



Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 321/12

In the matter between:

DEENADAYALAN MOODLEY

Applicant

and

MINISTER OF POLICE

First Respondent

ACTING NATIONAL COMMISSIONER

OF THE SOUTH AFRICAN POLICE

SERVICE

Second Respondent

PROVINCIAL COMMISSIONER:

KWAZULU-NATAL SOUTH AFRICAN

POLICE SERVICE

Third Respondent

DIVISIONAL COMMISSIONER:

CRIME INTELLIGENCE:

SOUTH AFRICAN POLICE SERVICE

Fourth Respondent

AND

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 322/12

In the matter between:

SITHEMBISO OLIPHANT NDLOVU

Applicant

and

MINISTER OF POLICE

First Respondent

ACTING NATIONAL COMMISSIONER

OF THE SOUTH AFRICAN POLICE

SERVICE

Second Respondent

PROVINCIAL COMMISSIONER:

KWAZULU-NATAL SOUTH AFRICAN

POLICE SERVICE

Third Respondent

DIVISIONAL COMMISSIONER:

CRIME INTELLIGENCE:**SOUT AFRICAN POLICE SERVICE****Fourth Respondent****Heard: 1 June 2012****Delivered: 7 June 2012**

Summary: Application for urgent interim relief: applicants not establishing urgency: Applications dismissed.

JUDGMENT

GUSH J

1]The applicants in these matters each filed an application seeking an order reviewing and setting aside the decision of the second and or third and or fourth respondent to transfer the applicants, in the case of:

(a)Moodley: case number D 321/12 from his post of provincial head: crime intelligence Kwazulu-Natal to that of cluster commander: Pinetown; and

(b)Ndlovu, Case no D 322/12 from his post of section head: crime intelligence, Kwazulu-Natal to that of station commander Inanda.

2]The review applications are couched in the form of applications for a rule *nisi* in which both applicants seek an order directing the respondents to show cause on a date to be determined, why the court should not order that “the second and/or third and/or fourth respondent’s decision to transfer the applicant[s] ... be and is hereby reviewed and set aside (whether allegedly pending the final determination of such transfer, or on a permanent basis)” (sic).

3]The notice of motion in addition calls upon the respondents to “dispatch within 10

days of receipt of the notice of motion, to the registrar, the complete record of the proceedings/decision sought to be reviewed and corrected or set aside, together with such reasons as are required by law desirable to provide, to notify the applicant that this has being done". Further, that if they "intend opposing the final relief as set out above that they are to file a notice of opposition and answering affidavit within 10 days of delivery of the applicants supplementary affidavit; alternatively, notice that the applicant stands by his notice of motion, failing which, the matter will be heard in the respondent's absence on the date appointed by the registrar"

4]In addition to the rule *nisi*, the applicants sought as a matter of urgency an interim order/interdict, pending the outcome of the application, restraining the respondents from permanently appointing any other member/individual to their erstwhile posts, directing the respondents to reinstate the applicants to those posts, interdicting and restraining the respondents from stopping the applicants' salaries and directing the respondents to accept the tender of the applicants' services in their erstwhile posts.

5]The interim relief sought by the applicants essentially foreshadows the final relief they seek in their applications to review the respondent's decision to transfer them. The difference being that the application for interim relief is brought as an urgent application.

6]The applicants' urgent applications were brought as before the Honourable Judge Lallie on 18 April 2012 who granted the following order by consent in each matter:

'1 the application is adjourned 1 June 2012 the purposes of arguing interim relief sought in paragraph 3 of the notice of motion;

2 the respondents will file the answering affidavit dealing with the question of interim relief by the 26 April 2012;

3 the applicant will file his replying affidavit, if any, by 11 May
2012;

4 costs reserved;

5 the parties record the following undertakings as part of this order
pending the outcome of the hearing with regard to interim relief:

5.1 the applicant tenders his services to the post of provincial head (KZN):
crime intelligence/section head (KZN): crime intelligence; [respectively]

5.2 the applicant[s] will not be required to report for duty or turned any
services in the post of cluster commander: Pinetown/station commander:
Inanda;

5.3 the respondents will not make any permanent appointment in the
applicants' post[s]: provincial head (KZN): crime intelligence/ section head
(KZN): crime intelligence;

5.4 the respondents will not cease the payment of the applicants'
salar[ies].'

7]It is pertinent to emphasise that the interim relief the applicants seek is relief
pending the final review of the respondents' decision to transfer the
applicants. The applicants, in seeking to review of the respondents' decision
to transfer them sought this relief in the form of a rule *nisi* and only the interim
relief as a matter of urgency. The application to review the respondents'
decision complies with rule 7A of the rules of this Court with regard to the
filing of opposing papers and the time limits within which to file them.

8]Accordingly, the matter before me is confined to the issue of the urgent interim
relief which the applicants seek pending the review of the respondents'
decision to transfer them 'alternatively the referral of an unfair labour practice
(in particular an unfair demotion dispute to the Safety and Security Sectoral
Bargaining Council for resolution ...'

9]In the affidavits opposing the applicants' applications for urgent interim, the respondents pertinently raise the issue of urgency and in particular aver that the applicants have not complied with Rule 8 of this Court's rules in that the applicants have not in their founding affidavits established that the application for interim relief is urgent.

10]Rule 8 provides that:

'(2) The affidavit in support of the application must also contain-

(a)the reasons for urgency and why urgent relief is necessary;

(b)the reasons why the requirements of the rules were not complied with, if that is the case; ...'

11]It is trite that an applicant must adequately set out his founding affidavit the reasons for urgency. It is not sufficient for applicants simply to refer in passing to the application being urgent but must explain in some detail and why urgent relief is necessary. Applicants are required give cogent reasons. Failure to do so inevitably will result in the application being struck off the roll for want of urgency. It is accordingly necessary to consider the grounds upon which the applicants rely in averring that their applications are urgent. The applicants offer differing reasons why their applications are urgent. I will accordingly deal with them separately.

12]In his replying affidavit, the applicant, Moodley, avers that the respondents in the answering affidavit have "conveniently" omitted the relevant portions of his founding affidavit dealing with urgency.

13]Bearing this in mind it is relevant to consider exactly what averments the applicant, Moodley, relies on and the reasons given in his founding affidavit in support of the application for interim relief being dealt with as a matter of urgency. The sum total of the averments appear in the following paragraphs:

(a)'in paragraph 52 the applicant records "the respondents have threatened

to stop my salary due to the fact that I have allegedly not reported to my transfer place"

(b)In paragraph 54 the applicant records "I require interim relief pending the outcome of this application. There is no suitable alternative remedy to address interim relief pending the outcome of this application. The reason is relevant to the proper and continued operation of crime intelligence in KwaZulu-Natal including the continued, coordinated investigation of crime presently being investigated, as well as my personal reasons including the reputational damage done by the unlawful transfer, it is absolutely necessary that I continue my post on an interim basis."

(c)And in paragraph 57 "I've taken all reasonable steps to bring this application to the above Honourable Court as soon as possible and respectfully submit that the matter is urgent.'

14]In Ndlovu's application, he deals with urgency in the following paragraphs of his founding affidavit thus:

(a)'Paragraph 39: "[My transfer] is arbitrary and capricious... unlawful ... punitive ... and was affected without any consultation or regard to my needs, career development or interests of the state. It should be addressed immediately in the interim";

(b)Paragraph 40: "it is absolutely imperative that I be accorded interim relief pending the outcome of this application and in particular prohibiting the respondents from permanently appointing someone to my post as should they do that would render the final principle relief i seek on review academic."; and

(c)Paragraph 41: "I require interim relief given that my rights have been clearly violated. I have good prospects of succeeding in the review and there's no suitable alternative remedy in the circumstances to preserve or restore the status quo other than an order from this court pending the outcome of the review.'

15]I am not satisfied that either of the applicants has adequately or sufficiently dealt with the reasons for urgency, why urgent relief is necessary to prevent

irreparable harm, and why the rules of this Court could not have been complied with.

16]Inextricably bound up with the question of urgency are the requirements for the granting of an urgent interdict and in particular the requirement that an applicant must show 'an irreparable injury actually has been committed or is reasonably apprehended". There is no basis established in the affidavits of the applicants to justify the conclusion that they have suffered or will suffer irreparable harm if the transfer is not set aside pending the review of the decision. If their review of the decision is upheld their objection to the transfer will have been vindicated. Likewise, bearing in mind the applicants have not been suspended but transferred, neither applicant has established that he will suffer irreparable harm should he take up the post to which he has been transferred pending the outcome of the review. Both applicants are long serving career policeman, who on the face of it are more than capable of satisfying the requirements of the posts to which they have been transferred even should such transfer be short lived.

17]In the absence of having established in their founding affidavits that they will suffer irreparable harm if their transfer is not set aside pending the review of the decision or if they are required to take up the positions to which they have been transferred to, the threat of withholding their salaries falls away as the papers establish that this threat was only made in the face of a refusal by the applicants to take up the posts which they had been transferred.

18]In addition, it is also necessary to take into account in considering urgency whether the applicants have any other satisfactory remedy. In this regard in addition to the applicants pending application for the review of the decision to transfer them, the applicants are entitled to, but have not as yet, referred a dispute concerning an unfair Labour practice to the bargaining Council. Had they done so at the time the decision to transfer them had been made it is conceivable that the dispute would have been conciliated and if not arbitrated ripe for arbitration.

19]Ms Nel, who appeared for the applicants, argued that if an order interdicting and restraining the respondents from permanently appointing any other member or individual to the applicants' erstwhile posts, the applicants would be prejudiced should they succeed in their application to review the decision to transfer them. Ms Nel suggested that should any appointments be made the applicants would be required to join the newly appointed incumbents. Given that the application is to set aside the transfer, there is no requirement to join any person who may have been appointed in the interim. Any appointments made by the respondents in the face of the application to review and set aside the decision to transfer the applicants would be made at the respondents' peril.

20]In addition, Ms Nel raised the concern that an arbitrator arbitrating the unfair labour practice enjoys the discretion to determine any unfair Labour practice dispute on terms which the arbitrator seems reasonable which may include compensation for the unfair labour practice. Ms Nel was at pains to emphasise that the application to review the transfer was a separate dispute from any dispute involving an unfair labour practice. In the circumstances, the applicants' applications to review and set aside the decision to transfer them, should such applications succeed, simply seek the restoration of the status *quo ante* and the applicants would revert to the posts they previously occupied. Any unfair labour practice would be dealt separately.

21]In summary, the interim relief which the applicants seek as a matter of urgency involves four specific orders:

(a)Firstly interdicting and restraining the respondents from permanently appointing any other member/individual to their erstwhile posts;

(b)Reinstating the applicants to their erstwhile posts;

(c)Interdicting the respondents from stopping their salaries; and

(d)Directing the respondents to accept the tender of the applicants'

services in their erstwhile posts.

22]I am not, in light of the above, satisfied that the applicants have established that they are, as a matter of **urgency**, entitled to any of the orders for interim relief that they seek. The applicants' applications to review and set aside the decision by the respondents to transfer them is pending and there is no bar to the applicants expediting the application to review the decision to transfer them. It is also clear from the papers that the applicants are at least considering referring a dispute concerning an alleged unfair practice regarding the actions of the respondents in effecting the transfers.

23]As regard to costs, given the continuing employment relationship and the fact that the review application is still pending I am of the opinion that it is fair that the costs of this matter be dealt with as costs in the cause.

24] I accordingly make the following order:

The applicants' urgent applications for interim relief pending the outcome of the application to review the respondents' decision to transfer are struck off the roll for want of urgency. The costs are costs in the cause.

D H Gush

Judge

APPEARANCES

FOR THE APPLICANT: Adv C A Nel

Instructed by Carl van der Merwe Attorneys.

FOR THE FIRST SECOND and THIRD

RESPONDENTS: Adv W Mokhari SC (with him M Zulu)

Instructed by The State Attorney