

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN CAPE TOWN

CASE NO **C295/04**

Date of Hearing: 27/08/2004

of Judgment 28.01.2005 Date

In the matter between

RIAZ SALOOJEE Applicant

and

KAREN McKENZIE N.O. 1st Respondent

**INDEPENDENT COMPLAINTS
DIRECTORATE** 2nd Respondent

MINISTER OF SAFETY & SECURITY 3rd Respondent

**JUDGMENT DELIVERED BY
THE HONOURABLE MR JUSTICE NGCAMU**

FOR THE APPLICANT:

ADVOCATE P A
GAMBLE SC
WITH ADVOCATE H RABKIN-
NAICKER

FOR THE 1ST &
2ND RESPONDENTS:

ADVOCATE N
ARENDSE SC

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JUDGMENTNGCAMU A]

[1] The applicant is the Head of the Independent Complaints Directorate, Western Cape Office. The first respondent is the Executive Director of the Independent Complaints Directorate, who has been cited as the person who took the decision which is the subject of the present review. The second respondent is an organizational component of the public service, falling under the authority of the National Minister of Safety and Security. The third respondent is cited as an interested party. No relief is sought against that respondent.

[2] The applicant filed an application in which the following order is sought:

- (a) The decision of the first respondent to transfer the applicant to the post of Provincial Head of the ICD in the Mpumalanga Province announced on 25 June 2004 be reviewed and set aside.
- (b) The first respondent be directed to reinstate the applicant in his post as Provincial Head, ICD in the Western Cape.
- (c) Costs of this review be paid by the respondents should the application be opposed.
- (d) Further and/or alternative relief.

[3] The applicant was charged with eight counts of misconduct. He was found guilty of only one, of contravening section 8.3(a)(vi) of the ICD's media policy, in that he participated in an interview of

national television without informing the Chief Information Officer or Deputy Chief Information Officer or obtaining approval for such action.

[4] At the disciplinary hearing the respondent argued for the dismissal of the applicant. The chairperson of the disciplinary hearing was not convinced that the nature of the transgression warranted a dismissal. The following sanction was imposed:

- (a) that the applicant be provided with a final written warning;
- (b) that he be demoted to the third notch of salary scale of someone on salary level 12 within the public service with effect from 1 July 2004 for a period of one year and thereafter he may apply for promotion;
- (c) that he should not communicate with the media;
- (d) the evaluation and discipline of members be done in consultation with the national office;
- (e) that he should not be involved in the career incidents of Ms Cornellison and Mr Lalla;
- (f) that he should undergo an intensive team-building exercise with the staff of his office;
- (g) that he should formally apologise to the MEC for any embarrassment his actions caused.

The chairperson indicated that he seriously considered his transfer from Cape Town office if the provisions of the disciplinary code provided for it.

[5] The applicant was formally informed of the sanction by letter from the Executive Director, the first respondent. The letter is dated 27 May 2004 and contained the recommendations of the chairperson.

[6] On 2 June 2004 the applicant lodged an appeal against the sanction. On 4 June 2004 the first respondent served the applicant with a notice of an intention to transfer him to Mpumalanga office and placement on special leave. The letter stated that the intended transfer was in terms of section 14(1) of the Public Service Act of 1994. The transfer would be with effect from 1 July 2004. The applicant was to become the Provincial Head of the Mpumalanga office in Nelspruit. The reasons for the transfer were set out as, *inter alia*:

- (a) The breakdown of the trust relationship between certain of the applicants' employees and himself.
- (b) The breakdown of the trust relationship between the applicant and key stakeholders in the Western Cape Province.

[7] The applicant was invited to make written submissions regarding the proposed transfer to Nelspruit. The letter advised the applicant that he was placed on special leave with effect from 4 June 2004 until 30 June 2004. Alternatively, until a decision was taken on his possible transfer.

[8] The applicant responded that he was dismayed about the intended transfer because his appeal was pending. He further mentioned that the special leave was not in accordance with the leave policy of the second respondent. He submitted that the special leave was tantamount to a suspension. The applicant

submitted his reasons against the intended transfer.

[9] On 25 June 2004 the first respondent announced that the applicant was being transferred to Mpumalanga Province.

[10] The applicant seeks to review and to set aside this decision. The respondents are opposing the review.

[11] The review application has been brought on the following grounds:

- (a) The empowering provision relied upon by the first respondent, that of section 14(1) of the Public Service Act, does not authorise a transfer where the reason for that transfer is that the employer has failed to obtain a desired result in a disciplinary process.
- (b) The decision to transfer was taken for an ulterior motive or purpose.
- (c) The first respondent did not consider the relevant considerations when confirming the decision to transfer the applicant.
- (d) The first respondent took the decision to transfer in bad faith or arbitrarily and that the administrative act was not rationally connected to the purpose for the empowering provision.
- (e) The administrative decision to transfer was unconstitutional.

[12] The respondent's defence to the matter is that the transfer of the applicant from the Western Cape Province is in the public interest. The transfer of employees in the public service is governed by section 14(1) of the Public Service Act. This section

provides:

- "1. Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is in another division or is of a lower or higher grade or is within or outside the Republic.
2. (a) The transfer of an officer or an employee from one post or position to another post or position may, subject to the provisions of paragraph (b) be made on the authority of the person having the power to transfer."

[13] The Public Service Act does not define "the public interest". This gives rise to different interpretations. The Courts have attempted in several cases to define what is meant by the term. In *Ex Parte President of the Conference of Methodist Church of South Africa N.O: in re William Marsh Will Trust* 1993 (2) SA 697 (CPD), at 703C-E BERMAN J, quoting HERBSTEIN J in *Argus Printing and Publishing Company Ltd v Darby's Artware (Pty) Ltd and Others* 1952 (2) SA 1 (C), stated:

"One must adopt, in giving effect to the phrase 'a broad common-sense view of the position as a whole' --- (and

it must be considered whether) ---- the public should be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs."

[14] In *Rail Commuter Action Group and Others v Transnet Ltd trading as Metro Rail and Others* 2003 (3) BCLR 288 (C), the Cape Town High Court at page 320A-B stated:

"In our view this narrow definition of public interest is inappropriate within the context of the present dispute. While the term 'public interest' may not be capable of precise definition, the use of the phrase is, to our mind, designed to ensure that the first and second respondents adopt a policy which promotes the general welfare of the public which uses the public facility in question. In this case the railway service."

The New Shorter Oxford English Dictionary defines "public interest" as "the common welfare".

[15] In *Transnet trading as Metro Rail v Rail Commuter Action Group v Minister, Safety and Security* 2003 (12) BCLR 1363 (SCA) at page 1369, paragraph 15, the Court observed that:

"The phrase by itself is not capable of clear and comprehensive definition. The answer must lie in an

analysis of the context provided by the Act and its predecessor, the 1981 Act."

The Court here was referring to the South African Transport Services Act No 9 of 1989. The Court preferred a narrow approach confined to the purpose of the Act.

[16] The first respondent has authority to transfer an officer from one position to another or from one area to another. In *Simelela and Others v Member of the Executive Council for Education, Province of the Eastern Cape and Another* (2001) 22 ILJ 1688 (LC) at page 1703, paragraph 56, the Court per FRANCIS AJ (as he then was) stated that:

"In addition to fair administrative action, the State employees are afforded a constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for expressly in the Labour Relations Act, an employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices. A decision to transfer an employee without prior consultation amounts to unfair labour practice."

[17] In *SAPU v SAPS and Others* (2004) 5 BLLR 567 (LC) at

page 576, paragraph 29, NDLOVU AJ stated:

"Where the transfer of a government official was, on the facts of the case, in the interests of the department concerned and where the decision to transfer was not influenced by any arbitrary attitude or actuated by bias or malice or by any ulterior or improper motive on the part of the transferring authority it did not lie with the Court to interfere."

[18] See also *Pharmaceutical Manufacturers Association of South Africa and Others: in re ex parte application of the President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) at page 271, paragraph 82, where the Court stated that interference would be possible and right if the officer acted *mala fide* or from ulterior motives.

[19] The challenge to the transfer can be dealt with on one point, although five grounds of review have been set out. I can safely conclude that the application for review is based on the fact that the decision to transfer was for an ulterior motive. The applicant has disputed that there is any breakdown in the relationship with the employees/staff, the MEC. The first respondent has alleged that the problem about the applicant's managerial style had been in existence since July 2001. It was alleged that the applicant

has been an abject failure as a manager of the Cape office of the ICD. It was alleged that Mr Kekana proposed the transfer of the applicant in July 2001 on the allegations of information which was confidentially conveyed to him. These allegations were never tested in the open court or in any disciplinary hearing.

[20] The first respondent also stated that Miss Elsie Verster had found evidence of mistrust, favouritism and poor managerial performance by the applicant. She also recommended the transfer of the applicant to another office.

[21] Advocate S Lakhi was instructed to investigate disciplinary charges against the applicant. Advocate Lakhi could not find anything on which the applicant could be charged. However, she found the applicant's managerial style and approach to the people had given rise to the situation. These are instances that had occurred before the applicant was charged.

[22] I am satisfied that the respondent had the idea of removing the applicant. The suggestion was that the applicant be transferred. This step was not taken, for reasons unknown to the Court. It may well be that there were not sufficient grounds for transferring him or it waited for the opportunity of removing him from the service by way of a dismissal. This latter option appeared to

have been favoured. The charges were then formulated and the applicant was charged. The desired result of a dismissal was not achieved.

[23] The allegations against the applicant are serious. According to the respondent, there have been problems with the applicant's management style and managerial efficiency since 2001. If this is correct, the applicant should have been charged for incapacity or poor work performance. It is true that the employer has a prerogative of whether to charge the employee for a particular misconduct. It can therefore be said that the respondent was not obliged to charge the applicant for these acts of misconduct. An explanation is required for failure to charge the applicant. More so when it is alleged that his managerial skills are lacking and this has caused divisions in his staff.

[24] The question then arises whether such a bad manager, as described in the papers, is good for the Mpumalanga Province. It cannot, in my view, be accepted that transferring a person to be a head of the second respondent is in the public interest in circumstances where it is alleged in no uncertain terms that he lacks managerial skills. That would suggest that the Mpumalanga Province is prepared to be a dumping place. I do not think the Mpumalanga Province needs a manager with no

managerial skills who will cause divisions in the existing staff.

[25] The clinical psychologist, Johan Greeff, filed an affidavit in which he has stated that the Cape Town office was a seriously dysfunctional team. He stated that this related to leadership decision-making and communication. He further stated that the applicant over-estimated his managerial abilities as a leader. He was not realistic and accurate in his assessment of himself and of events. Applicant, according to Greeff, was not totally focused and was not committed to improve himself as a manager or as a leader. Some of the information contained in Greeff's affidavit was not available at the time that the decision to transfer the applicant was made. The affidavit is filed to support the decision already made. In my view, this supports the allegation that the respondent wants to get rid of the applicant from the Cape Town office. The assessment of the applicant, as suggested by Johan Greeff, was not compared with any other manager in the office of the second respondent.

[26] The allegation has also been made that there is a breach of trust as the MEC for Safety and Security in the province does not trust the applicant. I do not accept that one instance of breach of the media policy can be so serious that there would be a breach of trust requiring the transfer. Besides this, the chairperson of the

disciplinary hearing mentioned that the policy was not clear and, for that reason, it would be unreasonable to transfer the applicant on that ground.

[27] The applicant disputed that the office was dysfunctional and stated that the problem was with one Patrick, who was not performing to the required standard. There is no other evidence to demonstrate the office was, in fact, not functioning. The decision was with the first respondent to take action against Mr Patrick. In any event, one of the suggestions made by Greeff was a complete change of the team. This was not followed by the respondent, who sought to remove only the applicant from the office.

[28] Throughout the disciplinary inquiry the applicant was working. If, in fact, there has been a breach of trust, it is strange that the applicant was always allowed to perform his functions. It is also strange that he was not transferred until the results of a disciplinary hearing were received. It is difficult to understand why the applicant was allowed to work when there was a breakdown in trust the relationship between him and certain employees.

[29] Another reason set out for the transfer was the breakdown of the

relationship between the applicant and stakeholders. There is no evidence of complaint from the members of the public. The Minister's complaint that there were 57 cases being investigated by the ICD in respect of which he had not been briefed and only got to know about them when confronted during the interview by e.tv cannot be a sufficient ground to warrant a transfer. I say that because it has not been suggested that there is any rule which requires a head of the ICD to brief the Minister on each case being reported. There is also no evidence that, by not briefing the Minister, the applicant intended to embarrass the Minister. In any event, the applicant has testified that he has a working relationship with the Minister.

[30] In the letter of 25 June 2004 the first respondent stated that the Commissioner of Police and the MEC only had a formal relationship with the applicant and that both cannot trust the applicant. There are no reasons set out as to why they do not trust him, and yet the decision to transfer is based on this allegation.

[31] I am not satisfied that the transfer of the applicant is in the interests of the public or the ICD. I say that because if the allegations against the applicant are true, he does not deserve to be the Head of the ICD at Mpumalanga. It is therefore not in the public interest to keep the applicant in service.

[32] On the contrary, I am satisfied that the transfer is being done with an ulterior motive. I say that because the respondent wanted to

remove the applicant by means of a dismissal. Now that it had failed to achieve the dismissal the move is being taken to remove him on account of the public interest. Section 14(1) of the Public Service Act was, in my view, enacted for the situation where the State has to use its resources where they are required. It was not intended to be a form of sanction, as the respondent has done.

[33] The applicant's personal circumstances were not considered as the respondent was mainly concerned with the breakdown of the trust relationship between the applicant and the stakeholders. I do not accept that the decision to transfer the applicant has nothing to do with the disciplinary hearing. If there was no ulterior motive, the first respondent would have waited until the appeal had been finalised.

[34] It was submitted that the disciplinary hearing and the transfer are two different processes. I have no problem with this submission. The Court, however, has to consider if the applicant has been subjected to an unfair labour practice as a result of the first respondent's actions. In my view, the applicant has been subjected to an unfair labour practice and therefore has the right to approach the Court for protection.

[35] The decision to transfer the applicant undermines the appeal. If the applicant succeeds in his appeal, the recommendations by the chairperson of the disciplinary hearing would have no effect. The applicant would remain as the Head of the Cape office. If he is transferred, he will have to come back. If the appeal is unsuccessful and the recommendations are accepted, the applicant would have to undergo an intensive team-building exercise with the staff, as recommended. This would not only be impossible if transferred, but unnecessary as he would now be heading a new team.

[36] The submission has been made that the position at Mpumalanga is of a lower grade. This has not been disputed. If that is correct, the applicant is being demoted as per recommendation to have him demoted. It is unfair to demote the applicant while there is a pending appeal. If a party acts as if there is no appeal, the affected party has a right to approach the Court. The chairperson of the disciplinary hearing hinted at the transfer of the applicant but did not recommend it because there was no provision for it in the disciplinary rules.

[37] The first respondent used section 14 of the Public Service Act to get the transfer which could not be achieved in the disciplinary hearing. In my view, such a transfer is effected with an ulterior motive for section 14(1) does not allow a transfer amounting to a sanction.

[38] A further reason for my finding that the transfer was effected for

an ulterior motive is that the applicant was immediately placed on special leave. There is no motivation for where the first respondent gets the power to place the applicant on special leave while considerations for transfer are being made. There is not sufficient reason to bar him from the office and take away from him the tools he uses to perform his services. In effect, the applicant was suspended.

[39] In the light of what I have said above, I am of the view that the transfer of the applicant was not made in the public interest but effected for an ulterior motive.

[40] It was submitted that the applicant is not entitled to prayer 2 because the appeal is pending. I do not agree with this submission. This prayer is intended to stop the special leave which bars him from the office. If the second prayer is not granted the applicant would remain on unfair suspension.

[41] In the result, I am of the view that the applicant is entitled to the order. I accordingly make the following order:

- (1) The decision of the first respondent to transfer the applicant to the post of the Provincial Head of the ICD, Mpumalanga Province, announced on 25 June 2004, is reviewed and set aside.

- (2) The first respondent is directed to reinstate the applicant in his position as Provincial Head, ICD, Western Cape, pending the appeal.
- (3) There is no order as to costs.
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NgcamuAJ