IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1434/2017

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA
obo ISAKE NKUKWANA AND OTHERS **Applicant**

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **First Respondent**

DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Second Respondent**

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION **Third Respondent**

Heard: **16 January 2019**
Delivered: **05 March 2019**

JUDGMENT

BECKENSTRATER, AJ

Introduction

[1] The Applicant seeks an order declaring that "*The translation of the Individual Applicants to the positions of Senior State Law Advisor remains extant and enforceable*". The Applicant relies upon a decision of Advocate Menzi Simelane, the then incumbent Director General: Department of Justice and Constitutional Development dated 28 June 2018 ("the Decision"). The Applicant asserts that the decision amended the Individual Applicants' titles from Senior Legal Administration Officers to Senior State Law Advisors and with it their concomitant remuneration and benefits. The Applicant also sought the payment of various amounts of back-pay in relation to its nine cited members. These members were referred to in the application and will be referred to in this Judgment as *"the Individual Applicants*". For convenience, I will refer to the Department of Justice and Constitutional Development as *"the Department".*

[2] The First and Second Respondents, the Minister of Justice and Constitutional Development and the Director General: Department of Justice and Constitutional Development opposed the application.

[3] Initially the application was not opposed and it was enrolled as an unopposed application. The deponent to the belatedly filed Answering Affidavit explained that the matter had been allocated to some State Attorney who appears not to have dealt with it. The Notice of Set Down came to the deponent's attention and, after he had some difficulties tracking down the history and background to the matter, he saw to the delivery of an Answering Affidavit shortly before the unopposed hearing. At the date of the unopposed application on 12 September 2017, the Court removed the matter from the unopposed roll so that it could be placed on the opposed roll and reserved the question of costs.

[4] In their Answering Affidavit the Respondents sought condonation for the late delivery of their affidavit. This application for condonation was opposed in the

Applicant's Replying Affidavit. Mr Geldenhuys, who appeared on behalf of the Applicant, did not persist with this opposition at the hearing of the matter. This matter has a long history giving rise to several matters. In order that it could be properly ventilated I granted condonation.

[5] The Individual Applicants are all employed by the First Respondent in the office of the Chief Directorate: International Legal Relations as Senior Legal Administration Officers. Around 23 June 2018, a Memorandum was written to the Second Respondent, the subject of which was the Amendment of Titles of Positions in the Chief Directorate: International Legal Relations. The express purpose of the Memorandum was to obtain his approval: "*For the amendment of titles of positions of Legal Administration Officers (LAOs), Senior Legal Administration Officers, Directors and Chief Director and upgrade the rank of LAO's to Level 12*". The Memorandum contained a motivation that the jobs of the LAOs and Senior LAOs embodied legal work similar to that of State Law Advisors and Senior State Law Advisors. It recommended the amendment of various titles including that "*the title of Senior LAO be amended to Senior State Law Advisor*" and that "*the rank of LAO be upgraded from Level 11 to Level 12*". The Second Respondent approved the change in titles, but did not approve the recommendation pertaining to the upgrading, stating that: "*There is no need for this upgrading*".

[6] The Applicant contends that the Second Respondent rejected the recommendation that the rank of LAO be upgraded to salary Level 12 as there was no need for such separate decision because the appropriate salary of the LAOs would be determined by the applied title, as with other amended titles. The Answering Affidavit did not dispute this assertion in any material manner. It simply noted the Second Respondent's rejection of that recommendation. In argument Mr Mokhari SC, who appeared on behalf of the Respondents, did not dispute this interpretation of the Second Respondent's Decision. The Respondents' defence was more principled.

[7] Subsequent to the Decision, there was a Memorandum calling upon the Decision to be implemented. However, on 25 November 2008, the Third Respondent wrote to the First Respondent in relation to "*the translation of employees to the Occupation Specific Dispensation (OSD) for legally qualified employees*" ("the Third Respondent's Letter"). The letter was written to "*assist the relevant departments in the implementation of the OSD*". In relation to LAOs, the Third Respondent stated the following:

> "**Legal Administration Officer**
>
> The current decentralised human resource framework allows departments to give a post any designation and as the job evaluation system was also inconsistently applied between departments, difficulties were being experienced in translation legally qualified employees to the OSD. Adding to this concern some departments indicated their intent to translate legally qualified employees to the state law advisor's dispensation. To this extent it should be highlighted that the OSD only provides from the translation from a specific post to a similar post. For example, an employee who held the post of legal administration officer (and who were performing the related functions) on 1 July 2007 will translate to the corresponding post of legal administration officer and may not translate to a different post such as a state law advisor...
>
> I have therefore determined, with effect from 1 July 2007, the following translation measures for legal administration officers: ...
>
> b. all posts graded on salary levels 11 and 12, irrespective of designation, shall translate to the post of senior legal administration officer (MR-6), with effect from 1 July 2007".

[8] On 19 January 2009, an official from the Department's Human Resources Directorate wrote a memorandum to the Second Respondent in relation to the Third Respondent's Letter. The memorandum recommended that "*the posts of State Law Advisor created in terms of the Director General's approval be abolished*". There is, however, no proof that the memorandum was ever approved by the Second Respondent. The plethora of subsequent correspondence does not include any confirmation that such memorandum was approved by the Second Respondent. It rather reflects that the original

memorandum had, at some stage, been misplaced and that the Second Respondent subsequently refused to sign a replacing report insisting that the original memorandum be located.

[9] The Applicant complains that, while there is no proof that the Second Respondent ever approved the memorandum overturning his initial Decision of 28 June 2008, the Decision was not implemented. In the result, the LAOs did not get the titles of State Law Advisors nor the related remuneration increments. When the Individual Applicants did not obtain satisfaction through correspondence, they lodged grievances with the Department. After much time, those grievances were rejected as being late.

[10] On 12 November 2014, seven of the Individual Applicants referred a dispute relating to an unfair labour practice pertaining to promotion to the General Public Services Sectoral Bargaining Council. They claimed "*the reinstatement of the State Law Advisor dispensation as approved by the former DG Advocate Menzi Simelane*". After a number of events at the Bargaining Council it was ruled that the seven Individual Applicants were obliged to apply for condonation. When they did apply for condonation it was refused by a Bargaining Council panellist.

[11] It was after these events that the Applicant launched the present application. The Applicant firstly argued that the Third Respondent's letter did not, in its own terms, purport to overturn the Decision and was, at most, guidance from the Third Respondent as to what the Second Respondent should do within the Department. This, it was argued, is why the Third Respondent's letter was the subject of the later Memorandum of 19 January 2009 which, if approved, would have constituted the implementation thereof. This, it was argued, also explained the need for the subsequent correspondence aimed at determining whether the Memorandum of 19 January 2009 had ever been approved by the Second Respondent.

[12] The Applicant's primary argument on the merits was that the Second Respondent's Decision had never been reversed by the Second Respondent or set aside. The Respondents had simply chosen to ignore the Decision which the Applicant argued they were not entitled to do because, as with invalid administrative decisions, such a decision must be given effect until set aside. In this regard, the Applicants relied upon the principles expounded in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute*[1].

[13] The Respondent opposed the application contending:

13.1 That the Bargaining Council's refusal of condonation constituted *res judicata* to the present application;

13.2 That the Individual Applicants' claims have, in any event, prescribed; and

13.3 That the Decision of the Second Respondent was invalid as it was in conflict with the OSD as pointed out in the Third Respondent's letter and that, in any event, the Third Respondent's letter constituted a valid countermanding of the Decision.

[14] I do not accept the Applicant's contention that the Third Respondent's letter only amounted to guidance to the Second Respondent. It sets out in clear terms that what had transpired was, in the Third Respondent's view, contrary to the OSD. The Third Respondent's letter, moreover, ends by stating:

> "You are also advised that the salary and grading of legally qualified posts covered by the OSD are centrally determined by the Minister for the Public Service and Administration. Therefore, departments may not job evaluate or re-evaluate any of these posts.
>
> Your department is informed not to deviate from the provisions of GPSSBC Resolution 1 of 2008, PSCBC Resolution 3 of 2008 and the

[1] 2014 (3) SA 481 (CC) at paras 64, 103 and 105.

> Minister's determination in this regard. Where departments have erroneously translated and adjusted employees' salaries such translations and adjustments will be regarded as incorrectly granted remuneration and departments must recover the overpayment, in terms of the provision of Public Service Act, 1994, section 38, from the affected officials".

[15] To my mind, the Third Respondent had, in his letter of 25 November 2008, countermanded the Decision. The question that arises for consideration is whether the Third Respondent had the power to do so in relation to the Department and whether, if he had such power, he could simply exercise that power by way of a letter rather than taking appropriate steps to have the Decision set aside.

[16] The Third Respondent is "*the Minister*" as defined in the Public Services Act[2]. Section 3(1) of that Act stipulates that:

> "*The Minister is responsible for establishing norms and standards relating to - ...*
>
> *(b) the organisational structures and establishments of departments and other organisational and government arrangements in the public service;*
>
> *(c) the conditions of service and other employment practises for employees;*
>
> *(d) labour relations in the public service ...*".

[17] Moreover, in its Founding Affidavit the Applicant describes the Third Respondent as being: "*Responsible for the administration of the PSA and the Regulations promulgated in terms thereof and which, inter alia, govern the employment of State employees across the public service, both national and provincial departments*".

[2] Act 103 of 1994.

[18] The Respondents recorded in their Answering Affidavit that: "*The Third Respondent is the guardian of OSD and any implementation and translation of OSD must comply with the guidelines and circulars issued by the Third Respondent*". The Applicant did not deny this description of the Third Respondent, but simply asserted that the Second Respondent was entitled to make decisions regarding staff within the Department.

[19] Given the above circumstances, I find that the Third Respondent did have the power to take decisions in respect of and issue directives relating to staff ranks and titles, the translation of posts and staff remuneration throughout the public service – subject, of course, to the rights of those affected by such decisions[3].

[20] In passing, I note that the Respondents contended that the Decision was invalid for being in conflict with the OSD. The precise terms of the OSD were never, however, pleaded as part of the affidavits. I, thus, cannot make a finding that the Decision was invalid as being in conflict with the OSD. On the papers before me what I have to consider is whether the Third Respondent's letter validly countermanded the Decision. To do this I turn to the Applicant's primary argument as outlined in paragraph 12 above.

[21] Mr Geldenhuys drew my attention to Section 158(1)(h) of the Labour Relations Act[4] (LRA) as well as the cases dealing with situations where employers were obliged to approach the Labour Court to review and set aside decisions of disciplinary enquiry chairpersons. The leading case in this regard appears to be *Hendricks v Overstrand Municipality and Another*[5]. He contended that the Second Respondent's Decision was such a decision and that in accordance with those cases and the principles set out in *Kirland*[6] the Respondents were obliged

[3] For example, the Third Respondent would not have the power to direct how Collective Agreements must be interpreted, see: *Western Cape Department of Health v MEC van Wyk and Others* (2014) 35 ILJ 3078 (LAC).
[4] Act 66 of 1995 as amend.
[5] (2015) 36 ILJ 163 (LAC).
[6] *Supra* n 1.

to have approached the Court to set aside the Decision and were not entitled to simply ignore or not implement it.

[22] Advocate Mokhari SC argued on behalf of the Respondents that the Decision was not a decision of the nature of those referred to in either *Kirland* or *Hendricks*[7].

[23] Having regard to the decisions of the Constitutional Court in *Chirwa v Transnet and Others*[8] and *Gcaba v Minister of Safety and Security and Others*[9] I doubt that the Decision can be said to amount to an administrative action. In *Hendricks* the Labour Appeal Court contemplated the circumstances in which employment decisions could still be classified as being administrative action having regard to the source of the power, the nature of the power, its subject matter and how closely it related to policy matters or the implementation of legislation. None of the hallmarks of an administrative decision as considered in *Hendricks* arise in the present matter. To my mind, the Second Respondent was purely giving consideration to and making a decision in relation to employment issues[10].

[24] The Applicant did not, however, press that the Decision was an administrative one, but rather that it was akin thereto. In *Economic Freedom Fighters v Speaker of the National Assembly and Others*[11] the Constitutional Court found that the *Kirland* decision has application to matters beyond administrative action having regard to the rule of law in the following terms:

> "No decision grounded on the Constitution or law may be disregarded without recourse to a Court of law. To do otherwise would 'amount to a license to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and

[7] Id n 5.
[8] (2008) 29 ILJ 73 (CC).
[9] 2010 (1) SA 238 (CC).
[10] See: *Hendricks* n 5 at paras 17 to 20.
[11] 2018 (2) SA 571 (CC) at para 74.

> constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of Court would have to be obtained"

[25] However, the Second Respondent's Decision does not constitute a binding constitutionally or statutorily sourced decision. It is rather a decision which he made acting as an employer and not because of some statutory or constitutional power. I can see no reason why such a decision cannot be reversed by the employer. This situation would, of course, be different if the Decision had become a term of employment or where it had created a labour practice or legitimate expectation on the part of employees. Those are, however, not the issues before me.

[26] In *Hendricks*[12] the Labour Appeal Court found that the Decision of a disciplinary chairperson was reviewable under Section 158(1)(h) of the LRA: "*On i) the grounds listed in PAJA, provided the decision constitutes administrative action; ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or iii) in accordance with the requirements of the constitutional principle of legality, such being grounds* 'permissible in law". It appears to me that the requirement for a court to set aside a decision would only apply to the type of decisions envisaged in this summary in *Hendricks*. The Second Respondent's Decision is not such a decision. This appears evident from the nature of the Decision. On the face of the Decision, there seems to be no reason why the Second Respondent himself could not have subsequently reversed it. The Second Respondent did not become *functus officio* when he made this Decision precisely because it was not a final decision.

[27] Consequently, I am of the view that the Second Respondent's Decision was capable of being countermanded without the need for any court order setting it aside and that the Third Respondent had the power to do so. As set out above, I find that the Third Respondent's letter of 25 November 2008, indeed, amounted

[12] *Supra* n 5 at para 29.

to such a countermanding instruction. In the circumstances, the Applicant is not entitled to the relief it seeks.

[28] Given this conclusion it is not necessary for me to deal with the Respondents' defences of *res judicata* or prescription.

[29] I am mindful of the ongoing relationship between the parties as well as the length of time over which this dispute has dragged and the uncertainty that has pervaded the matter. In those circumstances, I do not think an order of costs is warranted save in respect of the unnecessary wasted costs occasioned by the late delivery of the Answering Affidavit.

[30] Consequently, I make the following order:

Order

1. The application is dismissed.
2. The First and Second Respondents are ordered to pay the wasted costs relating to the appearance of 12 September 2017.

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C. Beckenstrater

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Elco Geldenhys of Macgregor & Erasmus Attorneys

For the Respondents: Mr M Mokhari SC

Instructed by: The State Attorney