

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: J916/2011

In the matter between:

SOUTH AFRICAN DEMOCRATIC TEACHERS' UNION First Applicant

M W NDEVU Second Applicant

and

GAUTENG DEPARTMENT OF EDUCATION First Respondent

D MCUACUA Second Respondent

Date of hearing: 01 June 2011

Date of judgment: 21 June 2011

JUDGMENT

VAN VOORE AJ:

- 1 This is an application, launched on an urgent basis, by the South African Democratic Teachers' Union (the union) and by the Second Applicant, Mr M W Mdevu (Mdevu). In essence the applicants seek an order that the first respondent, the Gauteng Department of Education (the department) not transfer him from the post of District Director, Operations Management to a post in Fleet Management with effect from 1 June 2011.
- 2 The background and material facts in this matter are largely undisputed. Ndevu is employed by the department and has been since 1996. Ndevu is still employed by the

department and his continued employment is not under threat. Until 1 June 2011 Ndevu was employed in the post District Director, Operations Management. Mdevu is also a shop steward of the union. It is not contended by Ndevu or the union that the department's decision to transfer him is as a result of or on account of his union membership or activities.

- 3 Ndevu trained as a teacher and qualified in 1971. His first appointment as a teacher was in 1975 and in the period 1975 to 1996 Ndevu held various teaching posts in the Eastern Cape and in Gauteng. In 1996 Ndevu joined the department as an inspector of schools and in 1997 was promoted to the level of Deputy Director. Ndevu held various managerial posts in the department and after successfully applying for an advertised post in 2010 he was appointed to the post of District Director, Operations Management for the period 1 April 2010 to 30 March 2011. Ndevu describes himself as 'quintessentially a teacher' and says further that he 'cannot imagine [himself] rendering any service not related, in some way and to some degree, to teaching or management of schools'. However it is undisputed that Ndevu sought and was promoted into various managerial positions rising to the level of Deputy Director, albeit related to the management of schools. Nonetheless Ndevu's career since 1996 when he joined the department as an inspector of schools has seen him being involved in managerial activity rather than that of teaching and learning.
- 4 When applying for the post District Director, Operations Management Ndevu knew and understood that his appointment to that post would be for the period 1 April 2010 to 30 March 2011. This was not a fixed term employment contract but rather an appointment to that position for a period of twelve months whereafter a decision would then be made.
- 5 On 23 May 2011 Ndevu's Head of Department called him to a meeting. The meeting was also attended by the department's Chief Director, the Head of Department, the Chief Director of Human Resources and the Director of Legal Services. At this meeting Ndevu was informed that it was proposed that he be transferred from his current position to a managerial position in Fleet Management position. He was further informed that the reason for the proposed transfer was that the department considered him to be the type of person to start the new fleet management unit on its behalf. Ndevu contends that at the meeting he was informed that he was allowed to object to

the proposed transfer and that on 25 May 2011 he sent a letter to his Head of Department. In that letter Mdevu writes the following:

“The meeting in the HOD’s office dated 23 May 2011 has reference.

I note that the manner in which the above meeting was called and carried out as well as the decision to consult on my transfer to Fleet Management.

I will also be failing if I do not express my view on the option of the transfer. My placement by the then acting HOD Mr Len Davids at Johannesburg West in June 2009 was as a result of extensive consultation between the current MEC and stake holders.

I hope and trust that the meeting was consulting and has not taken a decision already because it will be folly of me to think that I was consulted yet a decision had already been done.

In light of the above, I would appeal that your office takes this explanation into account and allow me to remain in Johannesburg West to complete the mandate that was given.”(emphasis added)

- 6 This was the full extent of Ndevu’s response to the meeting of 23 May 2011 at which he was apparently informed that he had an opportunity to object to his proposed transfer.
- 7 On 25 May 2011, and before any correspondence from attorneys, to which I will return later, the department called a meeting which Ndevu was required to attend. At this meeting the department informed those present of Ndevu’s ‘imminent’ transfer and the appointment of the second respondent, D Macucua (Macucua) to the post of District Director, Operations Management. It appears that a decision had in fact been made in respect of Ndevu’s transfer.

- 8 It appears that Ndevu and a number of other employees of the department sought legal advice and consulted attorneys. On 26 May 2011 attorneys on behalf of Mdevu and a number of other employees wrote to the department. In this letter the attorneys requested a ‘withdrawal’ of the decision to transfer Ndevu and the other employees. The letter also alleged that the department’s conduct and decision to transfer the union’s members was ‘without good reason, proper consultation and hearing’ and was ‘unlawful’. The attorneys’ letter of 26 May 2011 further claimed that Ndevu and the other employees had informed the department that they did not accept the decision to transfer them and further that the department had in fact proceeded to call a meeting in which it announced the decision to transfer Ndevu and the other employees. Notwithstanding the fact that the letter from the attorneys refers to Ndevu and other employees, by the time that this matter was heard on 1 June 2011 it was common cause that the other employees, excluding Ndevu, did not seek to challenge their transfer.
- 9 Whilst on the papers it is contended that Ndevu had objected to his proposed transfer and that in the face of an ‘unresolved objection’ the department decided to transfer him, this allegation is not supported by the facts of the matter. Ndevu in his letter of 25 May 2011 did not in fact object. His letter of 25 May records quite simply that, ***“in the light of the above, I would appeal that your office takes this explanation into account and allow me to remain in Johannesburg West to complete the mandate that was given.”*** On a plain reading this is not the language of objection. Rather Ndevu accepts that the department does indeed have the power to transfer him and requests that he be allowed to remain in the post. Accordingly, the claim in the attorneys’ letter that Ndevu had informed the department that he did not accept the decision to transfer him is not supported by Ndevu’s letter of 25 May 2011 in which he records, in part, what transpired at the meeting of 23 May 2011. Further Ndevu’s own version as to what transpired in the meeting of 23 May 2011 does not include any allegation or facts from which it can be concluded that Ndevu had during the meeting of 23 May 2011 objected to the proposed transfer. My assessment of Ndevu’s letter does not mean that he does not have the right to make representations and to be informed of the department’s response and attitude to such representations. However, those aspects do not make this matter urgent.

- 10 Prior to the launching of this application the department did not respond to the letter from the attorneys dated 26 May 2011.
- 11 It is common cause that after the transfer Ndevu will remain an employee of the department. On the papers it is not alleged that the transfer amounts to a demotion or that Ndevu's benefits will be altered, adversely, as result of the transfer. Other than a bald statement as to the transfer having the 'potential to adversely impact [his] circumstances', no case as to demotion or other adverse consequences is made out.
- 12 Ndevu contends that the decision to transfer him amounts to a contravention of section 14 of the Public Service Act, 103 of 1994 (the Act). In this regard Ndevu seeks to rely, *inter alia*, on section 14(4) of that Act which provides that:

“14(4) A member of any of the three branches of the services shall not without his or her consent be transferred to a post in the A or B division, and a member of the Agency or the Service shall not, subject to the provisions of any law regulating the service of such a member, without his or her consent to be transferred to a post in a division.”

- 13 However, Ndevu's reliance, albeit apparently prompted by the department, on section 14 of the Public Service Act is misplaced. The three branches of the services as contemplated in s14(4) are defined in section 1(1) of the Act to mean the Permanent Force of the National Defence Force, the South African Police Services and the Department of Correctional Services. Ndevu is not employed in any of these services and it is not proposed that he be transferred to any of these services. Further, 'agency' in section 1(1) of the Act is defined to mean the 'agency' as defined in section 1 of the Intelligence Services Act, 1994. Yet further, 'service' is defined in section 1(1) of the Intelligence Services Act to mean the South African Secret Service. Accordingly sections 14(3)(e) and section 14(4) do not apply to Ndevu. In the circumstances the provisions of the Act as relied on by Ndevu do not point to a right not to be transferred without his consent.
- 14 The other basis of the application is an alleged general right to be heard. For the purposes of determining the matter before me, it is not necessary to decide whether

Ndevu, on the facts of this matter, has such a general right. Even he did have such a general right, that would not make this matter urgent.

- 15 The union and Ndevu have approached this Court for final relief. Ndevu accepts that is appointment to the post District Director, Operations Management was for a period of 12 months from 1 April 2010 to 31 March 2011 and that thereafter a decision would be made. Accordingly Ndevu cannot claim that he has a right to remain in the post of District Director, Operations.
- 16 Further, Ndevu does indeed have an adequate alternative remedy in that he may, having exhausted such internal remedies available to him, approach the appropriate dispute resolution authorities and this Court in the ordinary course. Absent a clear right Ndevu cannot establish proper grounds for urgency.
- 17 Ndevu approached this Court for final relief and accordingly is obliged to satisfy the requirements for such final relief which include a clear right and the absence of an adequate alternative remedy. The application must fail at the first hurdle.
- 18 Given that the applicants have not met the requirements for final relief in an urgent application, the application is dismissed for lack of urgency. In the circumstances I make the following order:
 - (1) The application is struck off the roll.
 - (2) The applicants are ordered to pay the costs.

VAN VOORE AJ

Appearances:

For the applicants: Adv Raulefe

Instructed by: Cheadle Thompson & Haysom Inc

For the respondents: Adv T Motau SC

Instructed by: The State Attorney Johannesburg

LABOUR COURT