IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Case No.: 3580/2020

Reportable: YES/NO

In the matter between:

BEKENTLA ZWELITSHA	**Applicant**
and	
KING SABATA DALINDYEBO LOCAL MUNICIPALITY (K.S.D	**Respondent**

JUDGMENT

Cengani-Mbakaza AJ

[1] In this matter the applicant is a major male South African citizen and an employee at King S
Municipal Structures Act 117 of 1998.

[2] The applicant's permanent position with the municipality is that of an Inspector, a role he held since May 2005. He commenced employment with the municipality as Acting Assistant Security Manager between May and June 2006. As per contract, it was agreed that he would receive an acting allowance which according to him was never paid. The applicant now seeks the relief that essentially entails enforcing the terms of the acting appointment contract.

[3] In terms of the agreement, it was agreed that the position would endure until he was relieved of his acting appointment, the situation was reviewed, or the post was filled. The acting allowance would be paid based on difference between his salary and the commencement notch of post of level 8 for the duration of his acting appointment. The acting appointment as Acting Assistant Security Manager was at post level 12.

[4] The applicant avers that he has been in the acting capacity since 2006, the post was never filled and he was never relieved of his duties. He is currently performing the duties of the Acting Assistant Security Manager. In October 2018, the acting allowance was not paid and despite his enquiries, he received no valid responses. Therefore, so he avers, the termination of the acting allowance was unlawful and arbitrary, with malicious intent to cause financial injury to him and his family.

[5] In July 2019, he was paid, however, later in 2019 his acting allowance was not paid. Despite his enquiries, nothing came forth. Upon further enquires with the relevant authorities, the Municipal Manager promised to call a meeting to resolve the issue, however, that never materialised.

[6] The applicant contends therefore that the municipality is under a duty to act fairly, stemming from the principle of legality and not the Promotion of Administrative Justice Act[1] (PAJA). The municipality, so he contends, ought to have acted transparently and observed the rules of accountability before terminating the contractual rights.

[7] He referenced to the Basic Conditions of Employment Act[2] (BCEA) which defines the concept of remuneration as well as the clause that prohibits deductions from an employee’s remuneration. In a nutshell, the applicant avers that the conduct of the municipality not only relates to the termination of his acting appointment but also encompasses the deduction of his remuneration.

[1] Act 3 of 2000.
[2] 75 of 1997.

[8] The municipality through an affidavit deposed to by Ngamela Pakade, one of its employees, states that it was erroneous for the applicant to have been paid the acting allowance from October 2018 to 2019 based on the following reasons: that, the letter of appointment as the Assistant Security Manager, which is dated 05 June 2006 reads as follows,

> 'I have pleasure to inform you that the Municipality Manager has approved that with effect from 01 June 2006 you be appointed temporarily to act in the position of Assistant Security Manager in the <u>"Protection Service Division of the Public Safety and Security Department, until you are relieved of your acting appointment or the situation is reviewed or the post is appropriately filled, whichever occurs first.</u>'

[9] The municipality asserts that the 2004 organogram outlined the post in similar terms to the applicant's acting appointment letter. Subsequently in 2019, the 2004 staff establishment was abolished and replaced with 2010 staff establishment. There was no longer a post corresponding to the one contended by the applicant.

[10] In this regard, the municipality through Mr Kunju SC referenced to the approved staff establishment dated June 2010. It asserts that the applicant is aware that on 30 July 2012, he was advised of the changes through paragraph 1 of a letter dated 27 June 2012. The relevant section of the letter reads:

> 'It now gives the Municipality pleasure to inform you that you have been placed with effect from 01 July 2020, in a permanent capacity in the post of <u>**Senior Inspector (Task Grade T7) in the Access Control Section in the community Safety Directorate'**</u>**.**

[11] The municipality avers therefore that the post contended by the applicant is non-existent. Effectively, the 2010 staff establishment and the letter dated 27 June 2012, signed by the applicant on 30 July 2012, brought about changes and reviews to his situation.

[12] In his reply, the applicant denies that the situation was reviewed or post filled as contended by the municipality. He avers that the organogram attached to the answering affidavit refers to the Protection Service Division, in which he was appointed to act and nothing was reviewed in that division.

[13] The applicant further notes some contradictions in the municipality's answering affidavit, stating that the post can only be filled if it is existent. Therefore, its allegations that the post is non-existent contradict a statement that it was filled.

[14] Mr Zono, the applicant's legal representative, relies on the number of principles, specifically s 33 of the BCEA which provides:

> '33(1) An employer must give an employee the following information in writing on each day the employee is paid:
>
> (e) the amount and purpose of any deduction made from the remuneration.'

[15] In his submissions, he argues that the s 33 provision would serve as notice of termination of the acting appointment, and in the absence of such notice, the termination is invalid. He further bemoans the fact that the applicant is performing the duties of Assistant Security Manager, now referred to as Acting Principal Officer, yet he is not receiving the corresponding allowance.

[16] The question of whether a breach of contract occurred must be considered in the context of the employment contract's terms and the alleged breach. To determine this, a clear interpretation of the letter dated 05 June 2006 which outlined the contract's conditions is essential. This letter to the applicant provides crucial insight into the agreement and its purported breach.

[17] Upon examination of the papers filed, it is evident that the terms and the conditions of employment contract are not in dispute. However, the applicant's concerns persist due to the post not being filled and the organisational structure remaining unchanged. This argument triggers the application of the *Plascon-Evans*

Rule which was referred to by both parties in their argument. In *National Director of Public Prosecutions v Zuma,*[3] the court said:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where motion proceedings disputes of fact arise on affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma)affidavits, which have been admitted by the respondent (the NDPP) , together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, a palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers …'[footnote omitted].

[18] Upon closer examination, a persuasive case emerges in favour of the municipality due to the subsequent letter confirming the applicant's promotion, an indicative of a review of the staff establishment. Furthermore, the organisational structure, despite being disputed, clearly shows that the post that the applicant was acting in is no longer available in the organisational structure. Mr Zono's acknowledgment that the post of the Assistant Security Manager is now referred as Acting Principal Officer actually strengthens the municipality's argument that significant changes have been made to the organisational structure. The letter confirming the applicant's promotion further evidences a change in his employment contract, superseding his previous role as Acting Assistant Security Manager.

[19] I disagree with Mr Zono's assertion at paragraphs 27.1 and 28 of his heads of argument where he states that adherence to the provisions of s 33 (1) (e) of the BCEA would serve as a notice of termination of contract had it been adhered to. Section 33 (1) (e) applies to the contracts in force requiring the employers to transparently state the details of the employees' pay, including earnings, deductions

---

[3] 2009 (2) SA 277 (SAC) at paragraph 26.

and net pay, typically through a salary advice or payslip. This is distinct from the notice of termination of contract, which is governed by s 37 of the BCEA. Therefore, the reliance on s 33 of the BCEA is in this regard misplaced.

[20] The explicit contractual terms between the municipality and the applicant, the finding in paragraph 18 of this judgment, the letter of promotion which served as a formal notice of the changes of the conditions of employment as well as the applicant's partial acknowledgment of the changes in the organisational structure collectively suffice to establish a fair process and adherence to the principle of legality.

[21] Absent a contractual breach of contract between the two parties, the question that arises is whether granting a mandatory interdict is appropriate, specifically given its proximity to the prohibitory interdict. Generally in the context of labour dispute, the court has a discretion to grant an interdict, particularly where a breach of contract is at issue. For the applicant to succeed, they must establish three key principles: a clear right, a reasonable apprehension of harm and the absence of another legal remedy.

[22] In the present matter, the applicant has failed to establish a clear right, as no breach of contract exists. Considering the terms and the conditions of the employment contract which were understood by the applicant, there is no reasonable apprehension of harm rendering a repetition of what has already been noted in the judgment unwarranted. Consequently, the applicant's legal remedy lies with acknowledging the review of the Acting Assistant Security Manager's position. Therefore, this application cannot succeed.

Order

[23] The following order is issued:

1. The application is dismissed.
2. Each party shall pay its own costs.

N CENGANI-MBAKAZA

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

For the Applicant	:	Mr A.S. Zono
		AS ZONO &ASSOCIATES
		MTHATHA
Counsel for the Respondent:		Adv. Kunju SC
Instructed by	:	JOLWANA MGIDLANA INC
		MTHATHA

Date heard	:	13 March 2025
Date delivered	:	01 July 2025