



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: D244/15

In the matter between

DR SIBONGILE ZUNGU

Applicant

And

THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL

First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, KWAZULU-NATAL

Second Respondent

Heard: 10 April 2015

Delivered: 14 April 2015

Summary: An applicant alleging that the respondent has breached an agreement between the parties on the postponement of a matter may not seek to rely on grounds which fall outside the agreement.

JUDGMENT

LALLIE J

[1] The applicant launched an urgent application mainly for an order in the following terms:

2. That a rule nisi be hereby issued calling upon the respondents to show cause ... why an order in the following terms should not be made:

2.1 That the Respondents be and are hereby interdicted from making any appointment for the Head of Department of the Department of Health, other than that Applicant, including making any acting appointment in that position;

2.2 Directing the Respondent to appoint the Applicant as the Head of Department of the Department of Health in KwaZulu-Natal pursuant to the recommendation of the Independent Selection Panel recommending the appointment of the Applicant as the Head of Department for Department of Health in KwaZulu-Natal;

2.3 Declaring that the First Respondent is not entitled to take into account provisional report prepared by the investigating team concerning the Applicant;'

[2] The matter was set down for 31 March 2015. It was, however, not argued but the parties reach an agreement in terms of which the first respondent "undertook not to appoint anyone into the position which is the subject matter of this application (HOD KZN Health);

2 The matter would be adjourned to 17th April 2015".

[3] After the postponement of the matter the applicant became aware that the first respondent appointed Dr Simelane as the acting Head of Department for Health in KwaZulu-Natal (the HOD position) with effect from 1 April 2015 until the appointment of a new Head of Department. On 2 April 2015 the applicant received a letter dated 1 April 2015 in which the first respondent advised her that her contract had expired. He further expressed an intention not to renew it. The letters prompted the applicant to launch the present urgent application seeking the same relief she sought in the one postponed to 17 April 2015.

The only difference in the relief she is presently seeking is costs in that she now seeks costs *de boni propiis* on an attorney and client scale. The applicant submitted that by issuing the letters the first respondent undermined the undertaking made on 17 March 2015. The actual relief sought by the applicant is the enforcement of the agreement reached by the parties on 17 March 2015 (the agreement).

- [4] The respondents opposed this application on the basis that the first respondent did not breach the agreement. They submitted that the applicant sought to rely on facts which fall outside the realm of the agreement. Had the first respondent fail to appoint an acting HOD he would have been in breach of section 36 of the Public Finance Management Act (the PFMA) which precludes him from leaving a position of an accounting officer vacant. It is common cause that the HOD is an accounting officer. In an attempt to prove that the first respondent breached the agreement the applicant submitted that the first respondent was aware that she performed her official duties on 1 April 2015. The first respondent advised her of the termination of her contract with the intention not to renew it. He appointed Dr Simelane to act in the HOD position after making an undertaking not to appoint anyone in the capacity of the Head of Department, acting or otherwise in the intervening period until the matter was argued on 7 April 2015.
- [5] The applicant's submission that the first respondent made an undertaking not to appoint an acting HOD until the matter was argued on 17 April 2015 is not supported by the letter in which her attorneys reduced into writing the terms of the agreement. A reading of the letter which the agreement is recorded makes it clear that the undertaking was not to appoint anyone in the position which is the subject matter of the original application. The subject matter of the original application is the appointment in the HOD position for a period of five years. It is common cause that the first respondent has not made that appointment yet. The respondents' submission that the first respondent was compelled by legislation not to live the HOD position vacant was not challenged. The applicant therefore failed to prove that the first respondent breached the agreement.

[6] The respondents sought a costs order against the applicant. Having considered the submissions on behalf of the parties on the issue I am of the view that the undertaking not to appoint anyone to the HOD position does create the incorrect impression that it included the appointment of an acting HOD. The applicant's error is therefore not unreasonable. In the premises granting a costs order against her will not be fair.

[7] In the premises the following order is made:

- 7.1 The application is dismissed.
- 7.2 The application postponed to 17 April 2015 will proceed in terms of the agreement reached by the parties on 31 March 2015.
- 7.3 No order is made as to costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Madonsela

Instructed by: Strauss Daly Inc

For the Respondents: Advocate Van Niekerk SC with Advocate Patel

Instructed by: State Attorney

LABOUR COURT