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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2852/16

In the matter between:

Jacobus Petrus DUFFY

Applicant

and

CITY OF MATLOSANA

First Respondent

LOCAL MUNICIPALITY

T S R NKHUMISE N.O.

Second Respondent

(ACTING MUNICIPAL MANAGER)

Heard: 13 December 2016

Delivered: 19 January 2017

Summary: Urgent application. Reinstatement of municipal employee on previous post level pending final determination of applicable post level on review. Struck for lack of urgency.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Mr Duffy, is a traffic officer in Klerksdorp. He has applied to review the decision of his employer, the Municipality, and its municipal manager that he should return to his previous post level after he had been seconded to the position of “VIP Protector / Driver” for the mayor at post level 6. The post level to which he had to return, being level 9, attracts a lower salary. He has brought an urgent application to restore him to post level 9 pending the review application. He does so in terms of s 77(3) of the Basic Conditions of Employment Act¹ as the dispute concerns his contract of employment.

Background facts

- [2] Much of the background is common cause; but where it differs, the factual disputes needs to be resolved in accordance with the rule in *Plascon-Evans*.²
- [3] Duffy was employed as a traffic officer grade III in August 1995. This post is evaluated at level 9 and attracts a commensurate salary. In 2006 he was seconded as a “VIP protector/driver” for the mayor. He initially remained at post level 9. In June 2009 his post level was adjusted to level 6, which attracted a higher salary.
- [4] In June 2011 the then acting municipal manager, Mr SG Mabuda, notified Duffy that his secondment had come to an end. The municipality explains in its answering affidavit that the reason for this was that the secondment was in terms of a fixed term contract which would “automatically terminate on the date the current incumbent of the position of the executive mayor vacates his office for any reasons whatsoever after which the employee will return to the position of traffic officer grade 1 to 3 on the salary scale and level of a traffic officer grade 1 to 3 at that point in time.”

¹ Act 75 of 1997.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- [5] In the notice, dated 2 June 2011, Mr Mabuda says:

“kindly be informed that your secondment as VIP protector/driver (post level VI) which was linked to the term of office of the executive mayor has ended, in that the period of service of the executive mayor has lapsed.

Further note that you have to revert back to your position of Traffic Officer Grade III at the Traffic Division of the Directorate Municipal and Social Services.”

- [6] Duffy says he thought that his transfer was permanent; the municipality disputes that. Although it could not find the fixed term contract of employment with Duffy upon which it relies, it says that it was similar to that of a Mr Behr, whose contract it attached to the answering affidavit.

- [7] Duffy raised a grievance. On 6 July 2011 Mabuda sent him a new notice, temporarily placing him at the office of the mayor as a VIP protector “with effect from 1 July 2011 until 30 August 2011 or until the position is fold (whatever eventuality occurs first). Mabuda further stated:

“Please note that your placement to assist in the above mention office is on the same salary level you currently hold and the same conditions of service in the Public Safety Division.

Please note that you are to revert back to your original position as a traffic officer upon termination date of this placement.”

- [8] Duffy returned to the traffic department only on 25 June 2013. His salary was not adjusted from post level 6 to level 9. The municipality says that was an oversight and it is taking steps to recover the overpayment.

- [9] On 22 September 2016 (in a letter dated 19 September 2016) Mabuda wrote to Duffy yet again. Under the heading, “**ADJUSTMENT OF YOUR LEVEL AND SALARY**”, he said:³

“1. We record that you were seconded as a VIP protector/driver to the office of the executive mayor by resolution MM 175/2009.

2. In 2006, Council resolved by MM 151/2006, paragraph (0) reads ‘That permanent employees appointed on contract in political offices will as far as possible be redeployed after termination of their contracts to positions not

³ Grammar as in original.

less favourable than the permanent position vacated before contractual appointment'.

3. The information at our disposal by all indications proves that you fall within the category of paragraph (0) of the resolution.

4. We note that in 2011, you lodged a grievance to the acting municipal manager seeking to be redeployed to traffic department on post level 06. Your grievance was dismissed by the acting municipal manager: Mr Strydom and there are no indications that the decisions was challenged.

5. On 19 August 2013, the then Deputy Director: Office of the Mayor. Informed the Acting Deputy Director HR and LR by letter that you be redeployed to traffic department as traffic officer post level 09 and that your salary be adjusted accordingly.

6. We have since established that regardless of the efforts made by Human Resource Management to place you at appropriate post level 09, your salary was never adjusted.

7. This letter serves to inform you that with effect from 1 October 2016, your salary will be adjusted accordingly in line with the Council organogram. You will henceforth receive salary and benefits applicable to post level 09.'

[10] The applicant brought a prior urgent application before Lagrange J on 8 November 2016. An order was granted by agreement in these terms:

"1. That the first respondent withdraws its letter dated 19 September 2016, adjusting the applicant's salary level.

2. The balance of the applicant's salary for the month of October 2016 is to be paid in full on post level 6, on or before 30 November 2016.

3. The first respondent is ordered to pay the costs associated with the urgent application brought under case number J2522/16."

[11] On 29 November 2016 the new acting municipal manager, T S R Nkhumise (the second respondent) wrote to Duffy again. He informed Duffy that, with effect from 1 December 2016, "your salary and benefits will be adjusted accordingly in line with Council organogram from post level 6 to post level 9 as per the resolution mentioned above."

The relief sought

[12] The applicant seeks relief in two parts. In Part B of his notice of motion he seeks to review and set aside the decision of the acting municipal manager adjusting his post level and remuneration from post level 6 to post level 9 with effect from December 2016. In part A – which forms the basis of this urgent application – he initially sought an order declaring the adjustment to be unlawful, null and void, and to be set aside. At the hearing of the application, though, Mr *Scholtz* confined the interim relief sought to the following alternative:

- ‘1. Directing that part B of this application be finally determined on an urgent basis on a date and time to be determined by this court and in a manner in which this court deems fit; and
2. The first respondent is to reinstate the applicant on a post level 6 and remunerate him accordingly with effect from 1 December 2016, pending the final determination of this matter as referred to in prayer 1 above;
3. Directing the respondents’ attorneys to provide the applicant’s attorneys with the full record in relation to the second respondent’s decision which resulted in the adjustment of the applicant’s post level and remuneration within 10 days of this order being granted.”

Evaluation / Analysis

[13] The alternative relief sought is of an interim nature. In order to succeed, therefore, he must satisfy the requirements for an interim interdict. But first, Ms *Nkhutha*, for the respondents, took issue with urgency.

Urgency

[14] The applicant says that he acted swiftly upon being advised of his rights and immediately after becoming aware of the implementation of the acting municipal manager’s decision. He became aware of the decision on 29 November 2016. He consulted with his attorneys the next day. They wrote to the municipality on the same day, demanding that he be reinstated to post level 6. The municipality did not respond. The application was launched on 6 December 2016.

- [15] It is indeed so that the applicant and his attorneys acted with alacrity. But the question remains whether he is entitled to urgent relief. The relief he seeks is of an interim nature. That is because he has an alternative remedy in due course – being the application for review addressed in part B of his application. The harm he suffers in the interim, if any, is not irreparable. It is of a financial nature. He owns approximately R8000 less per month on post level 9 as compared to post level 6. Should he be successful in his application in due course, the discrepancy will be corrected. Should be unsuccessful, neither party will suffer any harm. The balance of convenience lies with the municipality. If the applicant is unsuccessful in due course, it would be difficult for the municipality to recover the overpayment; should he be successful, he will be reimbursed retrospectively.
- [16] Ms Nkhutha referred in her argument to *Masiye v MEC for Education: Mpumalanga*⁴ where Molahlehi J held that it is trite that an application brought on an urgent basis should fail if the applicant fails to show that there is no satisfactory remedy available that addresses his or her dispute. Similar considerations apply in this case. The applicant has an alternative satisfactory remedy. He has already lodged an application for review.

Conclusion

- [17] In the circumstances, I agree that the application is not urgent.
- [18] With regard to costs, I do not consider it appropriate in law or fairness to make a costs award at this stage. There is an ongoing employment relationship between the parties. There is also an ongoing dispute between them. A costs order may well be appropriate in the judgement on review in due course, but not at this stage.

Order

The application is removed from the roll for lack of urgency.

⁴ [2013] ZALCJHB 1 para [19].

Steenkamp J

APPEARANCES

APPLICANT: W P Schöltz (attorney).

FIRST RESPONDENT: Ms P Nkhutha
Instructed by Katake Attorneys, Oberholzer.