery, Mr Visser would probably have made reference to it in his subsequent correspondence with the applicant. It is also not the applicant's case that this letter was an answer to the conditional acceptance of a transfer. Ms Mathebula's evidence corroborates the version of Mr Visser that no response was given by the applicant to the conditional acceptance of the transfer.

20 Until such time that the parties negotiated in full, the form of a geographical relocation of Mr Visser, such transfer process could not reasonably be held to have been finalised".

Cele AJ then went on to say:

"The conditional acceptance of the geographical relocation was in itself reasonable. It left room for parties to negotiate whether or not Mr Visser was to be paid for his travelling costs. If the applicant

chose to decline such payment, it would have been up to Mr Visser whether he repudiated his agreement to the transfer. The parties would then be left to consider alternatives. It is only at the stage that Mr Visser could also consider whether to resort to the dispute or appeal processes open to him. It is the applicant's non cooperation which prevented him from having recourse to these processes".

10           So much for the judgment of Cele AJ and in addition the decision by way of an arbitration award of the second respondent. It is important to make the following trite observation. The mandate of Cele AJ on review of the decision of the second respondent was to come to the conclusion that the particular decision was one which on all the facts which I have set out, could or could not have been arrived at by a reasonable decision maker.

          Mr Cassim, who appeared together with Mr Mosam on behalf of the appellant, submitted that the court was correct in stating that the review turned on whether the placement process had been finalised. However, in his view the court had not simply been materially incorrect but the second  
20   respondent have been clearly unreasonable in coming to the conclusion that the process had not finalised and accordingly the SALGA agreement should not have been the only form of resolution of the dispute. In particular, Mr Cassim referred to the fact that Visser's union IMATU participated in the process which led to Visser being deployed to Giyani. Furthermore, Visser had initially accepted the reality that he had to tender

his services in Giyani, notwithstanding the conditional nature thereof. Furthermore Mr Cassim submitted that Visser's, in his view, blatant non compliance and defiance by reporting for duty at the Tzaneen Fire Station was part of a strategy to ensure that he, rather than his employer, could dictate where he would tender his employment. In short, Mr Cassim classified this as a dispute in which Visser wanted to be placed on terms and condition that suited him and otherwise he was not prepared to work for his employer being the appellant.

In summary therefore, the appellant's argument are articulated by  
10 Mr Cassim and Mr Mossel, is that the relationship within the parties was not that of an employer and employee because Visser had not accepted his placement in Giyani, it was his fault that this had not occurred and he should have invoked the provisions of the SALGA agreement, declared a dispute concerning the travelling allowance which he claimed and the matter could have been properly and adequately resolved. Instead he had invoked a form of self-help and was therefore to blame for the termination of the employment agreement.

These contentions however, do not appear to me to be entirely congruent with the thrust of all the material evidence. Briefly summarised,  
20 in my view, the evidence placed before the second respondent can be summarised thus:

1. Visser accepted the offer to move but conditionally.
2. In a letter of 17 November 2003, he indicated that he wanted to negotiate arrangements insofar as that offer was

concerned, in particular the problem of relocation and consequently thereto travelling costs.

3. The SALGA agreement envisaged a process of negotiation.
4. That process could not commence because the parties insofar as the Visser relocation was concerned were, in a position of abeyance 1:30:01 in that appellant did not respond to the conditional offer of Mr Visser. In other words, notwithstanding the letter of Mr Maake which appears to be the only written response to the Visser conditional offer, there had been no process by which the appellant had articulated a firm refusal or counter offer to the conditional offer which had been proposed by Visser.
5. As from 1 March 2004 and on the basis of the evidence, to the appellant's knowledge, particularly Ms Mathebula, Visser had tendered his services at Tzaneen.
6. On the basis of this evidence, there is little to justify the contention Mr Visser had deserted his post.

I return to that point which was urged upon us by Mr

Ackermann, who appeared on behalf of the respondent.

The case which had been brought before the second respondent pursuant to the arbitration hearing, was that the appellant had terminated the third respondent, Visser's services "on a charge of desertion". It was on the basis of this charge that the second respondent proceeded to examine the evidence and come to a decision. A claim of

desertion is unjustifiable and unsustainable because even if there was a form of unilateral action on the part of Visser, it did not amount to desertion and certainly, as I have indicated already, it did not prompt a response on the part of the appellant to negotiate in relation to the conditional offer which had initially been made, or I might add, the further correspondence to which I have made reference of Visser, in which he claimed that the appellant was in breach of its undertaking with regard to transport costs.

10 When it comes to the question of the procedural evidence, it appears that very little notification was generated by the appellant to the respondent with regard to its decision to dismiss. Only after the letter of dismissal was generated, were there some attempt to hold a disciplinary enquiry. There can be no question that in this particular regard, procedural fairness had hardly been complied with in terms of which are required by the law.

To summarise:

20 The approach which has to be adopted by this court, is not whether it would have found that the dismissal was justifiable, but whether, on the evidence which was placed before the second respondent, the second respondent comported herself in regard to the decision in a manner which was congruent with that of the reasonable decision maker. On any stretch of the test of reasonableness, in my view, there is no basis to overturn the decision of the second respondent, either on the grounds of

substantive or procedural fairness, for reasons which I have already set out.

That leaves the question of the appropriate award.

The second respondent made an award that the third respondent be reinstated to the position of chief fire officer and the appellant was further ordered to finalise the issue of Visser's placement within 30 days of the reinstatement. Furthermore, the appellant was ordered to compensate Visser for a period of two months, to be calculated at the rate of his salary at the date of dismissal. Visser was then reinstated and compensated  
10 pursuant to this order on or before 15 December 2004. It is the award which was confirmed and made an order of court by Cele JA.

In debate with counsel this morning, this court raised the issue as to whether this was an appropriate award. This court cannot come to any decision as to why it has taken six years for this dispute to finally be resolved in this court. It goes without saying that when disputes of this kind take so long to be resolved, the very purpose of the LRA which is to ensure expeditious resolution of labour disputes is subverted. It also means that the question of remedy becomes all the more complex. Consider the position in this case. Were this court to uphold the initial  
20 approach of second respondent, Mr Visser would return to Giyani after a six year absence. No evidence before this court as to what happened over this six years, whether the fires have broken out in an area, who the fire officer is, whether he is suitable for job, what he has been doing in the interim.

Furthermore, section 193(2) of the LRA, made some provision for these exigencies by it providing that the Labour Court or an arbitrator must require the employer to reinstate or reemploy the employee, unless it is not reasonably practical for the employer to reinstate or reemploy the employee (Section 193(2)(c) of the LRA).

Realising this difficulty, Mr Ackermann contended that an appropriate award would be to reinstate Visser as the chief fire officer for Giyani, subject to 12 months compensation and payment by the appellant of the pension contributions during the previous six year period. That particular approach does not resolve the difficulties which I have outlined. Mr Ackermann's attempt to classify appellant's approach as seriously lacking in moral integrity ignores the core of the dispute. In substance, the third respondent did not want to go to Giyani. He said so in terms. If he was going to Giyani, he insisted on certain further payments and that demand in essence what caused the entire dispute to finally end up in this Court. That he was substantively and procedurally unfairly treated is made clear from this Court's finding. That he should be reinstated in a job which he did not want in the first place, is an entirely different matter. It is impractical to send him back to Giyani after such a long period of time, when assessed in terms of the evidence available.

For this reason, it appears to me that this court should follow the approach which was prefigured in section 193(2)(c) of the LRA which is to ensure that the unfairness which was visited upon the appellant should be responded to by way of an award of compensation and that the matter should then be brought to finality.

There is a further question of costs. There is firstly a cross appeal which is really a *de minimis* matter because it turns on whether in the opposition to the making of the second respondent's award an order of costs which was opposed, should have been visited with costs. To the extent that the matter was opposed in the court *a quo* and that Visser won, those costs should have, in their totality, have been granted.

It is another matter where we consider costs with regard to this hearing. Mr Ackermann submitted that firstly, The nature of appeal had not raised the question of costs on appeal nor which presumably may have  
10 allowed Visser the opportunity to reconsider his position and negotiate a settlement. That is in the realm of speculation. What is clear, is that there has been a measure of success obtained by the appellant because the remedy which is now to be granted is significantly different from that which formed the basis of Cele AJ's order. Furthermore, it has resulted in a significant diminution of the amount of money which the appellant will be required to pay to third respondent.

However, I would consider a fair and equitable decision to be that there should be no order as to the costs on appeal. For these reasons therefore, I would made the following order:

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1. The appeal is dismissed insofar as the fairness of the dismissal of the third respondent is concerned. It is upheld insofar as the remedy is concerned.
  2. The order of the court *a quo* is therefore set aside and replaced with the following order:

2.1 The review application of second respondent's decision to dismiss the applicant is dismissed with costs;

2.2 The arbitration award issued by the second respondent on 23 November 2004, is altered so as to read as follows:

The dismissal of the applicant is declared to be both substantively and procedurally unfair.

The respondent is ordered to pay the applicant an amount of compensation, being 12 months remuneration, calculated at the rate of the applicant's salary at the date of his dismissal. Such remuneration is to be paid to Mr Visser by 1 July 2010.

3. The costs incurred in making the arbitration award an order of costs, are awarded in favour of the applicant.

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**DAVIS JA**

**TLALETSI AJA:**        )

**HENDRICKS AJA:**    ) Concur

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