REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 510/10

In the matter between:

POPCRU OBO N J MAHLANGU & OTHERS	**Applicant**
and	
THE PREMIER, GAUTENG	**First Respondent**
MEC FOR INFRASTRUCTURE	
DEVELOPMENT, GAUTENG	**Second Respondent**

Heard: **27 October 2011**

Delivered: 2 December 2011

Summary: Review in terms of section 158 (1) (h) – decision of State to charge market related rental not made in capacity as employer – dismissed with costs

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JUDGMENT

BHOOLA J

Introduction

[1] This is an application in terms of section 158(1)(h) of the Labour Relations Act- ("the LRA"),[1] in which the applicant seeks an order reviewing and setting aside a decision taken by the second respondent to charge market

[1] 66 of 1995.

related rental for state housing occupied by officials of the Gauteng Provincial Government, and which is provincial property ("the Decision").

[2] The Decision was communicated by the Department of Infrastructure Development ("the Department") of the Gauteng Provincial Government in its letter of 24 February 2009 in the following terms:

> 'To all GPG Officials Accommodated in State Residences:
>
> <u>NOTICE OF INTENTION TO CHARGE MARKET RELATED RENTALS – NEW LEASE AGREEMENT</u>
>
> Please be informed that:
>
> 1) The PFMA (Public Finance Management Act 1 of 1999) and in particular Treasury Regulation 16A7.4 (as published in Government Gazette 27388 dated 15 March 2005) requires this Department to charge market related rentals in respect of provincial property.
>
> 2) On the 3rd February 2009, the Executive Management Team (EMT) took a decision that all tenants who are occupying Gauteng Provincially owned properties must pay Market Related Rentals (MRR).
>
> 3) In a task team meeting on 15 May 2009, attended by Organised Labour at the office of the Premier, it was deliberated and agreed that the MRR implementation process should commence and that the implementation date should be 1st August 2009.
>
> 4) You are hereby given three (3) months' notice of termination of your current tenancy with effect from 1 March 2010 until 31 May 2010.
>
> 5) Should you be interested in entering into a new lease with the Department, which is to be effective 1 June 2010, you should kindly note that the new lease agreement will reflect a Market Related rental derived from the current Market Value of the property and you are free to come view the Valuation report.
>
> 6) Should you decline the offer, you will unfortunately have to vacate on or before 31 May 2010. …
>
> 7)…..

> 8) Should you wish to enter into a new lease agreement but are of the opinion that you are by way of your conditions of service entitled to state housing, you are advised to provide a letter signed by your Director, stating that you qualify for state housing as provided for in your Departmental Criteria on State Housing.'

[3] The applicant, POPCRU, seeks relief on behalf of its members who lease state and other housing owned by the provincial government in the Gauteng Province through the second respondent. None of these members are identified in the pleadings, nor are the terms of their lease agreements disclosed. However, the applicant has put up a lease concluded between NJ Mahlangu and the respondents as an example of the kind of lease agreements that exist between the respondents and POPCRU members occupying state housing. In terms of this agreement Mahlangu leases as 'state housing a residence/flat…for the purpose of housing, upon the terms and conditions stated in the lease agreement'. The agreement stipulates that an amount of R200.00 per month is payable as rent, which equal 4% of Mahlangu's salary and is to be deducted from his monthly salary. A salary advice was also put up in respect of Mahlangu and reflects that he receives a housing allowance of R500.00 per month and that rent of R500.00 per month is deducted from his salary. The lease agreement also contains a clause to the effect that '<u>the lessee understands and accepts that he/she is not entitled to State Housing as contemplated in Public Service Staff Code Chapter DVII</u> [2], and furthermore that the residence he/she is occupying is coupled without any recourse to the Gauteng Provincial Government'.

<u>Grounds of review</u>

[4] The applicants submit that they are entitled to review the decision on the grounds of legality in terms of section 158(1)(h) of the LRA. They expressly disavow reliance on the administrative law grounds of review. They submit that the Decision is contrary to treasury regulations, collective agreements concluded in the Public Service Co-ordinating Bargaining Council ("the

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[2] The Public Service Staff Code was withdrawn with effect from 1 July 1999 as per GN 847 published in Government Gazette No. 20271.

PSCBC"), and individual lease agreements concluded with employees, rendering it *ultra vires* and irrational.

[5] Mr Basson advanced the following submissions in support of the review:

(a) The Decision is contrary to regulation 16 A 7.4 of the treasury regulations, which was issued in terms of the Public Finance Management Act, 1 of 1999 ("the PFMA"), which provides as follows :

'The letting of immovable state property (**excluding state housing for officials**[3] and political office bearers) must be at market-related tariffs, unless the relevant treasury approves otherwise. No state property may be let free of charge without the prior approval of the relevant treasury'.

(b) The decision is contrary to collective agreements regulating the provisions of state housing for public officials. These include PSCBC Resolution 3 of 1999, PSCBC Resolution 2 of 2004, and PSCBC Resolution 1 of 2007. Part XVI of Resolution 3 of 1999 provides that it is applicable where the employer deems it necessary for an employee to occupy state housing. It further provides for the parties to agree on a more detailed policy provided it is negotiated and does not violate existing provisions. It requires the executing authority to enter into a lease agreement with the employee and states that the rent payable by officials who occupy state housing is 4% of their salary up to a maximum of R200.00 in respect of married quarters and 1% of salary in respect of single quarters. Resolution 2 of 2004 provides for a housing allowance (previously paid only to officials who owned houses), to be phased in to apply to officials who own or rent accommodation over a period from 2005 to 2009. It requires the rent to be equal to the housing allowance and states that rent payable by employees occupying housing **other than state**

[3] Counsel's emphasis.

housing[4] as provided for in Resolution 3, shall be determined in terms of a department policy, provided it is not less than the maximum rent payable for state housing. Resolution 3 of 1999 provides for the phasing in of the housing allowance until full implementation by 2007 and an increase to R500.00 per month with effect from 1 July 2007.

(c) The Decision is contrary to the lease agreement between Mahlangu and the second respondent.

Analysis

[6] The respondents raise a number of points *in limine* in opposing the application, including that POPCRU does not act on behalf of any employee of the respondents and therefore lacks *locus standi*. However, in essence they contend that this Court has no jurisdiction on the grounds *inter alia* that the review was not brought in terms of any specific provision of the LRA; the dispute relates to a contractual matter between the respondents and lessees; and that the issue of rent payable for provincial property is a matter of mutual interest.

[7] The example of the lease agreement makes it clear that Mahlangu (and consequently the other unidentified members on behalf of whom the claim is brought), has no right to occupy state housing. It is common cause that in respect of state housing employees can be charged rental; such rental is fixed by collective agreements and cannot be unilaterally changed. It would be appropriate to dismiss the review simply on this ground alone. However I consider it appropriate to deal with some of the other points raised *in limine* by Mr Semenya and in the heads of argument prepared by Mr Maenetje and do so below.

No provision in the LRA for a legality review of this nature

[8] Mr Basson submitted that the applicants were entitled to rely on section 158(1)(h) of the LRA which gives this Court the power to review ‘any decision taken or any act performed by the State in its capacity as employer, on such

[4] Counsel’s emphasis.

grounds as are permissible in law'. Legality, he submitted, is a permissible ground and has been recognised as such in two Labour Court decisions : *De Villiers v Head of Department: Education, Western Cape Province*[5] and *POPCRU v Minister of Correctional Services and Another.*[6] In *De Villiers* Van Niekerk J held, after a succinct discussion of the administrative law review grounds post-*Chirwa*, that the employer's conduct in refusing to reinstate the employee in terms of section 14(2) of the Employment of Educators Act constituted administrative action and that the Labour Court was entitled to review the decision on this ground. Furthermore, in the *POPCRU case,* Steenkamp J confirmed that an act of the state in its capacity as employer is reviewable on the basis of the principle of legality even if the act does not constitute administrative action. Mr Semenya argued that *Correctional Services* (which is on appeal) was distinguishable in that it addressed itself to whether the Minister acted *intra* or *ultra vires* in issuing regulations. In the present matter, the reliance on legality as a ground of review is misplaced in that the applicants admit that the Treasury regulations enjoin government to charge market related rental in respect of state property. Lack of authority is thus not in issue and the decision cannot therefore be said to be *ultra vires* or irrational. However even if the applicants contend, as I understood Mr Basson to do in argument, that the applicants stance is that the decision is *ultra vires* the treasury regulations, the application would still be misconceived. It is clear from the facts that Mahlangu is not entitled to occupy state housing nor has such an entitlement been shown among other members. In any event, if they do then all they are required to do is to submit the information required. It is clear that on the face of it, the Decision does not purport to apply MRR to state housing occupied by officials as part of their conditions of service.

[9] The applicant invoked section 158(1)(h) for the first time in reply in response to the respondents' allegation in their answering affidavit that they did not purport to being their case in terms of any specific provision of the LRA. However, even if one disregards the fact that this amounts to seeking to make out a case in reply which would warrant dismissal of the application solely on this ground, the applicant must still fail for the reason that section 158(1)(h) is

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5 (2010) 31 ILJ 1377.

6 [2011] 10 BLLR 996 (LC).

not applicable to the facts. In this regard, the respondents make the point in their heads of arguments that the Decision does not qualify for review in terms of section 158(1)(h) for three reasons :

(a) It does not constitute a decision taken or an act performed by the State in its capacity as an employer but in its capacity as a lessor;

(b) It is not reviewable on any grounds permissible in law; and

(c) Even if it were in principle reviewable, no case has been made out for review.

[10] The issue therefore is not whether legality is a permissible ground of review, but whether the decision is one that has been taken by the State as employer. I am in agreement with the submissions of Mr Semenya that the matter concerns a decision of the State *qua* lessor in this instance and that the review is on this basis misconceived.

The Decision relates to a contractual matter

[11] The respondents submit that the Decision relates to a contractual matter between the Department and affected members of POPCRU. The applicants submit that this loses sight of the fact that the decision is based, in the first instance, on the purported authority derived from the relevant provision of the treasury regulations (which have been incorrectly interpreted by the Department), and secondly on an alleged agreement concluded with labour (which has not been proven to exist). The Decision has not been taken in the context of, or with consideration given to, existing lease agreements. Furthermore, insofar as the rights and obligations of parties are determined by the lease agreements they are also determined by the collective agreements concluded in respect of state housing in terms of which the individual lease agreements are then concluded. Mr Basson submitted that the Decision was taken contrary to collective agreements concluded between the parties and arises from the employment relationship between the parties. It is therefore not a dispute about the interpretation of a lease in terms of ordinary contract law but in terms of the applicable conditions of service.

[12] Mr Basson conceded however that the term “state housing” can apply only when employees are required by their employers to occupy specific state owned accommodation for operational reasons.

Mr Basson submitted that it follows from the distinction between state and other housing referred to in clauses 7.1.8 and 7.1.9 of PSCBC Resolution 2 of 2004 that different considerations apply to the determination of rental as follows :

> ‘7.1.8 The rental payable by employees **occupying state housing, as required by the employer,** shall, with effect from 1 January 2005, be equal to the greater of either the housing allowance, as part of the phasing-in period referred to in clause 7.1.5 of the applicable amount payable in terms of Part XVI of Annexure B to PSCBC Resolution 3 of 1999, i.e. the rental amount will be equal to the housing allowance.
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> 7.1.9 The rental payable by employees occupying **housing other than state housing** as provided for in Part XVI of Annexure B to PSCBC Resolution 3 of 1999, shall be in terms of a departmental policy, provided that it is not less than the maximum rental payable for state housing’. (Counsels’ emphasis).

[13] For this reason, Mr Basson submitted that where an employer requires an employee to occupy state housing, for operational reasons or otherwise, and the employer charges the employee rent for that housing, the determination of that rental is subject to collective agreements, the purpose of which is to neutralise any detrimental financial impact of the requirement to pay rent on the employee by introducing two mechanisms. The collective agreements achieve this by limiting the amount of rent the employer may charge in respect of the housing and secondly by granting the employee an equivalent housing allowance. In respect of state housing then, the rent would be as prescribed by collective agreements and any revision of that rental would have to be subject to collective bargaining. The issue in dispute therefore does not relate to an ordinary contractual issue but to an issue that is regulated by collective bargaining.

[14] However, it is self-evident that the Decision excludes state housing and requires officials in such housing to provide proof to that effect. Insofar as

Mahlangu (and, it must be inferred) other individual applicants therefore occupy “other housing”, the rental applicable to them can be determined by departmental policy and would accordingly be excluded from the ambit of the collective bargaining. It is self explanatory that in light of the applicable Resolutions, it would be left to be regulated by the parties themselves outside the employment context.

Rent is a matter of mutual interest

[15] The applicants in essence are challenging the Department’s decision which they contend is based on its interpretation of the treasury regulations. This, they submit, does not relate to a matter of mutual interest. In this regard, they rely on the following passage from Rycroft & Jordaan: A Guide to SA Labour Law (Juta, 1992) at 169:

> ‘Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or “economic disputes”) concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests, while adjudication is normally regarded as an appropriate method of resolving disputes of right.’

[16] Accordingly, Mr Basson submitted that the decision taken by the respondents to charge market related rent is clearly not something that was proposed by the employer to the employees in the context of negotiations to create fresh rights, or with the purpose of amending the existing collective or individual lease agreements. This means that an unlawful and final decision has been taken outside the scope and application of the existing agreements, which decision infringes on the existing rights of employees embodied in collective agreements and lease agreements subsequently entered into.

[17] Even if the Department is correct in its understanding that it is required by the treasury regulations to charge market related rent for *all* provincial property occupied, it clearly attempts to distinguish “state housing” from the

ambit of the regulations by way of the proviso at the end of the letter conveying the Decision. Even on the limited basis contended for in reply by Mr Basson the relief sought would then be entirely academic and the application would still be misconceived in that all POPCRU members would need to show that they are in state housing in order to be excluded from the ambit of the Decision.

[18] The applicants sought to argue that the Decision, insofar as it applies to state and other housing i.e. to *all occupants of state housing* irrespective of whether they occupy the housing at the employer's behest as a term and condition of their employment or whether it is by their choice, is *prima facie* in conflict with the treasury regulations as well as the collective agreements and individual lease agreements. The applicants have not shown that any of its members are occupying state housing by virtue of their contracts of service. Nor are they employed by the respondents. Accordingly, they seek relief as lessees and cannot do so in this Court for the reasons set out above.

Order

[19] In the circumstances therefore, the points *in limine* are upheld and the application dismissed with costs.

Bhoola J

Judge of the Labour Court

APPEARANCES

APPLICANT:	Advocate J L Basson Instructed by Grosskopf Attorneys, Pretoria .
RESPONDENTS:	Advocate I Semenya SC (heads of arguments prepared by Advocate H Maenetje) Instructed by the Office of the State Attorney, Johannesburg