IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE CASE NO. JR1026/2003

In the matter between:-

L.M.B. THABANE **Applicant**

and

THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **First Respondent**

COMMISSIONER J.B. MTHEMBU (in his capacity as the Presiding Officer in Case No. PSGA 1201) **Second Respondent**

DEPARTMENT OF SAFETY, SECURITY & LIAISON (FS) **Third Respondent**

J U D G M E N T

CORAM FARBER AJ:

This is an application to review and set aside an award of the second respondent, in an arbitration held under the auspices of the first respondent, in which arbitration the second respondent held that he lacked jurisdiction to determine the merits of the dispute between the applicant and the third respondent. On this score, the second respondent determined that the applicant had been dismissed for what he described as "operational requirements", and that in consequence only this Court had jurisdiction in the matter.

The factual matrix against which the propriety of this decision falls to be assessed may be detailed as follows:-

On 21 June 1999, and prior to the conclusion of the written agreement to which reference will presently be made, the applicant met with the then Member of the Executive Council for Safety and Security of the Free State (the M.E.C.) and its then Head of Department. Under consideration was the engagement of the applicant in what has been described as a "role playing position" ... "on a contract basis". It was on that occasion explained to the applicant that her engagement would endure for a period of five years, but that in the event of the M.E.C.'s services being terminated prior thereto, she would be redeployed in an "equivalent" position within the Department for the surviving duration of that term.

Following thereon, and on 8 July 1999, the applicant and the third respondent concluded a written agreement, in terms of which the third respondent engaged the services of the applicant as an "administrative secretary" for a period of five years at a commencing annual salary of R130878,00.

Despite the "fixed term" of five years, clause 9(a) of the written agreement afforded to both parties the right to terminate it "at any time during the currency thereof on giving three months' notice in writing to the other party".

Pursuant to the conclusion of this agreement, the applicant was deployed in the

office of the M.E.C. She held a level 12 post which, by July 2001, yielded to her an annual salary of approximately R200 000,00.

On 27 June 2001, and in consequence of a "cabinet reshuffle", the M.E.C. lost office and was replaced.

The applicant was advised that the position which she then held would be filled by a person who would be appointed by the M.E.C.'s successor, but that she, and others who were also to be replaced, were to be redeployed in the Department in equivalent positions for the remaining duration of their respective contracts. This was, of course, entirely consonant with the promise which had previously been made to her.

On 10 July 2001 the applicant was advised that she was to assume duty as an executive assistant to the head of the Department of Finance. This post carried a level 8 grading with a commencing annual salary of R83 379,00. The applicant's qualifications, so it seems, did not permit her appointment to a more highly graded post.

Given the fact that the applicant had previously held a grade 12 post and that her then annual salary was approximately R200 000,00, she declined to accept the position which had been offered to her.

The consequence was somewhat predictable, as on 13 July 2001 the applicant was, pursuant to clause 9(a) of the written agreement, furnished with three months notice of the Department's intention to terminate it, such to take effect on 15 October 2001.

The applicant was subsequently freed of the obligation to tender her services during the currency of the notice period.

Aggrieved by the manner in which she had been treated, the applicant referred the matter to the first respondent for conciliation. She complained of an unfair labour practice, and a substantively and procedurally unfair dismissal. On this score she, in her written application to refer the matter, stated that the reasons for her dismissal were "unknown". She, however, in an accompanying affidavit, detailed the facts and circumstances which had given rise thereto.

The dispute was not resolved and was submitted to the second respondent for arbitration.

At the outset of the proceedings, the third respondent contended that the applicant had been dismissed for operational requirements, as contemplated in Section 189 of the Labour Relations Act, No. 66 of 1995, and that consequently the dispute was not arbitrable, but fell to be determined by this Court. The applicant

contended otherwise, asserting, *inter alia*, that she had not been dismissed for operational reasons.

The second respondent, after analysing the conflicting assertions of the parties, dealt with the point in issue thus:-

"Both Section 12A(3) of the Public Service Act and Chapter 14(1)(a)(i) of the Ministerial Handbook are clear that all political appointees are appointed for the term of office of the executing authority. If the latter goes so do they.

In this case the Respondent could not keep the Applicant within the Department in the same or equivalent post as the Applicant lacked the necessary qualifications.

The Respondent instead offered the Applicant an alternative lower post as opposed to retrenchment, which the Applicant declined.

In the circumstances the Respondent was left with no option but to terminate the Applicant's services by giving her three months' notice as provided by her contract of service. The Applicant had become redundant and the termination of her services had to take effect based on operational requirements.

In Wanda and Other v Toyota SA Marketing (2003) 2 BLLR 234 (LAC) the Court rejected the argument that retrenchment was unfair because the appellants had been dismissed without proper consultation between their union and the respondent over the reasons for staff reductions. The Court further held that the employees are not permitted to rely on the absence of consultations with them if they have rejected adequate alternative positions like the Applicant in this case.

On the issue of costs I have not been persuaded by either party why costs should be granted either way.

The forum that the Applicant should approach is the Labour Court which is bestowed with the jurisdiction to adjudicate dismissals based on operational requirements."

Section 12A of the Public Service Act, 1994 (Proclamation No. 103 of 1994)

readsasfollows:-

"**12A. Appointment of persons on grounds of policy considerations.-** (1) Subject to the provisions of this section, an executing authority may appoint one or more persons under a special contract, whether in a full-time or part-time capacity -

(a)to advise the executing authority on the exercise or performance of the executing authority's powers and duties;

(b)to advise the executing authority on the development of policy that will promote the relevant department's objectives; or

(c)to perform such other tasks as may be appropriate in respect of the exercise or performance of the executing authority's powers and duties.

(2) The maximum number of persons that may be appointed by an executing authority under this section and the upper limits of the remuneration and other conditions of service of such persons shall be determined by the Cabinet in the national sphere of government.

(3) The special contract contemplated in subsection (1) shall include any term and condition agreed upon between the relevant executing authority and the person concerned, including -

(a)the contractual period, which period shall not exceed the term of office of the executing authority;

(b)the particular duties for which the person concerned is appointed; and

(c)the remuneration and other conditions of service of the person concerned."

"Executing authority" is defined in Section 1 thereof to mean....

"in relation to -

(a)the Office of the President, means the President acting on his or her own;

(b)the Office of the Deputy President, means the Deputy President;

(c)a department or organisational component within a Cabinet portfolio, means

the Minister responsible for such portfolio;

(d)the Office of the Commission, means the Chairperson of the Commission;

(e)the Office of a Premier of a province, means the Premier of that province acting on his or her own; and

(f)a provincial department within an Executive Council portfolio, means the member of such Executive Council responsible for such portfolio."

The applicant was not appointed by the then M.E.C. for any of the purposes referred to in Section 12A. The appointment was made by the third respondent, albeit that it was represented by its then M.E.C. in so doing. The services which were required to be rendered thereunder related to that of an administrative secretary who might be deployed "at such places as may from time to time be directed by the employer"[1] "or any other officer duly authorised thereto in this respect". *Ex facie* the written agreement, the applicant was not appointed to serve the then M.E.C., although that consequence might well have been envisaged at the time of the conclusion thereof. Additionally, the agreement lacks the qualities of a "special contract", as contemplated in Section 12A(1), as read with Section 12A(3). Thus, its term was fixed for a period of five years and was not limited to the term of office of the then M.E.C. He may have held office for a lesser or even a longer period.

The Ministerial Handbook was not produced during the course of the hearing before the second respondent. Nor was it produced during the course of the hearing before me. I have not the slightest notion as to what it may contain. More importantly, the Handbook, according to the applicant, was not in existence at the time of the conclusion of the written agreement. This fact has been baldly

denied by the third respondent. It has, however, omitted all reference as to when it was published. I would have thought that the deponent to the third respondent's answering affidavit who, on probability, must have had full

1 This was a clear reference to the Department.

knowledge of the matter, would have dealt with this feature in some authoritative detail had the Handbook in fact been published at the relevant time. Given this omission, his bland denial on behalf of the third respondent does not in my judgment raise a genuine dispute of fact. I consequently accept the Applicant's assertion that the Handbook had not been published at the relevant time.

There is moreover nothing to suggest that even if it had been in issue at the time, the applicant's written agreement fell to be regulated by the contents thereof. **2** The agreement and the discussions which preceded it eschew all reference thereto.

In the result, I am unable to subscribe to the second respondent's finding that Section 12A(3) and the Handbook governed the contract between the applicant and the third respondent. It follows that I am unable to subscribe to the view that the applicant's position became redundant or that her retrenchment was required for economic, technological, structural or similar needs. [*Vide:* Sections 188(1)(a)(ii), 189, 213 and Schedule 8 Item 12 of the Act.]

2 There is no incorporation thereof in the written agreement by reference. Its status is moreover simply not known.

In short, the second respondent's findings were not rational in relation to the facts which were placed before him.

Additionally, the second respondent, in arriving at his conclusion, ignored the provisions of Section 191(5)(a)(iii) of the Act.

This subsection reads as follows:-

"(5) If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved -

(a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if -

(i).....
(ii).....
(iii) the *employee* does not know the reason for *dismissal*; [3] or
(iv)....."

[3] Brassey, in his commentary on the Labour Relations Act, Volume Three, at A8 : 58A, has, *inter alia*, the following comment on the subsection:-

"**the employee does not know the reason -** This paragraph uses the language of fact, not allegation. We are, as a result, forced to ask what is truly required: must the employee actually lack the knowledge, or is it enough that he alleges that he lacks it? The latter, it is suggested, must be what the legislature intended. Having closed the door on jurisdictional squabbling in the first two cases, the legislature had no reason to reopen it for the third, which is conceptually indistinguishable."

As previously indicated, the applicant, when referring the matter, stated that she did not know the reason for her dismissal. On this ground alone, the second respondent was obliged to consider and determine the merits of the dispute.

The review must succeed.

Costs sought in my judgment to follow the event.

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In the result, an order in the following terms will issue:-

A. The decision of the second respondent is set aside.

B. The matter is remitted to the first respondent for the merits of the dispute between the applicant and the third respondent to be determined by an arbitrator appointed by it.

C. Such appointee shall be a person other than the second respondent.

D. The costs of the application are to be paid by the third respondent.

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G FARBER
ACTING JUDGE OF THE
LABOUR COURT

DATE OF HEARING:
12 NOVEMBER 2004

DATE OF JUDGMENT:
01 **FEBRUARY 2005**

MR M KHANG ADV S E MOTLOUNG

IN THE LABOUR COURT OF SOUTH AFRICA

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