



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C596/17

In the matter between:

THANDEKA MDEKAZI

Applicant

and

DEPARTMENT OF HEALTH – WESTERN CAPE

1st Respondent

DR MICHAEL PHILLIPS

2nd Respondent

DR NOMAFRENCH MBOMBO (MEC)

3rd Respondent

Date heard: 20 November 2020

Delivered: 15 March 2021

JUDGMENT

RABKIN-NAICKER J

[1] This is a return day of a contempt application. The applicant contends the respondents are in contempt of the following order by Le Grange J in a judgment handed down on 7 July 2020:

“[2] The aforesaid finding in the award is substituted with following finding and relief:

2.1 The Third Respondent must reinstate the Applicant retrospectively to 1 July 2020, with a final written warning for unprofessional conduct, on tender of her services.

2.2 The Applicant must tender her services by reporting for duty within 10 days of the judgment.”

[2] The applicant was dismissed by the first respondent (the Department) on the 11 December 2017. She had been employed as a Clinical Program Coordinator prior to her dismissal in the Khayelitsha substructure. She presented herself at the workplace in terms of the above order. Her previous position had been filled by another employee as of 1 March 2019.

[3] The respondents set out how they attempted to accommodate the applicant and comply with the Court order:

3.1 A meeting was arranged at the Office of the Chief Directorate in order to find a suitable placement for the applicant.

3.2 At the meeting on 30 July 2020 no resolution was found. Applicant rejected the proposals made and insisted she wanted to be placed in the now filled post that she occupied before her dismissal.

3.3 The parties then exchanged further correspondence during August 2020 which concerned the offer of the post of Professional Nurse and attempts to remunerate the applicant.

3.4 In a final attempt to try and accommodate the Applicant, the Respondent's created a Clinical Coordinator post, additional to the establishment, at Mitchells Plain District Hospital, which was communicated to her on 4 September 2020, with retention of salary and notch range of a Clinical Coordinator. No reply was received by them. A further attempt was made to request applicant to report for duty for duty at Mitchells Plain. Again the applicant did not do this but pursued the contempt application.

- [4] On receipt of her job description at Court, the applicant submits that it was 'completely different' from her previous job description as it is similar to that of a nurse.
- [5] It is clear from emails sent by the applicant that she regarded being placed as a professional nurse as 'a mockery'. In reply to an offer of settlement of the dispute which is referred to by both sides, she rejected the offer of an amount of 12 months' salary and made a counter-offer of payment of her salary until she retires which would amount to some 7 million Rand.
- [6] In her replying papers, the applicant pointed out that it is incorrect that there are no positions available because two more positions were advertised for a Clinical Programme Coordinator in the Khayelitsha/Eastern Substructure. The adverts are annexed to the replying papers which record starting dates of 23 September 2020 and 13 November 2020. It is not evident as to when the adverts were published.
- [7] It was submitted on behalf of the applicant that the department's conduct was mala fide in that there were positions available in Khayelitsha but it appeared that she was not welcome there.
- [8] The Order in question pronounces that the applicant was to "be reinstated retrospectively". In **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC)**, the Court stated per Nkabinde J in a unanimous judgment that:
- "[36] The ordinary meaning of the word 'reinstate' is to put the employee back into the *same job or position* he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal...."

- [9] It is common cause in this case that there is another person employed in the 'job or position' that applicant occupied prior to her dismissal. This is no doubt the situation in very many cases when employers are ordered to reinstate an employee. What has happened in the matter before me, is that the employer has restored the employment contract, created a position on the establishment with the same title as that previously enjoyed by the applicant, and restored the applicant's terms and conditions of employment. In my view, this meets the **Equity Aviation** requirements. Whether the job description or the location of the post are exactly the same as before the dismissal, is neither here nor there. The fact that there have been new posts advertised (not her previous placement) is also of no consequence.
- [10] I find that the department has met the requirements of reinstatement as understood in our law. The requisites set out in **Fakie NO v CCII Systems (Pty) Ltd**¹ for contempt have not been met. These include that an applicant must prove non-compliance and wilfulness and mala fides of a Court Order beyond reasonable doubt.
- [11] In the result, I make the following order, mindful in exercising my discretion as to costs, that applicant was represented by Legal Aid: South Africa.

Order

1. The application is dismissed.
2. No order as to costs.



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

¹ 2006 (4) SA 326 (SCA) ([2006] ZASCA 52)

Representation

For the Applicant: Legal-Aid South Africa

For the Respondents: Kurt Allen instructed by State Attorney

LABOUR COURT