IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C3444/2007

In the matter between:

JOHN LYNERS Applicant

and

THE MINISTER OF EDUCATION

PROVINCE OF THE WESTERN CAPE First Respondent

DEPARTMENT OF EDUCATION

PROVINCE OF THE WESTERN CAPE Second Respondent

J U D G M E N T

NEL, AJ

[1] This is an urgent application in which the applicant initially filed his urgent application on 13 July 2007, indicating that the matter was to be heard on Tuesday 17 July 2007, at 14h00 or so soon thereafter as the matter may be heard.

[2] By reason of the fact that a Court was not available to hear the matter on the stipulated date, which fact was made known to the parties, the respondent parties herein had indicated that the decision to fill a post would, in any event, not be taken until August this year. Under these circumstances the urgent application was then, by agreement, to be heard today, being 23 July 2007.

[3] On 12 July 2007, the respondents' attorneys of record dispatched a letter to the applicant's attorneys of record and in this letter a proposal was made that the matter be dealt with in a particular manner and with stipulated time-frames, but with the purpose of hearing an expedited or urgent review application. The letter indicated that the respondents' attorneys were instructed to request a reply from the applicant to the offer, that is the offer to regulate the matter in a particular manner, and that such response should be made by not later than 09h00 the following day, which was Friday 13 July, 2007.

[4] Suffice it for me to say that there was no formal response to this letter and at one point in time, Mr Osborne, who appeared before me on behalf of the applicant, did informally indicate to Mr de Waal, who is one of the

counsel who appeared before me on behalf of the respondents, that the proposal appeared acceptable.

[5] The further events relevant to this particular part is simply that on 17 July 2007, the respondents' attorneys of record then advised the applicant that, as it had heard nothing in relation to the proposals made, the urgent application would proceed.

[6] The respondents accordingly filed extensive answering papers on Friday, 20 July 2007. On that day the respondents' attorneys also dispatched a letter to the applicant's attorneys in which it referred to the application set down for today. It confirmed that the respondents' answering papers had been served on the applicant. It sought that it be advised as a matter of urgency whether the applicant intended to serve replying papers. It further asked in this letter that if the applicant intended to do so, the respondents would need sufficient time to go through these papers before the hearing today. A suggestion was made that the replying papers should be filed not later than 12h00 on Saturday, 21 July 2007.

[7] It again repeated the call for a reply as to whether replying papers were to be served and the letter concludes by indicating that a security officer would be on duty at the offices of the respondents' lawyers and further leaving the cellphone numbers of two of the attorneys dealing with the matter at the respondents' attorneys of record.

[8] When the matter was called today, it appeared that the applicant wanted to have the matter postponed in order that he could properly and fully reply to the answering affidavit filed on behalf of the respondents. This application was opposed and in the event the end result was that I indicated that I would want the parties to address me on what I will refer to as the technical arguments raised by the respondents so that, in the event of me concluding that the matter should not proceed by reason of the respondents persuading me that there is merit in the technical points, then of course the postponement would not be necessary. In the event of me not being persuaded that there is merit in the technical points, at that point in time most likely and obviously the matter would have been postponed so that the substance could be properly aired.

[9] Equally briefly, what this matter involves is that the applicant, who was employed in the Department of Education of the Western Cape Province in a very senior position, has come to the Court on the basis that, following a restructuring exercise, and with the number of posts at the level of the applicant having been increased from the three existing to four positions, he contends that he ought to have been placed in one of those positions.

[10] Relevant, in the sequence of events as far as this particular issue is concerned, is the fact that it is clear that consultations had taken place between the respondent parties and as far as the applicant is concerned, his union, namely the Public Service Association. (I will refer to it hereinafter as “the PSA”).

[11] It is further apparent that during March 2007, it was indicated to the applicant’s union (the PSA) that the applicant’s position was going to be affected by the restructuring and that the applicant was not going to be placed in one of the existing positions. It would appear that this decision was made known to certainly the PSA somewhere about 6 March 2007.

[12] On 16 March 2007, the applicant was informed by the member of the Executive Council responsible for this particular portfolio that he could not be matched and he was invited to make representations. The applicant thereupon did submit substantive representations to the MEC and although the letter itself does not expressly indicate that it is a reply to such representations, the MEC then replied to the applicant on 27 March 2007, in which he confirmed yet again the respondents' decision, namely that the applicant's position was affected and that he was not going to be placed.

[13] A number of important dates herein are alleged to have been known to certainly the applicant's union. The one is that it is contended that the PSA, who had been consulted in this matter by the respondents, was aware of the fact that affected positions would be advertised on 5 April 2007. It is further contended that the PSA had been consulted about the fact that the applicant's post was affected and that such consultations had taken place on 20 March 2007. As I indicated, the Minister's decision, which clearly was to the effect that the applicant was not going to be placed, was conveyed to him on 27 March 2007.

]14] On the papers before me it would appear that the applicant took no further steps regarding the matter until almost two months later, when he in a letter dated 23 May 2007, asked for the reasons for the Provincial Minister's decision. It is placed in issue whether the reply from the Minister dated 11 June 2007, did constitute the provision of such reasons, but nevertheless on that date there was a reply to the applicant's letter of 23 May 2007.

[15] On 22 June 2007, the applicant's attorneys of record wrote a letter in which they sought confirmation from the respondents that they would not proceed with the recruitment and selection process, failing which an urgent application would be launched.

[16] It would appear that a meeting between the legal representatives of the parties took place on 3 July 2007, and when the parties were not able to reach agreement on the way forward, it is contended that the respondents at that point in time indicated to the applicant that, under these circumstances, he must bring his urgent application.

[17] The contention, or the grievance, which the applicant puts forward is that an unfair labour practice has been perpetrated against him relating to his alleged demotion. It must also be mentioned that the employer has raised the point that the applicant has failed to apply for the particular position which he contends he ought to be placed in. The applicant appears to be adamant that he is not going to apply for such position and he appears to persist that properly assessed, he ought to be placed in the particular position in the restructured organisation and his position appears to be that, accordingly, he need not apply for the position.

[18] The technical points raised on behalf of the respondents are briefly the following. In the first instance it is contended that the applicant has failed to comply with the mandatory requirements of the General Law Amendment Act, and specifically section 35 thereof, which provides as follows:

> "**Interim interdicts against the State**
>
> Notwithstanding anything to the contrary contained in any law, no court shall issue any rule *nisi* operating as an interim interdict against the Government of the Union, including the South

African Railways and Harbours administration or the administration of any province or any Minister, Premier or other officer of the said Government or Administration in his capacity as such, unless notice of the intention to apply for such a rule accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application was served upon the said Government, Administration, Minister, Premier or officer at least 72 hours or such lesser period as the court may, in all the circumstances of the case, consider reasonable before the time mentioned in the notice for the hearing of the application".

[19] Mr Kahanovitz, appearing on behalf of the respondents, with Mr de Waal, argued that this requires a separate notice to be served and that the filing of an applicant's application for a rule *nisi* is not sufficient. It is common cause that no such separate notice has been filed in this matter.

[20] I was referred to the relevant case law, which confirms that section 35 of the General Law Amendment Act is peremptory and the argument was further raised that under these circumstances, the Court is precluded from

hearing the matter. Mr Osborne referred me to a case heard in this court and he indicated that the Court did not find but, it would appear, *obiter*, mentioned that the possibility existed that this particular section does not apply to the State in its capacity as employer.

[21] I do not share that particular view and am therefore of the view that for this reason alone the application stands to fail. If I were wrong in this conclusion, I proceed to deal with the next proposition and that is that the urgency herein has been self-created.

[22] In this regard I do not believe that there can be any question that the letter of 27 March 2007, constitutes a clear confirmation to the applicant that he is not going to be placed, that his position was affected and to the extent, therefore, that he contends that an unfair labour practice was perpetrated by reason of his demotion surrounding the factors which I have referred to, I am satisfied that 27 March 2007 is the date on which he patently became aware of this being the case.

[23] Mr Osborne in this regard referred me to the questions as to when the clock starts ticking but did so with particular reference I believe more to the application of PAJA

herein, and further also with reference to the question of a review application.

[24] It is clear that the time period within which the applicant had to take action, either by way of referring a grievance to his employer or, if he elected to rather pursue his grievance through the bargaining council, he had to do so within 90 days from the date on which the dispute arose. In the event, it would appear that he has referred a dispute to the bargaining council but now he faces another predicament, namely that the bargaining council makes it very clear that it will only have jurisdiction once the internal grievance procedures of the employer had been complied with. It is, therefore, the present situation, in my view, that no proper referral has been made to the bargaining council in question. Mr Osborne referred me to a letter which the applicant had sent to the Minister and in which he indicated that he was formally in dispute.

[25] Dealing with the issue of self-created urgency, I am not going to be detained by the question whether that letter in and by itself complies with the proper referral of a dispute to the employer of the applicant.

[26] Another relevant factor is that on the facts placed before me, it is patently clear that, in the event of the applicant not being placed in one of the four newly created positions at his level, then he will continue to be carried against his post. It is further apparent that he would continue to be carried at the same rank and with the same remuneration. In this regard Mr Osborne has referred me to, and obviously the Court is quite aware of, the fact that a person's salary remaining the same is not the end all and the be all of the matter.

[27] The fact of the matter is that this Court is of the view that the dispute it has before it, declared by the employee herein, or if I say declared, I should rather rephrase that by saying alleged by the employee herein, relates to the fact that he contends that in the restructure, he is the person suitable to be placed in a particular restructured position. When he was advised that he was not going to be placed in that position, it is equally further clear that it was required of the applicant to apply for the position. I have already indicated that the applicant appears to be very adamant that he is not going to apply. Again, I do not believe it necessary for me to determine whether, under these circumstances, he has made out a case on a

prima facie basis that there may be an unfair labour practice relating to his demotion.

[28] The fact of the matter is that an urgent application has been brought to this Court under circumstances where the applicant, in the event of him not being placed in any one of those four positions, and it would appear as if that event is now fairly certain by reason particularly of the fact that he is failing and refusing to apply for the position, he is not going to lose out as far as his remuneration is concerned, and it is made further clear that he is going to continue to be used in the most effective manner.

[29] In this regard, I wish to simply quote from the letter which I have referred to a number of times now, namely that of the Provincial Minister dated 27 March 2007. The second-last and last paragraphs of this letter read as follows:

> "Intussen word daar van u gewag om voort te gaan met die uitvoering van u huidige verantwoordlikhede en alle bestaande delegasies bly van krag totdat u andersins in kennis gestel word.

U welsyn is van kardinale belang vir die Departement en alle moontlike hulp sal aan u verskaf word, indien u dit sou verlang. In hierdie verband kan u die Hoofdirekteur : Interne Menslikekapitaalbestuur, mnr J A Hurter, in Kamer 918, 9de vloer, Grand Central Towers, Kaapstad nader. Dit staan u ook vry om met hom by telefoon nommer 021 467 2539 kontak te maak".

[30] The question that immediately jumps to mind is what makes the applicant's position different to that of any other employee faced with a restructure in respect of which the employee is then identified as occupying an affected position and with the employee disagreeing with his employer. This Court is of the view that the urgent application processes in this court are very often abused. If every employee, who is confronted either with a dismissal or, as in the present case, confronted with what he or she contends to be a demotion, is able to run to this court on an urgent basis, one wonders what the need would then be for the arbitration processes which the Labour Relations Act makes provision for.

[31] Reference has been made by Mr Kahanovitz to the fact that the legislature has deemed it fit and proper not to

reproduce what, in the previous Act, became commonly known as "*status quo* applications" or the applications brought in terms of section 43 of the former Labour Relations Act. My attention was also drawn to the fact that, in the referral to arbitration, the applicant actually indicated to the bargaining council that the matter is urgent.

[32] Mr Osborne in this regard has referred me to cases to the effect that the Court is reluctant to order the reinstatement, or the instatement of employees, under circumstances where their positions have been filled. This again raises the same question as to what makes the applicant different to the many cases of alleged unfair dismissal which come before the CCMA and bargaining councils on a daily basis. When an employee alleges that he has been unfairly dismissed, most always his vacant position would have been filled by the employer who so has dismissed the employee. Equally often, if not always, the employer will be aware of the fact that the employee has declared an unfair dismissal dispute against the employer. When the employer then fills that position, it does so full well knowing that it faces the risk of having the employee reinstated. I do not believe that in the present circumstances, where the

applicant contends that, once the position is filled, he will not be able to obtain substantive relief, that this is a sound proposition.

[33] In the event of the employee satisfying an arbitrator that he had been demoted or, in the event of the matter proceeding on the basis that he ought to have been placed because he is suitably qualified for the newly created position, I am of the view that in the event of the position having been filled, and particularly under circumstances where the employer now does it at its own peril, it will be perfectly open to the arbitrator to make an order to the effect that the applicant needs to be instated in the particular position which he contends he ought to have been placed in.

[34] But reverting to the issue of self-created urgency, I am of the view that the urgency of this matter has as a matter of fact been created by the applicant. I am in addition to that also, as is apparent from what I have said a moment ago, of the view that this is a matter where the Court has not been persuaded that the applicant stands to suffer irreparable harm in the event of him not being granted the relief he is seeking.

[35] I am also not of the view that the Court has been persuaded that this is the only remedy available to the applicant. In fact, as I have indicated, the Court is of the view that, if anything, the energies of the applicant and his lawyers ought to have been directed at attempting to persuade the bargaining council to have heard this matter in arbitration on an urgent basis.

[36] For these reasons the Court is satisfied that the application should be dismissed.

[37] I may just also lastly very briefly deal with the proposition made on behalf of the respondents that the applicant has not established a *prima facie* right in labour law. I believe there is merit in that contention and I do not at this point in time intend dealing any further with that because for the reasons I have already indicated, I am of the view that the application should fail.

[38] That leaves me to deal with the issue of costs. Mr Kahanovitz has argued before me and raised a number of facts as to why the Court should consider granting costs on a punitive scale. He further contended that the Court should also order such costs as it does to be against the applicant as well as the PSA. The reasons raised by Mr

Kahanovitz as to why the Court should consider granting a punitive costs order in summary were to the effect that a number of important documents were not attached to the applicant's papers. Mr Osborne replied to this by conceding that the applicant's founding papers may not be perfect but that some leniency ought to be granted to him in that regard. It was further proposed by Mr Kahanovitz that the fact that no mention was made of a consultation process should also operate as a reason why punitive costs should be granted.

[39] Further, it was contended that because the applicant had not made mention of the fact that the PSA had indicated that they were generally happy or satisfied with the consultation process, should be considered as a reason why punitive costs should be granted. Also the fact that no mention was made thereto by the applicant that the PSA had not objected to his position having been declared affected. Further reference was made by Mr Kahanovitz to the fact that there was no compliance with section 35 of the General Law Amendment Act and a number of other points were raised by him.

[40] Having considered all of these, I am not persuaded that in the exercise of my discretion, the costs to be awarded

herein should be on a punitive scale. As far as the request that the order of costs be granted against the PSA as well, the Court is of the view that it understands the argument put forward that the PSA has throughout been the party acting on behalf of the applicant. This the Court says with particular reference to the fact that the papers before me indicate that the referral of the dispute to the bargaining council was made by the PSA on behalf of the applicant. However, the Court is of the view that only under circumstances where a union party, or a party not cited in the papers before it, has actively supported a party in the application, should it consider granting costs against it, in this case, the PSA. It may very well be that the PSA at this point in time has intentionally elected not to assist the applicant any further herein. I am also, although this was not raised, of the view that whilst a party's ability to pay is not a factor to be taken into consideration in considering whether that party should be made to pay the costs, this is a case where, in the event of the PSA in fact assisting the applicant to the extent, as Mr Kahanovitz suggested that the Court should have ordered costs against it, it is very likely that it will assist and continue to assist the applicant in respect of payment of costs.

[41] In the event of the Court being correct that the PSA has possibly at this point in time made an intentional decision no longer to assist the applicant, then I am of the view that the respondents herein ought nevertheless not to have difficulty in getting its costs paid by the applicant. However, as I said, that is not a factor of great relevance. I simply mention that obviously if the position was herein that the respondents made out a case that it will not be able to recover its costs, and that an award of costs will be a hollow one, then the Court would perhaps have proceeded in a different manner. As Mr Kahanovitz I believe suggested, one then would deal with it on the basis of giving the party against whom one intended seeking an order for costs whilst it was not present, or party to the proceedings, the opportunity to advise and argue why it should not be done.

[42] Because of the fact that the Court has come to the decision that it is not inclined to grant costs against the PSA, the end result is simply that the application is dismissed and the applicant is ordered to pay the first and the second respondents costs of suit herein. The Court has just been reminded that I need to also in my cost order indicate whether the order will include the costs incurred by employing two counsel. The Court is of

the view that because of the nature of the matter, as well as particularly the volume of factual allegations and matter which had to be dealt with, that it was warranted for the respondents to have employed two counsel.

[43] Under these circumstances the order as far as costs that I have already indicated the Court made is amplified by indicating that the costs are to include the costs of two counsel.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT.

Date of hearing and judgment: 23 July 2007.

Appearances:

For the applicant: Adv Michael Osborne, instructed by Smith Tabata Buchanan Boyes.

For the respondents: Adv C Kahanovitz and Adv J de Waal, instructed by Edward Nathan Sonnenbergs.