

REPORTABLE

**IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN**

D614/2001 CASE NO

In the matter between:

C P PASCOE First
Applicant

E M R RANDT Second
Applicant

and

**MINISTER FOR THE PUBLIC SERVICE
AND ADMINISTRATION** First
Respondent

MEC FOR HEALTH, KWAZULU NATAL Second
Respondent

**HEAD OF THE DEPARTMENT OF HEALTH
KWAZULU-NATAL** Third
Respondent

JUDGMENT

PI

LLAY D, J

- [1] This is an application for a declarator in the following terms:
- [a] that s37(2)(c) of the Public Service Act No 103 of 1994 (the PSA) contemplates, *inter alia*, the promotion of officials;
- [b] that second respondent was obliged by virtue of the provisions of s37(2)(c), read with s5 of the PSA, to promote the applicants to the rank of senior personnel practitioner with a salary of R82 305,00 per annum [third notch] with effect from 1 April 1999, and certain other relief.
- [2] I indicated to Advocate *Blomkamp* for the applicant that I would not be prepared to grant the relief sought in paragraph [b] as there are substantial disputes of fact as to whether the applicant met the requirements for promotion. As it is common cause that the applicants did not meet the RVQ requirements for that post, the question also arises as to whether their recommendation was competent. Furthermore, those issues are the subject of proceedings before the CCMA which had been suspended pending the judgment in this matter. In terms of a letter from the Commissioner the parties had agreed to approach the Labour Court for this declarator.
- [3] The background to the matter is that the KwaZulu-Natal Provincial Service Commission had made a recommendation in the following terms:
- "The Commission recommends the promotion of Mesdames C. P. Pascoe & E. M. R. Durandt to the rank of Senior Personnel Practitioner in terms of s37(2)(c) of the Public Service Act, 1994 with effect from 1 April 1999 on salary R82 305 per annum (third notch)."
- The applicants sought to implement that recommendation.

[4] The respondents refused to implement the recommendation as it was to promote the applicants in circumstances where the respondent believed:

- (a) that such promotions were not authorised by s37(2) and,
- (b) the requirements for such promotions had not been met.

These reasons are canvassed more fully in this application.

[5] Section 37(2) of the PSA prior to its amendment with effect from 1 July 1999 provides:

"Chapter VIII. Miscellaneous.

37. Remuneration of officers and employees.-

(1). Subject to the provisions of section 5, officers and employees shall be paid the salaries, wages and allowances in accordance with the scales recommended by the Commission for their ranks and grades in terms of s3(3)(g).

(2). On the recommendation of the Commission, but subject to the provisions of section 5-

(a) officers or employees or classes of officers or employees may on appointment, transfer or promotion be paid higher salaries or wages than the minimum amounts of the appropriate scale;

(b) officers or employees or classes of officers or employees may be granted special advancement in salaries within the scales applicable to them;

(c) the salary or wage of an officer or employee of exceptional ability or possessing special qualifications or who have rendered meritorious service, and, if it is in the interests of the public service, of any officer or employee, may be specially advanced within the scale applicable to him or her or may be paid a salary or wage in accordance with the higher scale or

may be granted any other fitting reward; and

(d) any special service benefit may be granted to a head of department or class of heads of department before or at the expiry of the term contemplated in s12(1)(a) or (b), or any extended term contemplated in s12(1)(c), or at the time of retirement or discharge from the public service."

[6] Advocate *Blomkamp* submitted that s37(2)(c) employs broad language. If the Legislature had intended to restrict the ambit of the provisions it could have done so. As I understood the argument, paragraph (c), it was submitted, was wider than paragraph (a) which expressly mentions "promotion".

[7] Advocate *Govender* submitted *in limine* that the scheme of the PSA did not lend itself to the interpretation advanced by Advocate *Blomkamp*. Furthermore, s37(2)(a) provides for recommendations for higher salaries or wages than the minimum amount on the appropriate scale to be made by the Commission only the appointment, transfer or promotion has been effected by the executing authority as provided for in Chapter IV of the PSA. Moreover, posts within the public service have different scales or levels of salary and benefits. The power of the Commission to recommend is limited to advancement in terms of financial reward within the ambit of the salary scales applicable to the post. So the argument went.

[8] The scheme of the PSA is such that appointments and promotions are provided for in Chapter IV in ss9 to 15 inclusive. Section 37 falls under Chapter VIII which is headed "Miscellaneous Matters". The heading of s37

itself is "The Remuneration of Officers and Employees". I agree with Advocate *Govender* that the scheme of the PSA clearly demarcates the provisions relating to promotion from remuneration.

[9] Adopting a purely literal approach to s37 the following emerges: the fact that the Legislature expressly mentions promotion in paragraph (a) but not in any of the other paragraphs of s37 implies that paragraphs (b), (c) and (d) do not refer to promotion. Paragraph (b) refers to "special advancement in salaries" and paragraph (c) refers to "may be specially advanced within the scale applicable". Construing the phrase "specially advanced" in s37(2)(c) *noscitur sociis* it has a special meaning in the context. It derives this meaning from the underlined words. The underlined words qualify "specially advanced" and relate its meaning to remuneration. "Specially advanced" cannot by any stretch of linguistic latitude be construed to mean promotion. This interpretation is also consistent with the interpretation of the phrase "special advancement" in s37(2)(b) which relates *noscitur sociis* to the phrase "in salaries".

[10] Advocate *Blomkamp* further submitted that the words "any other fitting reward" must be interpreted widely to include promotion as a reward. Applying the *eisdem generis* rule "reward" in s37(2)(c) must be in the nature of a salary or wage or similar reward. Furthermore, the qualification that it must be a "fitting" reward means that it must fit in the context of the legislation on the one hand and the exceptional ability, special qualifications, meritorious service or the public interest which it seeks to acknowledge on the other hand. The reward, therefore, cannot conflict with or undermine other provisions of the PSA or any other law.

[11] I turn to apply a purposive of interpretation of s37(2)(c). The power to make appointments and to promote officials is expressly entrusted to the executing authority in terms of s9(1) of the PSA which provides:

"Powers of Executing Authority.

1. Without derogating from the functions of the Commission in terms of this Act, the appointment of any person or the promotion or transfer of any officer or employee in the employ of a national department or provincial administration shall be made by the relevant executing authority or by an officer or officers to whom such authority has delegated his or her power for appointment, promotion or transfer.

2. Subject to the provisions of this Chapter appointments and promotions in and transfers in or to Public Service shall be made in such manner and of such conditions, including conditions regarding the knowledge of the official and other languages as may be prescribed, or in so far as they are not prescribed as may be directed by the Commission."

[12] The powers of the executing authority is jealously guarded and carefully demarcated between the various levels and components of government. [See the definition of "executing authority" in the PSA. Also *Premier of the Western Cape v President of the Republic of South Africa* 1999(3) SA 657 (CC).]

[13] The Public Service Regulations Government Gazette No 20117 dated 1 July 1999 provides under the heading "F. Promotion" the following:

"F.1 An executing authority may promote an employee to a vacant post on the approved establishment of the department if-

(a) sufficiently budgeted funds, including funds for the remaining period of the relevant medium-term expenditure framework are available for filling the vacancy; and

(b) the vacancy has been advertised and the candidate selected in accordance with the regulations VII(C) and (D).

F.2 A promotion may not take effect before the first day of the month first following the month during which the executing authority approved it.

F.3 No employee has any right to promotion to a vacant post until the promotion has been approved in writing by the executing authority."
(my underlining)

Regulation F.3 is quite explicit. It leaves no doubt that no one but the executing authority can approve a promotion to a vacant post. The regulations do not cater for promotions other than to a vacant post. I do not deal with posts held out of adjustment as the recommendation was for a promotion.

[14] The procedures for promoting officials are elaborately prescribed by legislation, ss9, 11, 12 and 13 of the PSA and Regulation F. Reference in sections is to the Public Service Commission, not a Provincial Service Commission. The rationale for such a rule-driven, regimented approach is to ensure that appointments and promotions in the public service take place in a manner and on the basis of criteria that are objective, fair, clear, well-known and predictable. Section 37(2)(c) does not provide any guidelines or criteria in terms of which the Public Service Commission may exercise its discretion.

- [15] Another issue that the applicants seem to have lost sight of, assuming that their reliance on s5 of the PSA is well-founded, is that a recommendation by the Public Service Commission involving expenditure from the national or provincial revenue funds, shall not be carried out unless the treasury approves the expenditure.
- [16] In all these circumstances the purpose of s37(2)(c) cannot be to authorise either the Public Service Commission or the Provincial Service Commission to make recommendations about promotions. In the circumstances, on both a linguistic and purposive of interpretation, I find that s37(2)(c) of the PSA does not contemplate the promotion of officials on the recommendation of a Provincial Service Commission
- [17] In the second part of this judgment I deal with the following further issues since they were argued. It is common cause that the recommendation was issued by the Provincial Service Commission. Sections 5 and 37 deal with recommendations of the Public Service Commission. The respondent submitted that the applicants' reliance on these sections was misconceived and misplaced.
- [18] The applicants painstakingly trawled through several pieces of legislation relating to the establishment, powers and functioning of the Public and Provincial Service Commissions. None of these provisions assist the applicants. The authority in sections 5 and 37 are specifically conferred on the Public Service Commission and not the Provincial Service Commission. Nor was there evidence that such authority had been expressly delegated to the Provincial Service Commission. The Provincial

Service Commission had no authority to make any recommendation in terms of s37, let alone one relating to promotion.

[19] It is common cause that the KwaZulu-Natal Provincial Service Commission was established on 1 July 1999. The applicants rely on the transitional arrangements promulgated in Government Gazette No 679, No 20117, dated 1 July 1999 for the continued existence of the Provincial Service Commission's recommendation.

[20] The respondents submit that the recommendation was extinguished by the repeal of the KwaZulu-Natal Provincial Service Act of 1994. Alternatively, and in so far as the recommendation was given a new lease of life by the transitional provisions, the recommendation had been withdrawn by the second respondent, the Provincial Minister of Health, on the recommendation of the third respondent, the head of the Department of Health on 29 September 1999. Such authority to withdraw the recommendation vested in the Minister pursuant to the decision in the *Premier of the Western Cape* case above. So the argument went.

[21] The transitional arrangements provide as follows:

"1(3) Despite Part VIII of the Regulations and subject to any collective agreement, the system for personnel evaluation, merit assessment and personal profiles, including any merit awards and the award for higher salary notches, shall continue to apply until 31 December 2000, unless a department is ready for implementation at an earlier date, in which case the performance management system can be implemented at any date between 1 July 1999 and 31 December 2000."

These provisions apply to s37(2)(c). But, neither s37(2)(c) nor Item 1.3 of the transitional arrangements refer to promotion. If the transitional arrangements applied to the recommendation - and clearly they do not - then their application expired on 31 December 2000.

[22] The applicants relied on s5(2)(a) of the PSA as authority for the proposition that the recommendation had not been rejected, varied or withdrawn. As stated above, s5 has application only to a recommendation of the Public Service Commission and not to that of a Provincial Service Commission. Furthermore, once the KwaZulu-Natal Provincial Service Commission was disestablished, it could not be engaged in the manner that the Public Service Commission could be to withdraw or vary its recommendation.

[23] For the limited reasons in the second part of this judgment, I find *obiter* that the recommendation of the Provincial Service Commission to promote the applicants purportedly in terms of s37(2)(c) to the rank of senior personnel practitioner with a salary of R82 305,00 p.a. with effect from 1 April 1999 is *ultra vires*. I grant a declarator in the following terms:

1. S37(2)(a) of the Public Service Act of 1994 does not contemplate the promotion of officers.
2. There is no order as to costs.

PILLAY D, J

DATE OF HEARING: 2 MAY 2002

DATE OF JUDGMENT: 3 MAY 2002

DATE OF REVISION: 4 JUNE 2002

FOR THE APPLICANT: ADVOACTE PJ BLOMKAMP
INSTRUCTED BY: LLEWELLYN CAIN ATTORNEYS

FOR THE RESPONDENT: ADVOCATE SM GOVENDER
INSTRUCTED BY: THE STATE ATTORNEY