



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J1726/18

In the matter between:

POPCRU obo LUYANDA MOLESHE

Applicant

and

MINISTER OF POLICE

First Respondent

NATIONAL COMMISSIONER

Second

Respondent

PROVINCIAL COMMISSIONER

Third

Respondent

MAJOR GENERAL DI BILLET

Fourth

Respondent

Application heard: 29 May 2018

Judgment delivered: 7 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an urgent application in which the applicant seeks to suspend a decision to withdraw his transfer to Mdatsane cluster pending his appeal against the decision, to require that the applicant continue to reporting to the Mdatsane cluster and/or provincial head office and/or King William's Town cluster pending the outcome of his appeal, that he be paid his full remuneration pending the outcome of the appeal and that no disciplinary action be taken against him pending the outcome of his appeal.
- [2] The factual background is not in dispute. The applicant was previously based at the crime operation sub-component in Aliwal North. On 11 December 2017, he applied for a transfer to King William's Town cluster legal services. The application was motivated by, amongst other things, the applicant's deteriorating health and his personal circumstances. Ultimately, during May 2018, the applicant was transferred to Mdatsane. He accepted the transfer and was instructed to report there and that 'the paperwork would follow'.
- [3] On 2 May 2018, the applicant went to the provincial head office as he had not yet received a written communication to take to Mdatsane to tender his services. He was told to go to Mdatsane, as they were expecting him there. On arrival at Mdatsane, the applicant was told to report to East London.
- [4] On 7 May 2018 the applicant was advised that his placement at Mdatsane had been withdrawn and that he was to report at Aliwal North with immediate effect. On 8 May 2018, the fourth respondent addressed a letter to the applicant headed

“Confirmation of withdrawal of placement of Lt Col Moleshe...’. The letter went on to state:

3. ... you are still reporting at the provincial office without authority.
4. Please note that your tender of service at the provincial office is not accepted as proper tender service at your workplace, as you have no authority to tender your service at the provincial office.
5. Be advised that a contract of employment is of a reciprocal nature and that your entitlement to salary is based on your tender of service to your employer
6. As indicated above, your tender of service at the provincial office is not regarded as proper tender of services and your absence at your current workplace in Aliwal North, is without authority.
7. It is as follows that you are absent from work without any authority and thus not entitled to salary. Your continued reporting at the provincial office does in no way cure or render your absence lawful.
8. Please be further advised that should you continue with your refusal to take up your post that Allah will North cluster, we will have no other option but to suspend our obligation to reimburse you.
9. Your continued disregard of the instruction to report to your post is also regarded as misconduct and will be dealt with accordingly.

[5] On 8 May 2018, the applicant appealed against this decision. On 16 May 2018, he supplemented his grounds of appeal.

[6] The *prima facie* right on which the applicant relies is founded in a collective agreement regulating transfers within the SAPS. The applicant submits that there is no provision made in the agreement for the withdrawal of a transfer, unilateral or otherwise. He submits that the approval of his transfer to Mdatsane demonstrates that there was a genuine occupational need and that the decision to transfer him there was in the best interests of all parties.

- [7] The applicant submits that exceptional circumstances exist for this court to intervene with the decision dated 7 May 2018 in terms of which he is to report in Aliwal North. He states that he was granted a transfer to Mdatsane on 17 April 2018, which he accepted, that he left Aliwal North and returned his belongings to his home in Bisho (which is closer to Mdatsane) as a result, that he tendered his services at Mdatsane, that he was told that there was no offer space for him there and that he has never refused to work there, that he was moved back to the provincial office and again to East London. The applicant maintains that he has no objection to reporting at Mdatsane, or the provincial office or King William's Town. In short, the applicant submits that there is no sound basis to withdraw his transfer to Mdatsane and that in any event, as mentioned above, there is no provision for any withdrawal in terms of the applicable collective agreement.
- [8] The respondents do not dispute that the applicant can apply for a transfer to King William's Town. They contend that the processing of the application is not yet been finalised and note that it 'may very well be successful'. The essence of the respondent's opposition to the application is that the respondents were sympathetic to the applicant's request to be transferred to a post closer to his home and for this reason, in terms of an informal arrangement, secured his placement at the Mdatsane offices. The applicant accepted this placement and accordingly tendered services in Mdatsane. His arrival there however was not anticipated and there was no office ready for him. As an interim measure, the applicant was accommodated in East London. On 3 May 2018, the applicant telephoned the provincial head of legal services stating that he was not willing to travel between King William's Town and East London or Mdatsane, and that for this reason, the Mdatsane placement was withdrawn. The applicant then reported for duty at the provincial offices which prompted the letter dated 8 May 2018, warning the employee that he should take up his post at the Aliwal North cluster or face suspension of his remuneration and/or disciplinary action.

- [9] Central to the respondent's case is the contention that the applicant has failed to establish that he was officially transferred, in terms of the applicable policy as informed by the collective agreement, from Aliwal North to Mdatsane. The applicant has accordingly failed to establish any right to be transferred since the subject of the interim agreement concerned a placement as opposed to a transfer. The respondent submitted that it is not for this court to complete a placement into a transfer, or to override the binding provisions of the transfer policy. In any event, the respondent contend that there are no appeal procedures relating to placement disputes and that the alternative remedy of the normal dispute resolution procedure remains available to the applicant.
- [10] Factual disputes in motion proceedings are to be decided in accordance with the rule established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 635B. The court may only find in favour of the applicant *"if the facts as stated by the first respondent together with the admitted facts in the applicant's affidavits justify such an order..."* The court is therefore, in effect, bound by what the respondent's state in their affidavit, unless it is *"so far-fetched or clearly untenable that [he] is justified in rejecting them merely on the papers"* (*Plascon-Evans, supra* at 634 – 635).
- [11] The respondents' averments that the applicant's application for a transfer remains pending must therefore be accepted, as must the averment that the applicant was placed in Mdatsane only as an interim measure. Further, the applicant does not seriously dispute that the 'transfer' on which he relies was not a transfer implemented in terms of the collective agreement. That being so, the collective agreement regulating transfers is not applicable to what amounts to no more than an interim placement pending the outcome of an application for a transfer. It follows that the applicant has no clear right or *prima facie* right in terms of that agreement to sustain an application for interim relief. The application accordingly stands to be dismissed.

[12] In relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The court ordinarily does not make orders for costs in disputes between collective-bargaining partners, and I do not intend to depart from that convention. In any event, it seems to me that the applicant has been subjected to human resource practices that appear to have been less than optimal. Finally, it warrants mentioned that the applicant's application for a transfer has remained pending since 11 December 2017, almost 6 months ago. Good industrial relations and principles of good governance require that matters such as this are dealt with diligently and expeditiously. The interests of the law and fairness are best satisfied by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. L Pillay instructed by Mitti Attorney

For the respondent: Adv. M Thys instructed by state attorney