



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 304/13

In the matter between

NONTLANTLA XAKO

Applicant

and

NELSON MANDELA BAY MUNICIPALITY

Respondent

Heard: 23 October 2014

Delivered: 1 October 2015

Summary: A declaratory order which will allow the respondent to appoint an employee contrary to its recruitment policy and practices may not be granted.

JUDGMENT

LALLIE J

Introduction

- [1] The applicant approached this Court for an order declaring her appointment by the respondent to the position of Head of Caucus Services in the office of the Chief Whip to be a permanent appointment with effect from 1 February 2010, (“Mr Nolutshungu”) the date of her appointment. She further seeks the respondent to pay her the full value of her remuneration and other related benefits and entitlements due to her as a level 17 employee from the same date and to continue paying her all the benefits she is entitled to as a permanent employee.

Material facts

- [2] While working for the Makana Municipality, the applicant was approached and offered the position of Head of Caucus Services in the office of the Chief Whip at the respondent. The respondent’s Executive Director: Corporate Services, Mr Nolutshungu (“Nolutshungu”) forwarded the applicant a letter of appointment dated 11 January 2010. The applicant accepted the appointment on 12 January 2010 by appending her signature to the acceptance of appointment form attached to her letter of appointment. The salient terms of the letter of appointment are that the applicant was appointed to the position of Head of Caucus Services in the office of the Chief Whip in grade 0017, her rate of remuneration, the date of her appointment, 1 February 2010, she would be on probation for six months and she was entitled to certain benefits. The applicant duly assumed duty on 1 February 2010, however, on 18 February 2010 the applicant was issued with a memorandum of agreement which stipulated that she was employed on a fixed term contract with effect from 1 February 2010 for as long as the then current Chief Whip remained in office.
- [3] In a letter dated 18 February 2010, the applicant registered her dissatisfaction with the contents of the memorandum of agreement with Nolutshungu and expressed her refusal to sign the document. The applicant pursued the matter in further correspondence. Nolutshungu informed Councillor Terblanche of the respondent municipality, in a letter dated 17 September 2010, that the applicant had been employed on a fixed term contract running from 1 February 2010 to

31 January 2011. On 30 June 2011, the Acting Municipal Manager directed a memorandum to the Executive Director: Corporate Services confirming that the applicant's contract of employment be extended, on the same terms and conditions, on a month-to-month basis. He however, withdrew the memorandum on the same day.

- [4] On 13 October 2011, the applicant referred a dispute regarding the unilateral change to the terms and conditions of her contract of employment to the South African Local Government Bargaining Council ("the bargaining council"). The dispute was scheduled for conciliation on 6 December 2011 on which date a certificate of the non-resolution of the dispute was issued and the applicant advised to pursue the dispute at the Labour Court. The applicant, however, decided to launch the application at hand in which she seeks a declaratory order that she is a permanent employee of the respondent in terms of her letter of appointment and therefore entitled to all the benefits stipulated in her letter of appointment which other employees on her grade are entitled to.

Special plea

- [5] In the answering affidavit attested to by the respondent's Legal Adviser: Labour Law, Ms James, the respondent denied the validity of the applicant's claim. The respondent raised a special plea that this Court lacks jurisdiction to entertain the present application because the relief claimed by the applicant is for the conferment of benefits as contemplated in section 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended ("the LRA") and therefore falls outside the jurisdiction of this Court. The applicant should have referred it to conciliation in terms of section 191 (1) (a) of the LRA and after a failed conciliation, to arbitration in terms of section 191 (5) (a) (iv) of the same Act. The respondent further sought to rely on section 157 (5) of the LRA which provides that the Labour Court lacks jurisdiction over disputes which may be referred for arbitration in terms of the LRA.
- [6] The applicant denied that the relief she is seeking is primarily for the conferment of benefits. She submitted that she is entitled to approach this Court in terms of section 77 (3) of the Basic Conditions of Employment Act 75

of 1997 (“the BCEA”) to enforce the contract of employment which is in existence between the parties. Having considered the respondent’s argument that this matter is an unfair labour practice and not a contractual claim and the authorities the respondent sought to rely on, I am of the view that the present matter is distinguishable in that the declaratory order is a precursor to the conferment of benefits. The decision therefore that the applicant is entitled to the benefits she is seeking flows from the declarator. The parties are in dispute as to which contract of employment is binding between them. They initially signed the letter of appointment, later the respondent submitted that the applicant was employed on a political role playing post whose duration coincided with the term of the Chief Whip she was employed to assist. Both the CCMA and bargaining councils lack jurisdiction to issue declaratory orders as it resides in the Labour Court. Further, jurisdiction is determined by the manner in which the applicant has pleaded his or her case. In this regard see *Gcaba v Minister for Safety and Security and Others*¹. The manner in which the applicant has pleaded her case places it within the jurisdiction of this Court as she has based it on section 77 of the BCEA. The special plea can therefore not succeed.

Merits

- [7] It is common cause that on 12 January 2010, the applicant signed a letter accepting her appointment to the position of Head of Caucus Services in the office of the Chief Whip (the impugned position) on the terms contained therein with effect from 1 February 2010. In terms of the letter, she became a permanent employee of the respondent and entitled to benefits which other permanent employees in grade 17 are entitled to. In addition to the letter of appointment, the applicant sought to rely on further letters in asserting her right of permanent employment. The first is a letter dated 2 August 2013 written by Mr Ndoyana (“Ndoyana”), the Acting Executive Director: Corporate Services, in which she confirmed the applicant’s permanent appointment in terms of her letter of appointment dated 11 January 2010. The second is a memorandum dated 3 March 2014, addressed to Ndoyana by Dr Chabula-Nxiweni, the Acting

¹ [2009] 12 BLLR 1145 (CC).

City Manager instructing the former to release, with immediate effect, the applicant's benefits retrospectively to 11 January 2010. The memorandum is based on the letter of 2 August 2013 and the applicant's letter of appointment.

- [8] Denying that the applicant was a permanent employee who was entitled to benefits, the respondent submitted that the letter of appointment was issued in error which the respondent sought to rectify by requiring the applicant to sign, on 18 February 2010, a memorandum of agreement, which for purposes of this matter, provides that the applicant was employed on a fixed term contract which commenced on 1 February 2010 and continued for as long as the then current Chief Whip remained in office. It further provides that the applicant was entitled to neither annual bonus nor fringe benefits. The applicant refused to sign the memorandum of agreement. The respondent further submitted that the letter dated 2 August 2013 which was subsequently withdrawn and the memorandum of 3 March 2014 were issued in error which flowed from the misunderstanding created by the letter of appointment. The applicant's appointment in a political position was in contravention of section 66 (3) of the Municipal Systems Act 32 of 2000 ("the MSA") and therefore null and void.
- [9] The respondent submitted that all the letters appointing and confirming the permanent appointment of the applicant were *bona fide* mistakes and do not sustain the applicant's claim. In amplification of this argument, the respondent submitted that the impugned position has always been a political position. It sought to rely on the following letter written by Mr Nolutshungu on 3 November 2009:

"PROCESS OF FILLING POLITICAL ROLE PLAYING POSTS

I hereby confirm that we had a meeting on the 3rd of November 2009 at 08h00 am, wherein you requested me to provide written advice on the matter setting out political processes to be followed in effecting appointments.

Positions that are filled in terms of the normal Recruitment Selection and Retention Policy provisions, require that a position be advertised first.

In contrast, the political process (even though not set out in a policy framework) requires that the following be done:

- that the position be approved and funding be provided for it, and
- that the Municipal Manager approves the political process and recommends to the Executive Mayor for such action (as outlined below) to be undertaken; and
- in the event that prospective candidates have already been identified or are already in service, the resolution should clearly provide for the absorption into the staff establishment in line with the specific positions to be filled, or if the latter exists some form of condonation of such employment be made; and
- that the resolution should clearly state the period and terms of employment (with effect from when to when) and in this case for the term of office of the political office bearer concerned, noting that such employment falls into the category of contract employment with no benefits; and
- that upon the signing of this approval, Corporate Services will give immediate effect to such employment in terms of set administrative measures.”

[10] The letter highlights the differences between filling posts through the recruitment policy and the process of appointing employees to political role playing posts. Employees appointed in terms of the latter procedure are on fixed terms contracts and have no benefits. The Organisational Establishment Policy (the policy) was approved on 10 November 2010, codifies the procedure for appointing employees to political positions. It submitted that the policy regulate the practice which has always been followed in filling political positions.

[11] A mere three weeks after the applicant had taken up employment the error was brought to her attention and an attempt made to rectify it. Contrary to the respondent's argument that a negative inference should be drawn from the applicant's conduct of approaching Ndoyana and the Dr Chabula-Nxiweni to have her position confirmed as permanent, the applicant's conduct is consistent with her efforts to have her permanence confirmed from the day the respondent required her to sign the fixed term contract. Rather than exploiting the ignorance of the true facts, she was pursuing her fight to assert her rights as envisaged in her letter of appointment.

[12] What the respondent considers to be errors originates from the applicant's letter of appointment which was issued by Nolutshungu in breach of the respondent's appointment practices. He is the author of the letter of 3 November 2009 in which he explained the process of filling political positions. In doing so he contrasts it with the procedure of filling positions in terms of the normal recruitment policy. He deemed it necessary to mention the requirement that positions to be filled through the recruitment policy need to be advertised. He further pointed out that in contrast, employees appointed to political posts are appointed on fixed term contracts with no benefits. Only two months after explaining the differences between the two procedures he flouts them by appointing the applicant in a manner that is a hybrid between them. He handpicked her. He could only do so in terms of the procedure for filling political positions but offered her terms and conditions which are a preserve of employees appointed in terms of the recruitment policy which required that the post be advertised. He spared her the competition and the risk of not being appointed which comes with being appointed through the recruitment policy but rewarded with permanence and benefits. Having handpicked her and protected her from the risk he offered her permanent employment and benefits not due to employees who enjoy the privilege of being handpicked. I am not convinced that Nolutshungu issued the letter of appointment in error in the absence of his affidavit explaining his conduct. His breach of the appointment practice and recruitment policy was an act of irregularity. Ndozana's explanation is that he confirmed the applicant's permanent appointment in error based on the letter of appointment. Although Dr Chabula-Nxiweni filed no confirmatory affidavit the most plausible inference that can be drawn from her conduct is that she order the release of benefits to the applicant in error having been influenced by her letter of appointment and Ndozana's letter.

[13] The applicant argued that the moment she accepted the offer encased in the letter of appointment it became a binding contract whose terms the respondent could not unilaterally change. This matter is distinguishable from the decision in *Woolworths (Pty) v Whitehead*,² *Wyeth SA (Pty) Ltd v Manqele & Others*³

² [2002] 6 BLLR 640 (LAC)

³ [2003] 7 BLLR 734 (LC)

and *Jack v Director-General Department of Environmental Affairs*⁴ which the applicant sought to rely on as it involves government officials acting in breach of recruitment policies and practices.

[14] I have considered the authority the applicant sought to rely on which is not based on employment including the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁵ which deal with unlawful administrative acts. When the government acts as an employer its conduct does not constitute administrative action. In this regard see *Gcaba v Minister of Safety and Security & Others (supra)*. The Constitutional Court in *Khumalo v MEC for Education*⁶ did not find that contracts of employment entered into by government officials acting in breach of policies and practices valid.

[15] None of the omissions by the respondent's officials can sanitize Nolutshungu's irregular conduct in issuing the letter of appointment. The respondent's submission that the Organisation Establishment Policy which was approved on 10 November 2010 codified a practice which had always been applied in filling political positions was not challenged. Nolutshungu knew that the applicant could either be appointed in terms of the recruitment policy or in terms of the practice for filling political positions. When he followed neither procedure in issuing the letter of appointment, he caused the respondent to act irregularly and beyond its authority. The principle of estoppel can therefore not be relied upon to remedy his actions. In this regard see *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*⁷. This court may not grant an order which would allow the respondent to appoint an employee contrary to the respondent's recruitment policies and practices. This application can therefore not succeed.

[16] Section 162 of the LRA provides that a costs order may be granted according to the requirements of the law and fairness. The applicant may not be out of

⁴ [2003] 1 BLLR 28 (LC)

⁵ [2004] 3 All SA 1 (SCA)

⁶ 2014 (5) SA 579

⁷ (2008) (3) (SA) 1.

pocket as a result of the respondent's irregular conduct. The respondent's conduct justifies a costs order in favour of the applicant.

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

- 17.1 The special plea is dismissed.
- 17.2 The application is dismissed.
- 17.3 The respondent pay the applicant's costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Voltsos

Instructed by: Kaplan Blumberg Attorneys

For the Respondent: Advocate Grogan

Instructed by: Gray Moodliar Attorneys

LABOUR COURT