



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1043/12

In the matter between:

SOLIDARITY obo ROOS

APPLICANT

and

SOUTH AFRICAN POLICE SERVICE

FIRST RESPONDENT

THE MINISTER OF POLICE N.O

SECOND RESPONDENT

THE NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICE

THIRD RESPONDENT

Heard: 16, 17, 18 March; June 2015 (heads of argument filed)

Delivered: 23 November 2015

JUDGMENT

WHITCHER J

Introduction

- [1] These proceedings concern whether the respondents are in contempt of an Order issued by this court¹ on 22 April 2014.

The Court Order

- [2] Colonel Roos ("Roos") instituted action against the respondents, claiming the SAPS had transferred him from his post in the internal audit section of Crime Intelligence and that such transfer had occurred as he had made a number of protected disclosures about fraud and corruption in the secret service account of Crime Intelligence. He alleged that the transfer amounted to an occupational detriment as envisaged in the Protected Disclosures Act 26 of 2000.
- [3] The court found that he had been deliberately moved out of his position as an auditor of the secret service account of the Crime Intelligence section of the SAPS, and placed in a position where he had no meaningful role, with an adverse effect on his career prospects.
- [4] The judgment recorded that Roos agreed that if he could not be placed in his previous position, an appointment in a comparable post acceptable to him would address the problem of his present placement.
- [5] In the paragraph immediately preceding the Order handed down, the court stated:
- "I am mindful of the primary consideration, which is that there is no reason why, as far as possible, the respondents would not wish to utilise the applicant in his capacity as an internal auditor for which he was trained and in which he performed well".
- [6] On 22 April 2014, the court handed down the following Order:
- '[66] In light of the above, noting that the respondents have conceded the merits of the applicant's claim and the points of agreement reached between the parties on the form that an order should take in relation to the applicant's return to useful employment, the following order is made:

¹ By Justice Lagrange.

66.1 For the avoidance of doubt it is recorded that:

66.1.1 Colonel JJH Roos ('Roos') is currently on the staff of the South African Police Services (Crime Intelligence) in the position of Colonel and is drawing benefits as such.

66.1.2 Nothing in this order shall effect his *status* as such; his rank as Colonel; his remuneration (that is, his basic salary and fringe benefits), which shall remain in full force and effect.

66.2 Nothing in this order shall entail the displacement of any person from his or her position in Crime Intelligence specifically, or in the South African Police Service generally.

66.3 The respondents are obliged –

66.3.1 to redeploy Roos preferably in the Internal Audit section of Crime Intelligence or failing that in an internal audit unit of the South African Police Service and to provide him with work of a comparable nature to that which he performed prior to his transfer to Inspection and Evaluation;

66.3.2 to give preference to Roos in any application for appointment or promotion in a post reasonably acceptable to him within the said Department or in any other Department in which his skills can properly be deployed, as soon as such a post becomes available.

66.4 The respondents must pay Roos compensation under s 194 (4) of the LRA in the amount of R 156,250-00 (one hundred and fifty six thousand, two hundred and fifty rands) within 14 days of the date of this judgment.

66.5 The respondent must pay the applicant's costs of suit, including the costs occasioned by the employment of two counsel.'

[7] Pursuant to this Order, the SAPS placed Roos in an internal audit unit of the SAPS (Internal Audit: Head Office), contending that there was no vacant Colonel post (level 12) in the internal audit section of Crime Intelligence. They claimed that the

internal audit section of Crime Intelligence possessed only two Colonel (level 12) posts which were occupied by Colonel Trollip and Colonel Changoolam. They could not place Roos in any of these posts as that would constitute a contravention of the Order prohibiting the displacement of any employee from his or her position in Crime Intelligence, or in the SAPS generally.

[8] The applicants were of the view that this placement is not in accordance with the Court Order of 22 April 2014 and instituted these proceedings.

[9] In their application, the applicants primarily alleged that there was a *third* post in the Internal Audit section of Crime Intelligence and it was vacant. In this regard they relied on a documentary Breakdown Structure: Crime Intelligence.

[10] The applicants further alleged that when Roos's placement was discussed at a meeting with the SAPS on 6 June 20014, "SAPS personnel stated that the [National] Commissioner herself had given explicit instruction that [he] be placed in *the* position outside Crime Intelligence". The applicants interpreted this as an order that Roos was not to be placed in Crime Intelligence.

[11] They further alleged that the respondents were refusing to consult Roos on the post to which he was to be deployed and were unmoved by the fact that he would be forfeiting fringe benefits, such as a motor vehicle, by being forced to take up the assigned post. They contended that Roos has been effectively demoted because the job description he was required to sign described his post as 'Internal Audit Manager'.

[12] The SAPS filed an answering affidavit, contending that:

12.1 They have complied with the Order.

12.2 There was no *third* post in the internal audit section of Crime Intelligence. In support hereof it was stated that the Crime Intelligence Structure approved on 1 September 2011 was applicable ("the 2011 Structure"). In terms thereof there were only two substantive Colonel (level 12) posts in the internal audit section of Crime Intelligence. The applicant's reliance on

the Breakdown Structure: Crime Intelligence was misplaced as this structure was a new draft which had not been approved by the National Commissioner.

12.3 Roos was thus placed at Internal Audit: Head Office without loss of earnings and benefits and he was given work of a comparable nature to that which he performed prior to his transfer out of the Crime Intelligence Unit.

12.4 The National Commissioner did not give any instruction that Roos be placed in a position outside Crime Intelligence.

[13] On 16 January 2015, having considered the parties' affidavits and heads of argument, Justice Van Niekerk issued a ruling wherein he directed that oral evidence be led in relation to matters referred to in paragraph 13 of his Ruling.

[14] Paragraph 13 of his Ruling reads as follows:

'It is common cause that Roos has not been placed in a position in the Internal Audit section of Crime Intelligence. The primary factual issues that the court is required to decide, it seems to me, in relation to the first leg of the court's order dated April 2014 are whether there was a direct order from the National Commissioner that Roos was to be placed in a position outside Crime Intelligence and whether there is in fact a post available in the Internal Audit section within the Crime Intelligence division of the SAPS and specifically, whether by failing to appoint Roos to a post in that section, the respondents relied on a structure that is outdated or otherwise not applicable. In relation to the second leg of the order, the primary factual issue is whether the post to which Roos has been redeployed is one that is truly comparable both in content and substance to that in which he performed prior to his transfer to Inspection and Evaluation, and whether Roos has been provided with all the necessary means to engage in that work. This is not an exhaustive list of all the *factual* disputes that are disclosed on the papers, but they seem to me to be the primary issues that require determination [emphasis added].

Oral evidence

- [15] Pursuant to this ruling, oral evidence was led before me. The evidence primarily revolved around whether a *third* Colonel post existed in the internal audit section of Crime Intelligence, whether there was a direct order from the National Commissioner that Roos was to be placed in a position outside Crime Intelligence and whether the post to which Roos has been redeployed is one that is truly comparable both in content and substance to the post in which he performed prior to his transfer out of Crime Intelligence.

The existence of a third post

- [16] Brigadier Mabena gave evidence that after receiving the Court Order the SAPS studied same. They understood that they should first try to place Roos in the internal audit section of Crime Intelligence. They investigated whether there was a post available in this section to place Roos. They ascertained that there were only two posts in the section, occupied by Colonel Trollip and Colonel Changoolam.
- [17] It is common cause that currently in order to determine how many posts exist regard must be had to the 'Fixed Establishment' signed in November 2014 which records the number of posts within the SAPS that are funded and can be utilized to render services within the organization. The 'Fixed Establishment' as well as the Breakdown Structure: Crime Intelligence which is aligned to the 'Fixed Establishment' shows that currently there are only two funded Colonel posts on the establishment.
- [18] However the issue is whether a third Colonel post (level 12) existed when and soon after the Order was issued on 22 April 2014, that is, prior to the introduction of the Fixed Establishment.
- [19] During the evidentiary hearing, the applicants essentially abandoned their reliance on the document they had relied on in their application and in the meeting of 6 June 2014 to prove the existence of a third Colonel post within the internal audit section of Crime Intelligence. Instead the debate centered on another document,

the Resource Allocation Guide ('RAG'). On the face of it, there were three Colonel posts in Crime Intelligence.

[20] During his testimony, Roos agreed that when he was in the internal audit unit of Crime Intelligence, there were only two Colonel posts. However, he contended that the RAG proved that a third post existed and, in his experience as an auditor, the RAG was considered as a source document for auditing purposes.

[21] In their closing argument, the applicant pointed out that Major General Nkosi, the most senior person in the internal audit unit of the SAPS, confirmed during his testimony that the RAG was used in audits. Moreover, Colonel Matsetela confirmed during his testimony that the RAG records that three Colonel posts existed. The document itself further records that it is a 'guide for the number of granted posts', and provided (at the time), 'management with a scientific based management tool to manage critical resources, on micro level', including 'the placement of new personnel members' and 'redistribution of resources'.

[22] I am however satisfied that the witnesses for the SAPS established that the RAG was merely a "wish list" of the ideal number of posts the SAPS wished to have in the unit, but is ultimately dependent on budgetary constraints. They further demonstrated that the three posts reflected in the RAG comprised the two funded posts occupied by Colonel Trollip and Colonel Changoolam and a third non-funded post. In the public service a non-funded post could not be filled. Its status was essentially non-existent.

[23] During his testimony, Colonel Matsetela explained it as follows:

"You explained that the document on page 154 is a combination of the funded posts and the non-funded posts. You used the word "wish list". Can you just elaborate on that? - One would say these are the number of posts that you wish to have within the organization in terms of to be able to perform functions. But now if one had to come to the budget point of view, you can only afford to have this number of posts in terms of the fixed establishment.

So the budget then is the deciding factor? – The budget is the deciding factor of course.

- [24] General Nkosi gave similar evidence and further stated that the RAG was used previously during auditing but done in conjunction with the organogram. She said:

“The Rag is particularly a guideline. So it has vacant funded and those unfunded posts. So that is why they even talk about the ideal. It is an ideal allocation ... You can only fill it when you got funds to be able to fill those particular posts which are funded.

Is that why you look at RAG together with the organogram? – Yes. So we compare the two

- [25] Colonel Mabena gave similar evidence:

“...the meaning of RAG means the Resource Allocation Guide, to say that if the SAPS had money. For SAPS to function effectively we would love to have so many people. But because of us not having enough funds to then accommodate this, the ideal is going to be so many people who render service to the organization. It is a wish list. If we had money We would love to have this number of people within the SAPS to render these kinds of services.”

- [26] Colonel Matsetela testified as follows:

Okay. Just hold it there. So it basically show all the posts that actually exist? This Rag document? These posts actually exist. However, you will have to go somewhere else to find out whether that post is filled, funded or vacant? Is that what you are saying? – In terms of the specifics to see if the post has been filled, which means the relevant manager will know In terms of to be able to know if the post is funded then one has to go through finance to check if the post has been funded ... In terms of whether the post is vacant, the manager will know.

- [27] In conclusion, I find that there was no third colonel post in the internal audit section of Crime Intelligence in which the SAPS could have placed Roos.

Whether Roos could have been placed in Colonel Changoolam's post

- [28] When the Order was handed down, Colonel Changoolam was acting in another post. During cross-examination, Roos conceded that Changoolam could return to his substantive post at any time and therefore the post was not vacant. More significantly, when he was asked if he would have accepted a temporary deployment to Changoolam's position, his answer was an emphatic: "No, I want to be placed back in my permanent post in crime intelligence".

Whether there was a direct order from the National Commissioner that Roos was to be placed outside Crime Intelligence

- [29] I find that there is no clear evidence that the National Commissioner gave such an order.
- [30] In the founding affidavit, the applicants contended that at a meeting on 6 June 2014, SAPS personnel stated that the National Commissioner had given explicit instructions that Roos be placed in a position *outside* Crime Intelligence. The applicants interpreted this as an order that Roos was not to be placed in Crime Intelligence.
- [31] At the evidentiary hearing, however, Roos and a union witness testified that Brigadier Mabena told them that the instruction to place Roos at head office came directly from the National Commissioner. This statement is materially different. At most it communicates that the National Commissioner allegedly instructed that Roos be placed at head office; not that he is to be kept out of Crime Intelligence.
- [32] Brigadier Mabena said she, at no stage, had discussions with the National Commissioner on Roos and denied telling Roos and his representatives that the National Commissioner had given explicit instructions that Roos be placed in a position *outside* Crime Intelligence. She may not have made this specific statement but I accept that she made a statement in which she invoked the name and authority of the National Commissioner to explain why Roos was placed in head office. Two witnesses testified to this.

Comparable work

- [33] The next issue is whether the post to which Roos has been deployed is comparable in content and substance to the post in which he performed in Crime Intelligence.
- [34] Roos has been placed in the Head Office of Internal Audits as an audit manager in charge of teams of auditors who audit all the police stations in Gauteng. His present unit has a larger budget than the internal audit section of Crime Intelligence because of the volume of work.
- [35] Roos however contends that the effect of his placement is a demotion. In Crime Intelligence he had been an audit manager way back in 2002 and thereafter became the section head of financial compliance with audit managers reporting to him. Moreover, the auditing process in Crime Intelligence was more complicated and interesting than the “low level auditing” of police stations.
- [36] I fail to see an objectionable issue. The Order states that if the SAPS cannot redeploy Roos in the internal audit section of Crime Intelligence, they must redeploy him *in an internal audit unit* of the SAPS and provide him with work of a comparable nature to that which he performed in Crime Intelligence. The judgment to the Order states:
- “I am mindful of the primary consideration, which is that there is no reason why, as far as possible, the respondents would not wish to utilise the applicant in his capacity *as an internal auditor* for which he was trained and in which he performed well’ [emphasis added].
- [37] Roos has been redeployed to an internal audit unit of the SAPS to be utilized as an internal auditor; and not to some low level department, but to a head office position. The core nature of the work remains the same, which is internal auditing and managing teams of auditors. In my view, the SAPS has, as far as is possible, provided Ross with work of a comparable nature. They obviously could not provide him with precisely the same work he performed in Crime Intelligence because, on his own version, Crime Intelligence work is unique.

- [38] He has retained his rank of Colonel (level 12), he has teams of auditors reporting to him and reports only to the provincial head: Gauteng who in turns reports to the national head of internal audit. He is thus performing at a *similar managerial level*, as can be achieved in the circumstances.
- [39] In their closing argument, the applicant contended that the Order must be understood to mean that Roos must be provided with duties and functions *equal in content, difficulty and/or complexity* to those he performed in Crime Intelligence.
- [40] As indicated, on Roos's version, the accounts in Crime Intelligence are *unique*. Obviously, then, no other auditing job in the SAPS, even at head office level, would be equal in content, difficult, complexity or status.
- [41] It seems to me that Roos' real grievance is not being placed in his former substantive position. During cross-examination he was asked if he was prepared to be temporarily deployed to Changoolam's position (as the latter was acting in another position). His answer was an emphatic: "No, I want to be placed back in my permanent post in crime intelligence".
- [42] In that case, he ought to have persisted with his prayer for such relief at the trial court. Instead he compromised and agreed to be placed in an alternative auditing position in the event that he could not be placed in his former position.

Whether Roos has been provided with all the necessary means to engage in that work.

- [43] There were issues regarding office space and a webbed laptop, but these matters were resolved by the time this hearing commenced. In my view the SAPS demonstrated that such issues were not due to any attempt to frustrate Roos in the performance of his duties.

Loss of benefits

- [44] Roos complained that whilst he was in Crime Intelligence he was given a motor vehicle which he could use for travel between home and work. This vehicle was removed from him and in his view he lost a benefit of the job. Under cross-

examination he confirmed that he would only be entitled to the vehicle if he was placed in Crime Intelligence. It was further demonstrated by the SAPS that Roos currently has access to pool vehicles that are available to him to conduct his duties.

Whether Roos was consulted on a comparable post acceptable to him

- [45] It is common cause that the parties met and also communicated in writing after the handing down of the Order. What emerged during this hearing is that in these discussions Roos pursued only one proposition and demand, namely that there is a third Colonel post in Crime Intelligence and that he be placed in that post. When he was told that there was no third post, he persisted with his proposition and demand and did not explore other options. In these circumstances, I cannot find that the respondents failed to properly consult him on his placement.

Interpretation of the Court Order

- [46] In their closing argument, the applicants contend that even if there was no third Colonel post in the internal audit section of Crime Intelligence, the respondents have nevertheless failed to comply with the Order.
- [47] They contend that that the language of the Order “preferring redeployment in the Internal Audit section of Crime Intelligence” was not really for appointment to a particular post, but for deployment to a particular unit. They contend that it is inconceivable that the trial judge would have made an order expressing a preference for the deployment of Roos in Crime Intelligence if he knew and understood that it would not be possible to deploy Roos there. If a vacant post did not exist in Crime Intelligence, the Order ought to have been satisfied by either by the creation of a post by the National Commissioner or by the National Commissioner transferring the post filled by Roos into the internal audit unit of Crime Intelligence. They contend that the Commissioner has a plethora of powers which made this possible.
- [48] Under s 11(2) of the SAPS Act, the Commissioner is responsible to 'determine the fixed establishment of the Service and the number and grading of posts',

'determine the distribution of the numerical strength of the Service', 'organise or reorganise the Service at national level into various components, units or groups'. Section 27(2) provides that the Commissioner 'may appoint a person to a post in the fixed establishment of the Service'. Under the SAPS Employment Regulations, the Commissioner must 'define the posts necessary to perform the relevant functions while remaining within the current budget and medium-term expenditure framework of the Service. She is further responsible to 'promote the efficient, economic and effective use of resources', and 'to that end' she must 'apply working methods such as the re-allocation'. The SAPS Employment Regulations provide that, before creating a post or filling a vacancy, the Commissioner must *inter alia* (i) confirm that the post is required to meet the objectives of the Service; and (ii) ensure that sufficient budgeted funds are available for the filling of the post.

- [49] There is no legal basis to the applicants' contentions. Firstly, these issues were not pleaded in the applicant's application or put to the respondents' witnesses in order to demonstrate their feasibility. Secondly, there is nothing in the above statutory provisions which demonstrates that the National Commissioner is empowered to use her powers to cater for the particular circumstances of an individual and for the benefit of a particular individual. Finally, the applicants' contentions are inconsistent with Van Niekerk J's ruling regarding the issues to be determined in this case.
- [50] I endorse the respondents' submissions that the applicants are basing their case of contempt on the interpretation of the Court Order. The applicants knowing that there is a dispute about the interpretation of the Court Order ought to have approached this Court to interpret the Court Order. In any event, on the face of it, the interpretation of the Court Order by the applicants is far-fetched, especially considering the fact that Roos agreed at the trial court that if he could not be placed in his previous post in Crime Intelligence then redeployment to a comparable post would be acceptable to him.

Conclusion

[51] The respondents have demonstrated ample proof that they have complied with the Court Order and furthermore established reasonable doubt that their actions were not wilful or mala fide.

Costs

[52] I do not think a cost order is appropriate, considering the history of this matter.

Order

[53] The rule *nisi* is discharged and the application is dismissed with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv. M J Engelbrecht

Instructed by: Serfontein Viljoen & Swart Attorneys

For the Respondents: Adv W R Mokhare SC with Adv S Tilly

Instructed by: The State Attorney, Pretoria

LABOUR COURT