

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN**

**D62/08
Reportable**

**HEALTH AND OTHER SERVICES PERSONNEL
TRADE UNION OF SA (Hospersa)**

APPLICANT

HUGH KENNETH VERREYNNE

SECOND APPLICANT

STEPHON LESLIE BURNS

THIRD APPLICANT

And

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR WORKS, KWAZULU NATAL**

FIRST RESPONDENT

DEPARTMENT OF WORKS, KWAZULU NATAL

SECOND RESPONDENT

JUDGMENT

Cele J

INTRODUCTION

- [1] The second and the third applicant have approached this court on an urgent basis, duly assisted by the first applicant, Hospersa, their union. They seek a final order, now that the matter has been fully opposed, in the following terms:

1.1 That the decision to advertise the posts of District Manager (Ugu District Office) and District Manager (Umgungundlovu District Office) (being posts on the establishment of the Second Respondent's staff organizational structure in Pietermaritzburg) and to proceed with a selection process to fill the said posts, is set aside;

1.2 That the respondents are ordered to appoint Second Applicant to the post of District Manager (Ugu District Office) and to appoint the Third Applicant to the post of District Manager (Umgungundlovu District Office);

1.3 Alternatively to para 1.2 above, that Respondents are ordered to act in terms of Chapter 1, Part V C.6 of the Public Service Regulations, and exercising the power conferred by that regulation, to continue to employ Second and Third Applicants in their present posts without holding any further selection process aimed at filling the posts;

1.4 Alternatively to para 1.1, 1.2 and 1.3 above, granting Applicants such further or alternative relief as to the above Honorable Court may seem fit;

1.5 Ordering Respondents to pay Applicants' costs of this application.

[2] On 5 February 2008 this court, per Pillay J, issued a *rule nisi* in terms very similar to paragraph 1.1 of the notice of motion returnable on 11 November 2008 while simultaneously permitting the parties to file their papers within stipulated time frames.

Background Facts

- [3] The second applicant, Mr Verreyne, is in the employ of the respondents and is stationed at Ugu District Offices of the second respondent at Port Shepstone where he holds the position of a District Manager (Ugu District Office). It is a post on the establishment of the staff organization of the second respondent. The third applicant, Mr Burns, is similarly in the employ of the respondents, stationed at the Umgungundlovu District of the second respondent at Pietermaritzburg where he holds the position of a District Manager (Umgungudlovu District Office), a post on the establishment of the staff organisation of the second respondent. Messrs Verreyne and Burns are both members of Hospersa. It is convenient to refer to both respondents henceforth as “the Department”. Both Messrs Verreyne and Burns (“the applicants”) have been in those positions for a number of years and have performed more than satisfactorily.
- [4] The Premier of Kwazulu-Natal requested the Department of the Public Service and Administration and the Public Service Commission to conduct an investigation onto the provincial departments to determine their readiness for the service delivery. The second respondent was one of the departments that were found not ready to deliver. It was found that the departmental organisational structure was not aligned to the core functions of the department and to the district municipalities’ boundaries. The previous MEC then introduced a “Change Agenda” in the department which also necessitated the review of the departmental structure. The Department commissioned a consultant, Heiter and Bouer, to review the organizational structure. A proposed structure was presented to and approved by the MEC on 26 June 2006. The date to implement the new structure was scheduled as 1 April 2007. The intention for the deferred

date was to allow for consultation with the organised labour and the staff. In September 2006 a departmental Restructuring Forum was appointed for the task by the Head of Department. The forum agreed to conduct road shows pertaining to the implementation of the new approved structure. The consultation plan (road show) was scheduled thus:

No	Institution	Date
1	Midlands region	14/02/07
2	Southern Region	21/02/07
3	Head Office	22/02/07
4	North Coast Region	28/02/07
		01/03/07
5	Ethekwini Region	07/03/07

[5] The road show for the Southern Region, where the applicants are based, was re scheduled for 27 February 2007. The Chief Work study Officer, Mr V.S Khumalo indicated during the presentations that hand outs being used for presentations were not a complete structure, but an overview of the structure for the region. He said that the new structure was aligned to the service delivery model and municipal boundaries. He reported that depot systems had been done away and that districts and sub-districts were introduced in some regions. He indicated that the Southern Region had three districts namely, Umgungundlovu, Ugu and Sisonke Districts and that the districts were then aligned to the municipal boundaries.

[6] Ms J. Nel, Assistant Manager: HRM Southern Region reported that three filled posts namely, Telcom Operator, General Foreman and Registry Clerk had been abolished in the new structure and this had resulted in three employees being in excess. She indicated that posts would be identified for the absorption of the three employees, but further explained

that the Head Department had given assurance that no staff in excess would be retrenched. Questions were then invited from the floor and the first question and the answer to it are recorded as:

“Question 1: When would the staff on the excess list be accommodated in the new structure.

Answer : Southern Region is not affected by the new structure as is the case with Ethekwini and North Coast Regions. Posts will be identified for the three employees on the excess list and these employees are still to be addressed individually. “

- [7] The respondents then advertised the post of a District Manager for various districts within KwaZulu –Natal under their reference 090702. The centers for which the advertisement was published were: Ugu, Ethekwini, Ilembe, Umgungundlovu, Sisonke, Uthungulu, Uthukela and Amajuba Districts. The body of the advertisement reads:

“ Requirements: A degree or National Diploma, plus appropriate managerial experience, computer literacy. Qualifications in built will be an added advantage. A valid driver's licence.

Knowledge, Skills and Compelencies: Expert knowledge of administration policies and practices. Understanding of transformation. Project and finance management and knowledge of procurement process.

Key responsibility areas: Manage works inspection services and projects. Construct, adapt and physical facilities. Manage General Administration support services. Manage implementation

of policies, procedures and resources of the District. Liaise with consultant professionals, client departments and stake holders. Conduct inspectors of new existing Works according to plans and specifications and/or confirm to prescribe standards. Analyse compilations of inter alias plans and specification bills of quantizes and contractual stipulations with regard to new maintenance and other works in terms of quality control savings and costs savings. Advise with the use of new existing technical systems, techniques, material equipment and compounds. Organise the work of technical, work Inspectors, artisans and general auxiliary personnel in the execution of projects. Prepare and control other financial related matters”.

- [8] The closing date for the applications was 12 October 2007. Both applicants are not possessed of the academic requirement stated in the advertisement. The positions held by the applicants are graded as salary level 10 while the advertised posts are graded salary level 11. The applicants formed a view that the advertised posts for centres Ugu and Umgungundlovu Districts are infact the very positions they are occupying and that these have merely been upgraded in terms of salary level. They then initiated the present application in February 2008, on urgent basis.

Applicants' version

- [9] The advertised posts for Ugu and Umgungundlovu Districts are already filled by the applicants. The respondents have decided to advertise the posts and to invite the applications from persons wishing to be considered for appointment to the posts. As a consequence, the applicants are placed in a position where, in the absence of an intervention such as is sought by them in this application, they would have to apply for their own posts and to take their chances in a selection process in which they then put their chances against sundry other applicants for the posts. The action by the Department is inherently and per se unfair, apart from being irrational.

- [10] The applicants meet all the requirements in the advertisement save that neither has a degree or national diploma. Both have the necessary “appropriate managerial experience.” Both are computer literate to a considerable degree. Both have valid driver’s licenses. Both have had formal training in fields relevant to the so- called “built environment”. In addition both of them have extensive experience gained over many years in a built environment. By a “built environment” is meant in Department of Works parlance the sphere embracing the building construction and project management fields. However, although neither applicant has a degree or national diploma, the advertised key performance areas are exactly what is contained in job description and are, in effect, their daily duties.
- [11] The imposition of the degree or national diploma requirement would effectively preclude the applicants from being considered for the posts were they to apply for them. They would likely not be shortlisted because they would most probably be excluded at that stage of the process for not meeting the requirement of a “degree or national diploma”. Even were they to be shortlisted, it is likely that the selection panel would give preference to applicants for the post who met the requirements of “a degree or national diploma” because the advertisement stipulates that such is a requirement. It is likely that the selection panel would give those persons preference notwithstanding the applicants’ extensive experience in the very same post; and extensive experience in the built environment.
- [12] To advertise an employee’s post with a view to interviewing others and choosing from those interviewed, even if the employee himself is interviewed, is, in the absence of some satisfactory reason justifying such a course, *prima facie* an act of bad faith on the part of the employer and

therefore necessarily unfair. Where there is no reason to terminate the employment of the present incumbent of the position or to demote him, then to advertise his post while he still occupies it with the intention of possibly choosing a replacement for him is tantamount to a repudiation of the contract of employment by the employer. It amounts to a refusal to continue to employ the employee in terms of his contract of employment. It evinces a clear intention not to continue to employ the employee in terms of his contract of employment.

[13] Neither Second nor Third Applicant have given the Department any reason to terminate their employment or to demote them. Second and Third Applicants presently fulfil the function of the posts of District Manager which they hold, and do so by performing more than satisfactory. It may be that the Department will attempt to justify the course it has embarked upon on the basis that the post advertised are supposedly “new posts” created in the course of a restructuring exercise, or on the basis that because the posts have been upgraded from salary level 10 to level 11 the Department is entitled to advertise and hold a selection process and even, if it wishes, appoint new persons to the posts. As to any such contention by the Department it is contended that the advertised posts and posts presently held by Second and Third Applicants are in essence identical posts.

[14] The Department does not have a free hand in the restructuring of its organization. It is bound to ensure that any restructuring exercise is carried out within the constraints that are laid down by the Department of the Public Service and Administration. The guidelines which have been laid down by the Department of the Public Service and Administration which the Department is obliged to follow in conducting any restructuring exercise emphasize the concepts of an analysis of the skills and competencies of existing staff, skills audits, absorption of existing staff

against appropriate posts, and “matching and placing” of existing employees, the consulting of employees on the process of placement, minimizing disruption to service delivery, minimizing inconvenience to affected employees, and the adoption of procedures that are “fair, transparent and in accordance with applicable employment labour legislation”. In terms of a “Guide on Transformation and Restructuring: Human Resources” and which contains the guidelines approved by the Minister of the Public Service and Administration applicable to restructuring exercise. It states that:

“If a post occupied by the employee is regraded to a higher salary level during the restructuring process, following the prescribed job evaluation exercise, the provisions of PSR Chapter 1, Part V C.6 may be applied.”

- [15] The reference to “PSR” is a reference to the Public Service Regulations. Chapter 1, Part V C.6 of the Public Service Regulations which states as follows:

“C.6 If any executing authority increases the salary of a post as provided under regulation V C. 5, she or he may continue to employ the incumbent employee in the higher- graded post without advertising the post if the incumbent-

- (a) already performs the duties of the post
- (b) has received a satisfactory rating in her or his most recent performance assessment: and
- (c) Starts employment at a minimum notch of the higher salary range.”

- [16] The applicants fall in the category of employees occupying a post which is regraded to a higher salary level during a restructuring process. The guidelines laid down by the Department of the Public Service and Administration apply and so do the provisions of PSR Chapter 1, Part V

C.6. It is thus open to the Department, even though the salary level of the District Managers' post has been increased, to "continue to employ the incumbent employee(s) in the higher-graded post(s) without advertising the posts(s)". Second and Third Applicants do already perform the duties of those posts. Second and Third Applicants have both received satisfactory ratings in their most recent performances assessment. Both Second and Third Applicants are prepared to be remunerated "at the minimum notch of the higher salary range", that is, at the minimum notch of salary level 11, as they both state in their own affidavits. All the requirements of PSR Chapter 1, Part V.6 are met, and the Department may continue to employ them in the higher-graded posts without advertising the posts. There is thus no need to advertise the posts and hold a selection process.

- [17] It is within the power of the Department to leave them in the posts. It is of course, so that Chapter 1, Part V C.6 of the public Service Regulations is not couched in peremptory terms but use the word "may". The use of the word "may" in that context does not confer on the executing authority a free discretion. The provision confers a discretion which the executing authority is obliged to exercise in each case in such a way as not to lead to the loss of employment by a satisfactory incumbent as a consequence of the upgrading of his post. The provision not only empowers the executing authority to retain an incumbent in an upgraded post without advertising it, but places the executing authority under duty to do so in appropriate cases.

Respondents' Version

- [18] The restructuring process was decided upon and there is an agreement that no employee will be redundant and/ or possibly retrenched. To this end the Respondents have embarked on a re-structuring programme that

is necessitated by the policies of central government to make service delivery more effective in all spheres of government, including the Respondents. Re-structuring therefore became necessary. Respondents have issued an undertaking to all employees, including those who may be in excess, that there will be no retrenchments.

[19] The allegation that in the course of the supposed restructuring, the respondents have merely re-named and re-graded the post presently occupied by Second and Third Applicants are denied. In amplification thereof the Respondents aver that:

- The posts that Second and Third Applicants presently occupy are salary level ten posts;
- The new post being advertised, with which applicants take issue is pitched at a salary level eleven grading;
- There are many other level ten posts that are available which have not yet been matched;
- The said salary level ten posts are currently sub-district posts in the new structure of the Respondents;
- The applicants are presently employed in those posts at the sub-district level;
- The level eleven posts are not sub-district posts but district post. In respect of the advertisement an example of a district would be the Ethekwini District in this instance;
- The salary level ten and salary level eleven posts are substantially different. The salary eleven posts require a higher level of management expertise than the salary level ten posts. In addition, the salary eleven posts require responsibility of a much larger area than the salary ten posts.

- The salary eleven post also requires knowledge of management of finances and other allied issues;
- The salary eleven post was created by the virtue of a need that arose as a result of re-restructuring;
- The creation of a new post (in this instance the salary level eleven post) is subject to a rigorous process whereby the establishment of the aforementioned new post is not an arbitrary decision but has been subjected to a rigorous evaluation process in terms of the policy manual for job evaluations.
- Qualified job analysts are required to evaluate a proposed post and attach appropriate weight levels to such posts. These analysts and their recommendations are not arbitrary in nature.
- The job evaluation process is a complex exercise, which requires more than a cursory examination of functions and duties that a particular post may require. The job evaluation exercise looks at issues such as communication, the number of subordinates under the proposed posts, the level of the managerial component, interaction with senior stake holders, ect.

[20] The respondent's action in regard to the manner in which it advertised the salary level eleven post is in accordance with the guidelines as laid down by the Department of Public Service and Administration. To this end the respondents have effectively complied with the Public Service Regulations.

[21] The new post is a management post but with a greater degree of responsibility than level ten by virtue of its being a post in a bigger geographical area than sub-district post and is subject to the provisions of the Public Service Chapter 1 Part VII paragraph C 2.3. In respect of this provision it is peremptory that any vacant post in the management be advertised nationally. The applicants are therefore not entitled to be

absorbed into the new post by virtue of the requirement to advertise the said post. In any event, the Regulations provide that for absorption to take place there must be incumbent to the post and the incumbent must meet all the requirements of the new post. Second and Third Applicants are not incumbents to the posts. They cannot be absorbed.

- [22] Although there are similarities between the key performance areas in the salary level ten post and level eleven post, the Applicants have not taken note of the fact that the salary level eleven post is a regional post and the incumbent to the post will be responsible for a much larger area. The work load will thus be greater than the salary level ten post, which is a sub district post. All sub-districts attract posts that are salary level ten and under.
- [23] The evaluation committee has evaluated the salary level eleven post and have established that a degree of national diploma is necessary in so far as the demands of the salary level eleven post requires.
- [24] It is true that the requirement for the salary level eleven post (district manager requires a degree or national diploma, which will effectively preclude the applicants being considered for the post. It must be borne in mind that the applicants are not automatically entitled to apply for these posts by virtue of their so –called extensive experience in the salary level ten post. This would constitute a promotion for them if they were successful in their application for the district manager post. It is not true that the applicants' present posts will "disappear". The salary level ten post will always exist in the sub-districts. The respondents have therefore not advertised applicants' posts. They are presently in a salary level ten post. In addition, it is not the intention of the Respondents to terminate or demote them.

- [25] Although the applicants were called district managers in the old structure, they were in fact working in a much smaller geographic area. In the new structure the position of district manager is pitched at a regional level for example the Ethekewini District and not at the sub-district. The new district manager post is substantially different from the old district manager's post in the old structure, although the title appears to be the same. There is, therefore no basis for the allegation that the salary level ten post has been upgraded to a salary eleven post. There has been no upgrading. The salary level ten posts continue to exist in the sub-districts in the new structure. Although the duties appear to be similar, the responsibilities demanded by the posts are substantially different. The new salary level eleven post demands accountability from a greater geographical area, hence the responsibilities and duties are of a greater magnitude.
- [26] It is clear that re-structuring process was a well thought out programme necessitated by the central government demand for service delivery. There are valid reasons why re-organisation had to take place. Such re-structuring is the prerogative of the Respondents and was necessary because the old structure was cumbersome and not user-friendly. In the previous structure the Department of Works had four regions. In these regions there was considerable overlap. The region was vast in geographical terms for example the North Coast area extended up to Tugela. Central Government recommended that the Department re-structures in terms of municipal boundaries thereby making the areas easily manageable. The Department is in the building industry and clients require building structures in all parts of the province. Re-structuring according to municipal boundaries are in line with Treasury's demand that budget allocations be indicated in terms of district municipalities. The reason for this is that if two regions were overlapping the budget will be skewed, as well as for the purposes of uniformity at a national level.

[27] In the old structure:

- Respondents had regional offices, district offices and depots;
- There were no district offices in some areas;
- Respondent had only regional offices in some areas; and
- There was overlap between the regions.

[28] As a result of the above it was necessary to establish uniformity in line with Treasury's requirement that budget allocations should be indicated in terms of district municipalities.

[29] As can be seen from above, the Respondent's decision to re-structure and create the new salary level eleven post was part of a rigorous evaluation process and certainly not malicious or arbitrary in nature.

ANALYSIS

[30] The applicants have approached this court by way of application proceedings, on urgent basis, seeking an order whose terms are final, prohibitory and mandatory in nature. They had then to show the court that they have a clear right, an injury has been committed or is reasonably apprehended and that they had no other suitable alternative remedy, see *Fawu v Premier Foods Industries Ltd (Epic Foods Division) 1997 15 ILJ 1082 (LC)*

[31] The dispute between the parties is about whether or not the two posts, District Manager Ugu and Umgungundlovu, advertised by the respondents are the same posts which are presently occupied by the applicants. If they

are, it follows necessarily that the applicants would be severally prejudiced by the advertisement of their posts and the subsequent filling of such posts by incumbents other than the applicants. It has been shown in their papers that the applicants have a reasonable apprehension of a loss of their jobs. Further, it has been shown that the applicants were devoid of any suitable remedy than to have approached this court on urgent basis. What falls to be decided is whether or not they have a clear right to the order they seek. That largely depends on whether they have made out a case in their papers that it is their posts that are in jeopardy consequent upon the intention of the respondents to replace them. The respondents' position is simply that the positions for which the advertisement was issued and published are different from those occupied by the applicants.

- [32] The applicants do not seek to have recourse to oral evidence for the resolution of the dispute. In such a case, the applicable, general principle as stated in *Stellenbosch Framers Winnery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) and subsequently qualified in *Plascon Evans Paints (Pty) Ltd v Van Riebeek Paints* 1984 (3) SA 623 (AD), applies. It states:

“where in the proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other relief, may be granted if those facts averred in the applicant’s affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (*see in this regard Room Hire Co Pty Ltd v Jeppe Street Mansions Pty Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto No* 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniforms Rules of Court (cf *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at

164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and another* 1983 (4) SA 278 (W) at 283 E-H). Moreover, there may be exceptions to this general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on papers"

- [33] The applicants' case appears to be that the appellation of the advertised posts together with knowledge, skills and the competencies of the candidate to whom the advertisement is sought to be directed, are identical to those of the posts they currently hold. Further, they aver that the key responsibility areas of the advertised posts are those that apply to their positions. They then conclude that the respondents want to replace them with people who have degrees or diplomas, which the applicants do not have. They say that it is their positions that are to be upgraded and that, in that eventuality they are the ones who must be preferred to the exclusion of all others.
- [34] The respondents refute these allegations. They concede though that the duties of the posts appear to be similar but say that the responsibilities demanded by the post are substantially different. They say that the new salary level eleven post demands accountability from a greater geographical area, hence the responsibilities and duties are of a greater magnitude. They say that the posts of the applicants are unaffected by the restructuring process as they will continue to exist in the sub-district level in the new structure. They say that the new salary level eleven post is not an upgrading of the applicants post.

- [35] In their replying affidavit, the applicants say that there has been no organizational change to the structures in the Southern Region and that they are not in the sub-strict posts.
- [36] The roadshow undertaken by the respondents included a visit to the Southern Region. This was in February 2008. Mr V.S Khumalo said in that show that the hand outs being used for presentation were not a complete structure, but an overview of the structure for the region. In response to the first question, it was said that the Southern Region was not much affected by the new structure as was the case with Ethekewini and North Coast Regions. Three employees were identified as affected but they were not the applicants.
- [37] The respondents came to court to oppose this application knowing very well that the complete organogram of the Southern Region was never presented to the staff in February 2008. Surely if a completed organogram was subsequently produced and explained to the staff in the Southern Region, this court would have been told of it. Had such an organogram been produced in court, it would dispel all doubt in the minds of the applicants, who would see where in it their positions are featured. In my view, the denials raised by the respondents of the facts alleged by the applicants did not go far enough so as to raise a real, genuine or *bona fide* dispute of facts. The respondents did not apply for the matter to be referred to oral evidence. I am satisfied as to the inherent credibility of the applicants' factual averments. On the papers before me, the applicants have shown, on a balance of probabilities in their favour, that the posts for which the respondents seek to advertise are those which they occupy.
- [38] The respondents have shown though that the process of restructuring was approved of and the implementation process had started. It has not been

shown when such restructuring would end. Should the restructuring process continue in future and affect the Southern Region, it is expected that proper consultation agreed to by the parties would take place. In such an instance, tools such as an organogram, would no doubt help to allay fears of those whose positions might in one way or another be affected.

[39] In the circumstances I make the following order:

1. The decision to advertise the posts of Districts Manager (Ugu District Office and District Manager (Umgungundlovu District Office), being posts on the establishment of the Second Respondent's Staff Organisational Structure in Pietermaritzburg, and to proceed with a selection process to fill the said posts, is set aside.
2. Any restructuring process of the Department as already approved by the Premier, and to be carried out in the Southern Region of kwaZulu-Natal is to be preceded by a consultation plan (road show) for the benefit of the staff concerned.
3. The respondents are ordered to pay the costs of this application.

Cele J

17 February 2009

APPEARANCES

For the applicant: P. J Blomkamp

Assisted by: Llewellyn Cain Attorneys

For the applicant: N.G Winfred

Assisted by: State Attorney

