

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

OF INTEREST

CASE NO **D332/03**

DATE HEARD: 2003/06/20

DATE DELIVERED: 2003/06/03

In the matter between:

NICHOLAAS WILLEM DANNHAUSER & 19 OTHERS

Applicant

and

eTHEKWINI MUNICIPALITY

Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY
ON 20 JUNE 2003**

ON BEHALF OF APPLICANTS:

MR S M
GOVENDER

ON BEHALF OF RESPONDENT:

MR M G MAESO

PILLAY J

[1] The applicants seek urgent relief, *inter alia*, in the following terms.

"2.1 That the appointments to the nine (9) Superintendent and two (2) Senior Superintendent posts advertised in circular No 56 be and is hereby stayed pending the finalisation of this matter.

"2.2 That the respondent be and is hereby ordered to place the Applicants in the posts with the Durban Metropolitan Police Services as set out hereunder in accordance with Staff Placement Policy and Process dated 3 September 1996 retrospectively to November 2000."

The current title, name of each applicant and the post to which the applicants seek appointment are listed thereunder.

[2] An alternative order making the award of Arbitrator Naidoo dated 29 January 2002 an order of court was also sought.

[3] The applicants founded this relief on the Staff Placement Policy and Process ("SPPP") agreement and the award of Arbitrator Naidoo. The

terms of reference for the arbitration before Naidoo were as follows:

"7. The arbitrator will decide whether the non-placement/placement is reasonable/unreasonable.

8. If the grievance is upheld it will be referred to the placement committee for reconsideration."

[4] Arbitrator Naidoo issued an award in which he found that the applicants had been unreasonably placed. He recommended that they be appointed to the posts to which they now seek appointment. In the case of a few applicants, he also referred the matter to the placement committee for reconsideration.

[5] The recommendations are just that. If they were to amount to more than recommendations, as Mr *Govender*, for the applicant, urges me to hold, then it would be an award for specific performance which fell outside Arbitrator Naidoo's terms of reference. The award would then be *ultra vires*.

[6] The award is capable of being so interpreted as to give effect to its legality. Effect can only be given to the finding that their placements were unreasonable. That is the declarator that the parties to that arbitration sought.

[7] The Court is not bound by Arbitrator Naidoo's recommendations to appoint the applicants to the posts they seek. The recommendations are unenforceable.

[8] The Court will have to conduct its own investigation to determine whether, factually, the applicants are entitled to the posts to which they aspire, on the basis that they are a "close match" (discussed below) to the posts they currently hold. A case for such an investigation has not been made out in these papers, assuming that this is the proper forum to advance such a cause of action, which I doubt.

[9] Turning to the second basis relied on by the applicants, namely that the SPPP agreement confers a right on the applicants to the posts, the agreement provides as follows:

"5. Each Area Industrial Council is required to create a Placement Committee consisting of equal numbers of employer and employee representatives. The terms of reference of these Committees will be to consider and reach consensus regarding the placement of existing employees into posts in the new structures.

6. Staff are to be placed in these structures on a permanent

basis. Every attempt (my underlining) will be made to place all existing staff within these new structures. New or major changed posts will only be advertised where no “close match” placement is possible including the consideration of staff in the Metropolitan Staff Placement Pool which will be created to accommodate any surplus staff.

.....

9.1.4 Major Changed Posts

These are posts which have undergone a major change to their duties and responsibilities and as such require submission for grading. Wherever possible, consideration in the first instance should be given to the placement of existing staff in these posts on a “close match” basis. These posts with existing and proposed duty schedules should be submitted to the Committee together with the names and service numbers of employees to be placed in posts on a “close match” basis. Following publication of the decision of the Placement Committee and finalisation of any grievances arising therefrom, the post/s concerned will be submitted for grading.

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9.3 The decision-making process

The Placement Committee shall strive to reach consensus

on the staff placement submissions under consideration. Where consensus cannot be achieved, the Council's proposal will be published in the decision circular indicating that no consensus was reached. Notwithstanding any decision of the Placement Committee, individual employees or Trade Unions on behalf of their members retain the right to lodge grievances against published decision/s. Any grievances lodged will be dealt with in terms of the grievance procedure as set out in clause 12 below. Following the standard grievance period of 10 days, staff placements against which no grievances have been lodged will be deemed to be final.

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12.5 Should the arbitrator rule that the placement proposal is unreasonable and that the parties concerned are still not able to resolve the matter, the following will apply:

The employee will be placed in the Metropolitan Staff Placement Pool for a period of not more than 6 months or such agreed extension thereof, during which period alternative employment will be sought for the employee who would, in addition, be expected to -

- Identify alternative positions to which placement would be acceptable (and the employer will canvass the feasibility thereof on his behalf); and

- actively make application for suitable vacancies at the time; and
- carry out any reasonable alternative duties assigned."

[10] Nothing from the foregoing extracts relied on by the applicants give them a right to appointment to the posts they seek.

[11] As it emerged during argument, only the five applicants who seek appointment as senior superintendent and superintendent, respectively, have an interest in the first order prayed, namely for the staying of the appointments. With regard to the remaining applicants, there is a dispute as to whether the posts to which they aspire in fact exist and are funded or whether they exist only on an organogram. Such a dispute must be resolved, for the purposes of this application, on the respondent's version.

[12] I have disposed of this application on the merits. I am nevertheless not convinced that the matter is urgent or that there is no alternative remedy. From the SPPP agreement it would appear that the applicants may grieve as often as they wish about any appointment or non-appointment. That is the remedy they should pursue.

[13] In the circumstances, the application is dismissed. With regard to costs and there is no order on the basis of the submission by Mr *Govender* that there is an on-going relationship.

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PILLAY D, J
10 September 2003.