



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P58/14

In the matter between:

SEDRICK SIMON AMSTERDAM

Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

REGIONAL COMMISSIONER, DEPARTMENT OF

CORRECTIONAL SERVICES, EASTERN CAPE

Second Respondent

Heard: 14 May 2014

Delivered: 27 June 2014

Summary: An applicant in an urgent application must furnish reasons for urgency and state why urgent relief is necessary. Failure to do will lead to the application being struck from the roll for lack of urgency.

JUDGMENT

Lallie, J

Introduction

- [1] The applicant launched an urgent application for an order in the following terms:
- '1.1 that the respondents be and are hereby interdicted and/or restrained from continuing with the recruitment process and any conduct in furtherance of the filling of the post of Deputy Director/; Head Correctional Centre, East London Maximum (Ref CSA/2/2014) as advertised in the issue of City Press dated 16 March 2014, pending the finalisation of this application;
 - 1.2 the decision to transfer the applicant from East London Maximum Correctional Centre to Mdantsane Medium Correction Centre be and is hereby declared wrongful and unlawful and reviewed and set aside;
 - 1.3 that the applicant be and is hereby declared to be the Head of Correctional Centre, East London Maximum pending the finalisation of this application;
 - 1.4 prayers in terms of sub-paragraphs 1.1, 1.2 and 1.3 above shall operate as an interim interdict or mandamus until the finalisation of this application'.

Factual background

- [2] The applicant was appointed to the position of Deputy Director: Head Correctional Centre East London with effect from 3 May 2005. A number of attempts were made to transfer him from the position as early as 7 December 2006. He was successful in resisting them.
- [3] The applicant attended a meeting on 1 March 2012 where the issue of restructuring the Eastern Cape Centres of the Department of Correctional Services (the Department) was discussed. A system of rotation of managers was amongst the points of discussion. The purpose of the reshuffling was said to be to achieve a single goal, which was the improvement of service delivery in Management Areas and the Region. On 14 March 2012, the Department extended an invitation to all managers who wished to relocate from their positions to express their wish in writing. The purpose of the

invitation was to afford managers in the Eastern Cape Region an opportunity of voluntary horizontal transfer. Where there were no voluntary requests, recommendations whether to rotate managers had to be provided, based on the performance of each manager holding a key position. Prime consideration was given to persons who had been in a post for a minimum of three years. The applicant did not express a wish to be transferred horizontally. He, however, was consulted on 30 April 2012 regarding his horizontal transfer to the post of Head Correctional Centre: Mdantsane. Representations were made on behalf of the applicant in a letter dated 11 May 2012 in which the applicant objected to his intended transfer. The respondents did not respond to the representations. In a letter dated 16 October 2013 the respondents again expressed the intention to effect the transfer. The transfer was said to have been necessitated by the operational reasons of the region and efforts to improve service delivery. The applicant was required to indicate whether he was accepting the transfer by 21 October 2013.

- [4] A meeting in which the applicant expressed his concerns about the transfer was held on 13 November 2013 between the applicant and the second respondent at the applicant's request. The second respondent asked the applicant to reduce his concerns to writing. The applicant submitted his written representations on 28 November 2013. They were mainly that the Mdantsane official residence is in a bad condition and too small to accommodate his furniture and personal belongings. His family was reluctant to move from East London to Mdantsane, his transfer would therefore have a negative effect on his marriage and family ties. His daughter was studying in East London and commuting daily would be very costly. The insurance premiums of his motor vehicles would be increased owing to lack of safe garaging and the fact that Mdantsane is considered a high risk area. His transfer was pre-determined. He had identified two managers who were keen to be transferred to Mdantsane. The transfer would have the effect of a demotion owing to its burdensome financial implications and he was receiving treatment for stress induced by the proposed transfer from a psychologist. The respondents responded by granting the applicant permission to continue

using the East London official residence and considered renovating and extending the Mdantsane official residence.

- [5] On 29 November 2013, the applicant received a letter informing him that his transfer had been approved. He lodged a grievance against his transfer on 12 December 2013. On 23 December 2013, the applicant's psychologist wrote a letter to the respondents appealing on his behalf. On 19 January 2014, the applicant was informed that the matter had been finalized. The applicant waited for the respondents to deal with his grievance. When he did not hear from the respondents as he was on sick leave from August 2013, he assumed that the respondents had abandoned their efforts to transfer him as they had done in the past. He launched this application of 3 April 2014 after seeing 'his' position being advertised in a newspaper on 27 March 2014.
- [6] The respondents raised two preliminary issues. The first is that no grounds for review have been disclosed in the founding affidavit and the interim interdict is therefore not competent. The second is the applicant's failure to make out a case for urgency. It will be appropriate to demine the issue of urgency first as it is dispositive of this matter. The applicant based the urgency of his application on two grounds. Firstly, he submitted that he has a valid contract of employment with the respondents in terms of which he was appointed to the impugned post. He lodged a grievance which had not yet reached its final level of authority. In the event of the outcome of his grievance being in his favour, he will be allowed to remain in his post. Secondly, the filling of his post is imminent as it has already been advertised in the newspaper and the closing date for submission of applications being the 28 March 2014.
- [7] I will firstly deal with the applicant's first ground of urgency. Rule 8 (2) (a) requires an applicant for urgency to give reasons for urgency and state why urgent relief is necessary. In *Caledon Street Restaurants CC v Monica de Aviera* [1998] JOL 1832 (SE) an unreported decision of the South Eastern Cape Local Division of the High Court of South Africa at page 54, the Court expressed the following view on the issue of urgency:

'The objection of the respondent to the applicant's bringing the application on the basis of urgency was two fold in nature. Firstly, it was contended that on

the applicant's own papers it had been aware of the alleged conduct on the part of the respondent for a considerable period prior to its launching the present proceedings on 21 October 1997. Its delay in bringing the proceedings had accordingly disqualified it from invoking an alleged urgency. Secondly, on the premise (which was conceded) that there was some urgency present, the applicant had nevertheless not been entitled to force the respondent into court within the limit time provided for in its notice of motion. Again, I consider it unnecessary to canvass the validity of the first leg of the argument. The matter may be disposed of on the basis of the second leg'.

- [8] The applicant was made aware of his transfer upon receipt of his letter of transfer on 29 November 2013. He elected to lodge a grievance on 12 December 2013. The department's grievance procedure provides as follows with regard to unresolved grievances:

'If a grievance is not resolved within the time frame (or as mutually agreed) the grievance may promptly be forwarded to the higher level of authority by the aggrieved employee.

The grievance must be forwarded to the higher level of authority by the employer in any event'.

- [9] When the applicant did not hear from the respondents he did not escalate his grievance to the higher level of authority. Instead, his psychologist forwarded a letter to the first respondent on 23 December 2013, appealing against the transfer on his behalf. On 19 January 2014, he was advised, in response to his psychologist's letter, that his transfer had been finalised. The applicant proffered no explanation for not filing the present application shortly after being told that the matter had been finalised. The applicant's explanation that he was waiting for the respondents to escalate his grievance is untenable in view of the provisions of the grievance procedure which required him to escalate his grievance promptly.

- [10] The applicant may not seek to rely on the respondents' past practice of putting on hold their attempts to transfer him when he challenged their conduct. The process of transferring him continued unabated at the latest from the time of the consultation of 13 November 2013. He had never been told in the past

that a decision to transfer him had been taken and that his transfer had been finalised. The delay caused by the applicant's unreasonable belief that his transfer had once more been put on hold based on past practice cannot be imputed on the respondents. It is delay that the applicant is responsible for which constituted self-created urgency. The applicant's first ground of urgency does not hold water.

- [11] I now turn to the second ground of urgency, namely, the applicant realized on 27 March 2013 that the filling of his post was imminent. The applicant was informed on 29 November 2013 of the decision to transfer him. On 19 January 2014, he was informed that his transfer had been finalized. The confirmation provided the applicant with the necessary clarity that he had been transferred from East London to Mdantsane. The East London post was no longer his. He provided no valid reason for waiting until the post was advertised. The applicant cannot base the urgency of his application on the advertisement which was brought to his attention on 27 March 2014 almost two months after the confirmation of the finalisation of his transfer. The second ground has also proved to be invalid.
- [12] The applicant served this application on the respondents on 2 April 2014 and required them to file their answering affidavit the following day. In view of the grounds of urgency the applicant sought to rely on which proved to be invalid, the applicant had no reason to force the respondents to file their answering affidavit just a day after the service of the application. This application therefore stands to be struck from the roll for lack of urgency because the applicant created the urgency by delaying in bringing this application and the period within which the respondents were required to file the answering affidavit was unreasonably short and not justified by the circumstances of this matter.
- [13] The respondents sought a costs order against the applicant. Requirements of the law and fairness warrant a costs order against the applicant for forcing the

respondent to appear in court at very short notice for a matter whose urgency was not proved.

[14] In the premises, the following order is made:

14.1 The application is struck from the roll with costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Nobatana

Instructed by: Godongwana Ngonyama Pakade Attorneys

For the Respondents: Advocate Kroon

Instructed by: State Attorney

LABOUR COURT