**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**CASE NO. J4833/02**

In the matter between:

**M M DANI** **Applicant**

and

**MINISTER OF SAFETY AND SECURITY** **First Respondent**

**NATIONAL COMMISSIONER OF SAPS** Second Respondent

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**JUDGMENT**

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**TIP AJ**

1. The applicant is a Director in the South African Police Service ("SAPS"). Until the events giving rise to this application he held the post of Provincial Head Detective Services for the Northern Cape, stationed in

Kimberley. Whilst in that position, allegations were made concerning sexual harassment on the part of the applicant. On 18 October 2001 he was served with a notice that a departmental investigation was being instituted. On 30 October 2001 he was served with a notice of temporary transfer to the Provincial Evaluation Services of SAPS, also in Kimberley.

2. An extended disciplinary enquiry followed. The applicant was found guilty on two counts and, on 11 September 2002, a sanction of dismissal suspended for a period of twelve months was imposed. An appeal was lodged. It was successful, with the findings and sanction being set aside on 13 January 2003.

3. In the interim, the applicant received a notice dated 27 September 2002 in the following terms:

> "*1 As a result of the disciplinary hearing and sanction imposed on the officer, an administrative investigation pertaining the placement and utilization of the officer is pending.*

"*2 Due to the functional requirements of the Service and the fact that the relationship between the officer and employees has been severely affected, the officer must remain in the post to which he was temporary transferred until the*

*investigation is finalized.*

"*3 It is Head Office's intention to transfer the officer to one of the following posts ….*

"*4 The written response of the officer is awaited at Head Office on or before 2002-10-01*."

4. Various representations and items of correspondence followed. It is unnecessary for me to analyse them all. On 27 November 2002 the applicant informed the Provincial Commissioner for the Northern Cape that he "*will be reporting for duty at my office at the Detective Services at 08h00 on Monday the 2nd December 2002 as the Provincial Head Detective Services Northern Cape*." Notwithstanding a warning from the Provincial Commissioner that this would amount to misconduct, the applicant carried out his intentions. On 2 December 2002 the applicant informed *inter alios* the National Commissioner (the second respondent) and the Provincial Commissioner that: "*I have this day the 2nd of December 2002 reported to my office at the Provincial Detective Service Northern Cape*."

5. Evidently in response, the second respondent issued a letter stating:

> "*1 The officer must remain in the post in which he was temporary transferred. If he fails to adhere to the instruction, disciplinary action should be considered.*
>
> "*2 The officer's representations were considered but due to the breakdown of relations his transfer to Gauteng in the post Deputy Area Commissioner: West Rand, is hereby approved. He must take up the post as soon as possible but not later than 2 January 2003.*"

6. After further exchanges, the applicant launched the present proceedings as a matter of urgency on 27 December 2002. The notice of motion sets out the following prayers:

> "*1 Condoning the Applicant's failure to comply with the Rules of the above Honourable Court relating to service and time frames and hearing this matter on an urgent basis.*
>
> "*2 Declaring the 2nd Respondent's decision to transfer the Applicant to Gauteng in the post Deputy Area Commissioner: West Rand to be unconstitutional and unlawful.*
>
> "*3 Declaring the 2nd Respondent's decision to transfer the Applicant to*

*Gauteng in the post Deputy Area Commissioner: West Rand to be irregular and unprocedural.*

"*4 Declaring the 2nd Respondent's decision to transfer the Applicant to Gauteng in the post Deputy Area Commissioner: West Rand to be unfair and prejudicial.*

"*5 Declaring the 2nd Respondent's decision to transfer the Applicant to Gauteng in the post Deputy Area Commissioner: West Rand to be contrary to the Agreement reached by the Safety and Security Sectoral Bargaining Chambers (hereinafter referred to as the "Agreement".*

"*6 Interdicting the Respondents from transferring the Applicant to Gauteng in the Post Deputy Area Commissioner pending the finalisation of the Appeal against the finding of Director P van Vuuren.*

"*7 Interdicting the Respondents from transferring the Applicant to any Area and Post pending the finalisation of the Appeal against the finding of Director P van Vuuren.*

"*8 Directing the Respondents to re-instate the Applicant to the Post Provincial Head Detective Services Northern Cape.*

"*9 Directing the Respondents to pay the Applicant's costs on an attorney and client scale.*

"*10 Directing that prayers 1,2,3,4,5,6,7 and 8 serve as Interim Relief with immediate effect pending the finalisation of this Application.*

"*11 Further and/or alternative relief.*"

7. The application came before Court on 30 December 2002. By agreement it was postponed *sine die* with costs reserved. The respondents undertook not to implement the transfer of the applicant which was to have taken place on 2 January 2003. Answering and replying affidavits were thereafter filed and, on 17 April 2003, the matter came before me.

8. Although no *in limine* points had been raised in the respondents' papers, Ms Barnard who appeared on their behalf made the submission in her heads of argument that a dispute about demotion fell within section 186 of the Labour Relations Act 66 of 1995 ("LRA") and, accordingly, should have been referred for arbitration instead of being placed before this Court. The role of 'demotion' has featured prominently in the applicant's papers on the basis that the transfer

measures taken in respect of himself amounted to a *de facto* demotion. It was also the leading feature of the heads of argument lodged by his counsel. When this issue of jurisdiction was raised, Mr Mathibedi for the applicant stated that the demotion component of the applicant's case was not being proceeded with.

9. However, the jurisdictional obstacles in the path of the applicant are not swept away through this redirection of his case. Crucially, there is in place a collective agreement (No. 5/1999 concluded on 8 October 1999) that comprehensively governs transfer policy and procedures. This agreement was reached within the Safety and Security Sectoral Bargaining Chamber.

10. It is the alleged contravention of this agreement that forms the subject matter of prayer 5 of the relief sought, set out above. Whether or not the applicant's complaints are well founded is not something that I can now decide, since the antecedent question is whether they fall within the parameters of the collective agreement. *Prima facie* they do. According to Mr Mathibedi, the main argument to be put forward for the applicant is that the officer who made the decision to transfer him did not have the requisite authority. That issue is expressly dealt with in clause 3 of the agreement, which contains a set of particular provisions under the

rubric: "*In the following circumstances the persons who are mentioned will be responsible for deciding whether or not a transfer must be effected:*". Other provisions of the agreement stipulate matters such as: the reasons that must be place for there to be a valid transfer; the restriction on the use of a transfer as a punitive measure; its permissibility as a temporary measure where misconduct is suspected; procedural requirements; transfer in situations of urgency; the submission of representations; and, the circumstances in which the National Commissioner or his Deputy may play a role.

11. In short, the collective agreement contains a set of agreed provisions that comfortably address the various complaints advanced by the applicant in support of the declaratory orders and ancillary relief claimed by him in this application. That is evident from a conjunction of the applicant's contentions and the terms of the collective agreement. Mr Mathibedi, correctly, did not suggest that the agreement did not accommodate the issues raised in this case.

12. All things being equal, it follows that the disputes raised by the applicant in these proceedings are concerned with the interpretation and application of a collective agreement. The agreement that has been included in the papers before me does not itself contain any provisions

relating to dispute resolution in the event of a dispute about its interpretation or application. Whether or not there is a governing or regulatory agreement having that consequence is therefore unclear. That fact does not affect the result. If there is, it will need to comply with the requirements of section 24(1) of the LRA, namely that it must provide for conciliation and, if necessary, arbitration. If the panoply of collective agreements relevant to this case do not incorporate provisions of that kind, the present dispute about the circumstances and terms of the transfer here at issue will fall within the provisions of sections 24(2) to 24(5) of the LRA, in which event the dispute remains one concerning the interpretation or application of a collective agreement, save only that it then must be processed through the CCMA. The same dispute resolution course is prescribed: conciliation and, if unresolved, arbitration.

13. If it should be the case that I am wrong in my view that the present range of disputes before this Court are not embraced within the scope of the collective agreements that regulate the affairs of the parties, they would nevertheless be classifiable as disputes on matters of mutual interest as between an employee and an employer. That characterisation would place the present application within the framework of section 51 of the LRA. Again, the result is that the same

dispute resolution sequence would have to be pursued, namely conciliation and arbitration, this time under the auspices of the Bargaining Council.

14. Shortly put, the grounds for relief advanced by the applicant in this case are in one way or the other specifically catered for within the remedial and dispute resolution provisions of the LRA. Each of them involves the conduct, if necessary, of an arbitration. Each of them involves a preliminary phase of conciliation. None of them involves the attention of this Court.

15. The LRA sets out clear delineations in relation to jurisdiction. That has been done in pursuit of clear policy objectives concerning the manner in which disputes are to be resolved and the primacy that is to be accorded within that framework to the role of collective agreements. In accordance with that approach, section 157(5) of the LRA unambiguously records that: "*Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration*."

16. The importance attached by the legislature to the processes of

conciliation and arbitration is reflected also in section 157(4)(a): "*The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation*."

17. Mr Mathibedi sought to preserve the applicant's quest for relief in this Court by relying on the terms of section 157(2)(b) of the LRA:

> "*The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from - … in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;*"

18. In support of this approach, he argued that the applicant has cited a constitutional ground in prayer 2 of the notice of motion and that this should be read as a reference to the right to fair administrative action guaranteed through section 33(1) of the Constitution. Hence, ran his argument, since the act in question is the act of the State as an employer, jurisdiction is conferred on this Court *via* section 157(2) of the LRA.

19. The prayer itself refers merely to 'unconstitutional'. However, even assuming that a constitutional reference has been made with sufficient clarity, I am unpersuaded that this is sufficient to take this dispute out of the normal dispute resolution route set out in the LRA. That Act has been put in place to give effect to relevant constitutional provisions and values. Its administration is required to be carried out in accordance with those provisions and values. But that is a far cry from the notion that specific mechanisms and dedicated bodies that have been established to provide and regulate the resolution of disputes can be bypassed through an insubstantial reference to the Constitution.

20. In this case there is a collective agreement. The conclusion of a regulatory instrument of that sort in itself gives expression to the values and objects of the Constitution. Mr Mathibedi advanced no suggestion that the agreement is in some way flawed. Likewise, he did not suggest that the prescribed dispute resolution process, which I have described above, is at odds with the Constitution or that it does not provide a satisfactory manner through which this dispute can be resolved. In short, an adequate remedy is available without recourse to a provision of the Constitution.

21. In these circumstances, there is in my view no good ground for this

dispute to be translocated from the prescribed channel to this Court. If section 157(2) were to have the meaning contended for by Mr Mathibedi, the operation of the LRA would be undermined. For instance, the prohibition against this Court hearing matters that were required to go to arbitration, expressly set out in section 157(5) could be rendered nugatory simply by attaching a constitutional tag to a dispute. That was not the purpose of section 157(2) and I hold that it does not vest this Court with jurisdiction in the present matter.

22. Comparable points have already been decided by this Court, in the manner that I consider appropriate in this case. See *Walters v Transitional Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC). Given that I consider that this case does not raise any constitutional principle, the observations of the Constitutional Court are analogously apposite: *National Education Health and Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at paras [30] – [31].

23. In the result, the application is dismissed with costs, such costs to include the costs reserved on 30 December 2002.

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**K S TIP**
Acting Judge of the Labour Court

Date of Hearing : 17 April 2003

Date of Judgment : 29 April 2003

For the Applicant : Adv T F Mathibedi with Adv M J Ramaepadi

Instructed by Bosman & Delpoort Attorneys c/o M N Moabi Attorneys

For the Respondent : Adv M Barnard

Instructed by State Attorney