



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D 877/14

In the matter between:

NANCY BONGIWE NGCEKE

Applicant

and

THE DEPARTMENT OF EDUCATION, KZN

First Respondent

THE HONOURABLE MADAM P NKONYENI
(In her capacity as MEC for the Department)

Second Respondent

Heard: 31 October 2014

Delivered: 12 December 2014

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

[1] This is an urgent application which originally came before Cele J on 10 October 2014 and was postponed to 31 October 2014 in order to allow answering and replying affidavits to be filed. The applicant now seeks a final order in the following terms:

- 1.1 Staying the recruitment process in respect of the post of a Chief Director Specialist, Post No: DOE/1009/14, pending finalisation of grievance hearing that was lodged against the recommendation to

appoint the Applicant to the same post which was then advertised as Post No: DOE/416/07.

1.2 Directing the Respondents to implement with immediate effect the recommendations of the interviewing panel held for Post No: DOE/416/07 for a position of Chief Director Specialist – Umzimkhulu Circuit retrospectively from 29 July 2010.

1.3 Directing the Respondents to pay the Applicant what she would have been paid or received if the selection committee's recommendation was effected.

Factual background

- [2] The Applicant is employed by the First Respondent as a Deputy Chief Educator Specialist at uMzimkhulu Management Centre. On 19 April 2007 the First Respondent advertised a post of Chief Education Specialist for uMzimkhulu Circuit with reference number DOE/416/07. The Applicant applied for the said post and was accordingly interviewed. She was subsequently informed that she had been recommended for appointment.
- [3] However, her appointment could not be effected because Mr Mabija, one of the candidates that had been interviewed and not recommended, had lodged a grievance challenging the interviewing processes. Mr Mabija referred a dispute to the Education Labour Relations Council ("ELRC") and joined the Applicant as a party in that matter. The ELRC ruled that the dispute was premature as the recommendation to appoint the Applicant had not been implemented.
- [4] The First Respondent did not implement the recommendation to appoint the Applicant. Conversely, an investigation into the interviewing process was conducted and it was found that the Applicant did not submit her application on time. As a result, the recommendation to appoint the Applicant was not endorsed and hence the post was re-advertised.

Urgency

- [5] Before dealing with the substantive issues, I have to satisfy myself on whether the Applicant has made out a case to be heard on urgent basis. In *re: Several Matters on the Urgent Court Roll*,¹ Wepener J, referred with approval to *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at paras 6-7 where Notshe AJ held that:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'

- [6] The Respondents' counsel submitted that the Applicant never challenged the First respondent's decision not to ratify the recommendation for her appointment. In fact, the ELRC ruling on Mr Mabija's dispute was issued in July 2010 and for four years the applicant did nothing to challenge the First Respondent's action. The Applicant's counsel submitted, in response, that she had accepted the explanation that the First Respondent could not appoint her due to lack of funding for the post. In any event, this contention is contested by the Respondents, and on the principle in *Plascon-Evans* the Respondents' version must be accepted.

¹ [2012] 4 All SA 570 (GSJ) at para 7. .

[7] It is also patent *ex facie* the Vacancy Circular re-advertising the post under reference number DOE/1009/14 that the advert was issued on 30 May 2014 with a closing date of 5 September 2014. The Applicant filed this application on 29 September 2014, four months after the advertisement of the post. There is no explanation proffered for her lack of celerity in bringing this application. The Applicant's assertion that the matter is urgent solely on the basis of the closing date for the submission of applications to fill the post is irrational and is, therefore, rejected.

[8] In any event, the Applicant has a substantial redress at her disposal in the internal grievance processes and dispute resolution machinery of the LRA.

Conclusion

[9] I am not convinced that this matter is urgent and this application accordingly stands to fail on this ground alone.

Costs

[10] The applicant is an individual litigant seeking to vindicate their rights in good faith and the doors of this court should always be open to such a person. For this reason, I am not inclined to make an order as to costs.

Order

[11] In the circumstances, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. There is no order as to costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate MG Sibisi

Instructed by Mjoli and Associates Attorneys

FOR THE RESPONDENTS:

Advocate A Vahed

Instructed by State Attorney

LABOUR COURT