

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

CASE NO J 637/10

In the matter between:

M VAN JAARSVELD

FIRST APPLICANT

N J MASITHELA

SECOND APPLICANT

M J MOLOYENI

THIRD APPLICANT

R R NAIDOO

FOURTH APPLICANT

T M M MOCHOCHOKO

FIFTH APPLICANT

M F MOKGOBU

SIXTH APPLICANT

and

MANGAUNG LOCAL MUNICIPALITY

FIRST RESPONDENT

**THE CITY MANAGER: MANGAUNG
LOCAL MUNICIPALITY**

SECOND RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application brought on a semi-urgent basis in which the applicants seek what amounts to a final order declaring the second respondent's decision to re-assign the applicants to posts other than those in which they were employed to be unlawful. The applicants rely on s 77 of the Basic Conditions of Employment Act read with s 158 of the Labour Relations Act to contend that they were engaged to perform specific and defined work, and that the respondents'

conduct in directing them to engage in other materially different work, constitutes a breach of their contracts of employment.

The facts

[2] The applicants are all employed as general managers of the first respondent. They all work in Bloemfontein, where they hold various portfolios. The applicants' terms and conditions of employment are regulated by signed contracts. For the purposes of these proceedings, the first applicant's contract annexed to the papers, in circumstances where it was not disputes that the contracts signed by the remaining applicants are materially similar. The nature of the first applicant's responsibilities is spelled out in his contract of employment, over some three pages. In broad terms, he is required to provide legal advice to the first respondent, with a managerial responsibility for the process of amending by-laws, drafting contracts, litigation and the like.

[3] Clause 6.4 of the contract provides as follows:

“The Employee's head office and ordinary place of work is Bram Fischer Building, 5 De Villiers Street, Bloemfontein or such other municipal workplace in the municipality are as determined by the Municipality...”

[4] Clause 16 of the contract reads as follows:

“VARIATIONS NOT EFFECTIVE UNLESS IN WRITING

No variation, modification or waiver of any provision of this agreement, or consent to any departure therefrom, shall in any way be of any force or effect unless confirmed in writing and signed by both parties. Such variation, modification, waiver or consent shall

be effective only in the specific instance and for the purpose and to the extent for which it was given.”

[5] The second respondent, the city manager, assumed office in August 2009. He soon formed the view that the first respondent had a bloated management structure, and that regional structures ought to be strengthened *inter alia* to respond better to challenges relating to service delivery. In November 2009, a report was prepared on how the first respondent's operations might be decentralized. A meeting was held on 8 December 2009 at which the report was presented by means of a PowerPoint presentation. For reasons that are not material, four of the six applicants were not present at the meeting. On 10 February 2010, a meeting was held with each of the affected employees, including the applicants, when it was explained to them that they would be assigned new positions at post level 4 (the applicants were appointed on the higher post level 3), that their personal profiles, qualifications and skills would be taken into account in the re-designation of their positions and the re-assignment of their duties, functions and responsibilities. The applicants were given seven days to reflect on the proposed changes. After this meeting, the applicants were advised of their new positions. All but the fifth applicant were allocated posts with different portfolios in the Thaba Nchu or Botshabelo regions.

[6] On 25 February 2010, the second respondent addressed letters to the affected employees, including the applicants, informing them of the re-designation of their respective positions and their re-assignment and directing them to commence their new duties on 1 March 2010.

[7] The letter addressed to the first applicant on 25 February reads as follows:

*“RE-DESIGNATION OF YOUR POSITION AND RE-ASSIGNMENT OF
YOUR DUTIES, FUNCTIONS AND RESPONSIBILITIES*

I refer to the previous consultation meetings with all members of management (City Manager, Executive directors and General Managers), including you in your individual capacity on 10th February 2010; on the above matter. I confirm having advised you in the aforementioned consultation meetings, inter alia, as follows:

- 1. The institution is faced with a declining performance as it relates to basic service delivery;*
 - 2. The current management arrangement of the municipality is not aligned to the service delivery challenges of the municipality; and management and close supervision are major contributors to regular failures experienced in the system, sometimes;*
 - 3. The situation is deteriorating with centralized decision-making delaying implementation, which situation is not conducive to effective and optimal utilization of the Municipality's human resources, and is completely unhelpful to effective and efficient delivery of services to communities falling within the area of jurisdiction of Mangaung Local Municipality;*
 - 4 The re-alignment and devolving of additional powers and functions to the three (3) Regional Offices will effectively decentralize operations of the Municipality and bring services closer to the communities the Municipality is serving. It will assist in removing bureaucratic red tape; which more often hinders service delivery and has been thoroughly discussed, consulted and debated with relevant stakeholders. It has also been overwhelmingly received as the best way to address the deteriorating performance of the Municipality by senior management.*
 - 5. The following is hereby re-confirmed:*
 - (i) The re-alignment of the current micro-organizational structure will take effect as from 1st March 2010;*
 - (ii) You are officially being re-assigned from your current position of General Manager: Legal Services; to the position of Manager: Corporate Support and finance (Thaba Nchu Region), with effect 1st March 2010.*
- The rest of the terms and conditions of service as it relates to your*

employment will remain unchanged; and so will your salary notch and incremental date, where applicable.

- (iii) The duties, functions and responsibilities assigned to you pursuant to your aforesaid re-designated position are set out in the attached Annexure A10 of this letter.*
- (iv) You will report to the General Manager: Regional Office: Thaba Nchu; with effect 1st March 2010, who will allocate the necessary office accommodation at the Regional Office on your assumption of duty.*

[8] The extent of the changes effected by this directive can be illustrated by reference to the circumstances of the first applicant. He contends that his status has been diminished, that the effect of the respondents' directive is to inconvenience him since Thaba Nchu is some 70 kilometers from his home (which is in Bloemfontein), that he is being obliged to perform work outside of the scope contemplated by his contract of employment, that he does not have the necessary qualifications, skills and experience to perform the job of a manager for corporate support and finance, and that he will accordingly be prejudiced by the performance rating system applied by the first respondent. All of these and other issues were incorporated into the terms of a grievance lodged by the applicants on 1 March 2010. After correspondence with the speaker and thereafter between the parties' respective attorneys, this application was filed.

[9] The 'mobility' issue was abandoned at the hearing of this application – Mr. Venter, who appeared for the applicants, properly conceded that the terms of the applicant's contracts were such that the first respondent was entitled to require them to work at any place within the municipal boundaries, and that this included Thaba Nchu and Botshabelo. I did not understand the respondents to dispute that the second respondent's directive to the effect that the applicants' positions were re-designated and their duties re-assigned constituted a variation of their

employment contracts. The dispute boiled down to whether or not the applicants had consented to the variation.

Legal principles

[10] The founding affidavit does not clearly articulate the right on which the applicants rely to secure the relief that they claim. However, it is sufficiently apparent that their primary complaint is that the respondents acted in breach of their employment contracts by taking a unilateral decision to transfer them and re-assign their duties. The starting point in any consideration of the applicable legal principles is the nature and extent of an employee's obligation to render services to the employer. Writing in *Labour and Employment Law*, Wallis says the following:

“The primary purpose of the contract of employment is that the employee should render services for the employer. That obligation is not entirely general. The scope of the services to be rendered will be determined by the terms of the contract. The employee is only obliged to perform those services which fall within the defined scope of the post which he or she has been employed to fill and those which are reasonably ancillary thereto. The employer cannot demand that the employee perform tasks falling outside those parameters.” (At 4-3, para 21, footnotes omitted).

It follows that an employer seeking to vary the terms of an employment contract (for example, by varying the scope of the services to be rendered) must do so in a manner that is lawful. Ordinarily, this requires any amendment to be brought about by the same mechanism that was necessary in the first place for the conclusion of the contract, i.e. agreement to the new terms (see Wallis *supra* at 7-18(4)).

[11] The respondents contend that the applicants consented to the change to their employment contracts. In this regard, they rely on the meetings held on 8 December 2009 and 10 February 2010, and in particular the fact that the applicants failed to offer any alternatives to the proposals made by the respondents during what was described as a period of consultation. The furthest the respondents go is to suggest that after the 'one on one' meeting in February, the applicants "all accepted their positions", and that in the following seven days that the applicants were afforded time to make further inputs or suggestions, they did not do so. Even on this version of events (the applicants' dispute that they accepted or acquiesced in the respondent's proposals), in my view, the failure by an employee to respond to a variation proposal does not ordinarily amount to agreement as it is understood in contractual terms, i.e. an offer and a clear and unequivocal acceptance of that offer. The second respondent's letter dated 25 February 2010 does not refer to or confirm any agreement to the varied terms, nor does the lodging of a grievance by the applicants less than a week later sustain this version. Thus on the respondents' own version, consent to variation of the scope of responsibilities has not been established.

[12] Even if I am wrong in coming to this conclusion, assent by acquiescence is not sufficient to effect a lawful variation of the applicants' employment contracts. Clause 16 of the contract requires any variation of its terms to be reduced to writing and signed by both parties. It is common cause that the first respondent did not seek to secure or confirm the applicants' written consent to the changes that it proposed to their employment contracts, nor did the applicants sign any record of any variation, thus signifying their assent thereto. In these circumstances, clause 16 provides that a variation or departure from the agreement is of no force and effect.

[13] The applicants have accordingly established a clear right to the relief that they seek. None of the other requirements for final relief were in issue.

For these reasons, I make the following order:

1. The re-assignment of the applicants' positions and the re-designation of their duties constitute a breach of the applicants' contracts of employment.
2. The respondents are ordered to comply with the terms of the applicants' contracts of employment.
3. The respondents are ordered to pay the costs of these proceedings, jointly and severally, the one paying the other to be absolved.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing 9 June 2010

Date of judgment 11 June 2010

Appearances:

For the applicants: Adv Venter instructed by Lovius Block

For the respondents: Adv RT Sutherland SC, instructed by Lebea and Associates.