
SOUTH AFRICA / JUDGMENT

Kgwadi v Cwele NO and Another (56481/11) [2016] ZAGPPHC 1128 (10 November 2016)

[2016] ZAGPPHC 1128

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

56481/11

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 56481/11

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between: BANYANA
 GLADYS
 KGWADI
 Applicant
 and
 HONOURABLE
 MINISTER SIYABONGA)
 1st Respondent
 CWELE
 (NO
 DEPARTMENT
 OF STATE SECURITY
 2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1]In her notice of motion the applicant seeks the following relief:

1.1that the applicant's transfer to the South African National Academy of Intelligence, Mmabatho be approved with retrospective effect

(transfer issue);

1.2 that the second respondent be prevented from making deductions from the applicant's salary to recover an erroneous deposit made into

her bank account (deduction issue);

1.3 that the applicant's performance assessment be set aside (performance assessment issue);

1.4 that the respondents pay the costs of this application.

Factual

background

[2]The applicant is employed as a physical security officer within the Chief Directorate, Internal Security of the Department of State Security Agency ("SASSA"). SASSA was established through the amalgamation of three departments, the National Intelligence Agency ("NIA"), the South African Secret Service ("SASA") and the South African National Academy of Intelligence ("SANAI"). During 2008 the applicant was employed by NIA. Sometime in 2008 SANAI advertised a position for Security Shift Leader, Grade 4 level. The requirements an applicant for the position was expected to have as per the advertisement was, 'Matric/Grade 12 qualification or equivalent recognised qualification with suitable experience in the security environment'.

[3] The applicant applied for the position and was recommended. The employer made her an offer of the position, setting out the terms and conditions of her employment in the new position which was at a higher level than the one she occupied and was also supervisory. The second paragraph of the letter extending the offer to the new position, dated 17 July 2008, reads as follows:

"It is imperative that we ascertain whether you intend to accept this offer before we conduct other processes on yourself. These are the last phases of the recruitment process".

[4] The applicant duly accepted the offer of employment. However, when it became apparent that her transfer to SANAI was not eventuating, the applicant made enquiries through the SANAI Human Resources Division. When he could find no joy she approached the Office of the Inspector-General.

[5] Although the approval of the appointment of the applicant to be appointed to the new position served before the relevant Cabinet Minister, Mr Kasrils, at the time he did not make any decision confirming the applicant's appointment to the position of Shift Security Leader as he had certain reservations about the transfer. After Mr Kasrils left office, the second respondent as the incumbent Minister did not approve the applicant's transfer. Furthermore, the then acting Director -General, Mr Dlomo also did not approve the applicant's transfer on the basis that she did not meet the basic requirements for the position.

The transfer issue

[6] The issue to be determined is whether the non-transfer of the applicant was unlawful and irrational.

[7] It is the applicant's contention that failure to approve her transfer to the higher position was an unfair labour practice and was administrative action which was unlawful as the respondents have no basis not to approve her transfer. Further, the applicant alleges that the issue of her lack of the required academic qualification was an after-thought and therefore mala fide. The applicant further contends that the requirement that her transfer had to be approved by the Minister was a new condition, unknown to the applicant. Furthermore it is the applicant's contention that the main requirements for the position applied for was experience and loyalty.

[8] On behalf of the respondents it was submitted that the applicant's transfer was not approved as she lacked the required academic

qualification, namely, matric or grade 12. It was submitted further that the offer to the applicant was erroneously made as the Human Resources Division was under the impression that the applicant had a senior certificate as she had indicated in her curriculum vitae. It is common cause that the applicant does not have a matric qualification.

[9] Further it was submitted on behalf of the respondents that in terms of section 19 of the Intelligence Services Act of 2002 read with regulation 11 of the Intelligence Services Regulations of 2003, interdepartmental transfers could only take place with the approval of either the relevant Minister, the Director-General or the CEO. It is the respondents' contention that since the applicant does not meet the minimum requirements for the position she contests, the acting Director-General acted lawfully and rationally in not approving her transfer.

[10] The applicant relies on the second respondent's directive, 'Human resource Directive (HRD.12): Promotions, for her contention that the main criteria for promotion was experience and loyalty. I am of the view that the applicant's reliance on this directive is misplaced. Article 5.1.1 of the Directive provides that "All members shall, subject to the promotion criteria provided for in this directive and that have a satisfactory record of conduct, good work ethic, loyalty and service, be eligible for promotion." Further article 5.1.4 reads as follows: "Preferential consideration for promotion shall, in cases of appointment in a vacancy, be given to members of the Agency who comply with the job requirements". Nothing in the reading of articles 5.1.1 and 5.1.4 suggests that 'experience and loyalty' are the overriding criteria for promotion. For one to be eligible for promotion one has to comply with the requirements of the job and in this case, have matric or a senior certificate.

[11] I am of the view that the applicant has not shown cause why an order for her to be transferred should be granted. It is clear that the applicant did not meet the minimum requirements for the position she had applied for in that she does not have a senior certificate qualification, a fact which the applicant does not dispute. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others*[1] stated that:

"[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

[90] The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene

and set aside the irrational decision."

[12] I am satisfied that the decision not to transfer the applicant was rationally taken for the purpose for which it was intended. Furthermore, the decision not to transfer her was correctly taken by the functionary vested with the power to exercise such power.

Deductions

[13] It is common cause that on February 2009 erroneously deposited an amount of R71 022.00 into the bank account of the applicant. That

the applicant on discovering the deposit was aware that she was not entitled to such payment. It appears from the papers before this court that on discovering the error, the Division started making deductions from the applicant's salary in order to recoup the money erroneously deposited into the applicant's account. When this was done the applicant complained in that the deductions were made without her consent. On confirmation by its legal department that they were not entitled in law to make deductions from the applicant's salary without her consenting to it, the second respondent ceased making deductions. An attempt was made to negotiate the repayment of the money by requesting the applicant to sign a consent form. According to the applicant she refused to sign the consent form because a different date of the deposit was reflected on the consent form she was required to sign. The second respondent has issued summons to recover the money.

[14] There is no dispute that the applicant knew that she was not entitled to the additional funds she found in her account. However,

with this knowledge, she dishonestly dissipated the funds and is balking at repaying the unjustified payment made to her. I am puzzled by the relief the applicant is seeking, particularly as she is aware that the second respondent is no longer making any deductions from her salary. Even if the Department still made deductions, I am of the view that it cannot be expected of this court to countenance and encourage the applicant's dishonest conduct by ordering the Department to cease making such deductions. Accordingly I am of the view that the relief sought in respect of the deductions, ought to be dismissed.

Setting aside of the performance assessment

[15] During the 2010 financial year the second respondent embarked on a performance assessment of its employees. From the papers filed

of record it would appear that in terms of the process followed, an employee first does a self-assessment and scoring which will then be discussed with the immediate supervisor and then referred to a moderation committee. It would appear that in this instance the moderation committee had lowered the scores the applicant had allocated herself. The applicant did not deal with this prayer in her founding affidavit but decided to file a supplementary affidavit. It is the applicant's contention that her performance assessment was unfair. According to the second respondent after the applicant's performance was moderated and the decision communicated to her, she appealed her performance rating but did not pursue the appeal to its finality as she launched these proceedings.

[16] Section 7(2) of the Promotion of Administrative Justice Act[2] provides that a court cannot entertain a review of an administrative action unless the applicant has exhausted all available internal

remedies. I am satisfied that the relief sought by the applicant under this prayer is premature. It is incumbent on the applicant to exhaust the internal remedies provided in order to deal with her assessment complaint before she can come to court on the issue. I am therefore of the view that this prayer also ought to be dismissed.

[17] The only issue remaining for determination is the costs. The general rule is that a successful litigant is entitled to his or her

costs. There is no reason why the respondents should not be awarded the costs of this application.

[18] In the result the following order is made:

'The application is dismissed with costs.'

MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For Applicant: Adv T Moretlwe

Instructed by: Kgokong Nameng Tumagole

For Respondent: Adv Pio

Instructed by: State Attorney

[1] 2000 (2) SA 674 (CC).

[2] Act 3 of 2000.

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