

SOUTH AFRICA / JUDGMENT

Mncwango and Another v Area Commissioner (Pietermaritzburg) Correctional Services and Another (D 165/23) [2024] ZALCD 5 (19 January 2024) [2024] ZALCD 5

COURT

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D 165/23

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

AT DURBAN)

Case No: D 165/23

Not Reportable

In

the matter between:

A

S MNCWANGO

First Applicant

S

M ZUMA

Second Applicant

And

AREA

COMMISSIONER (PIETERMARITZBURG),

CORRECTIONAL

SERVICES

First Respondent

REGIONAL

COMMISSIONER,

CORRECTIONAL

SERVICES

Second Respondent

Heard: 16 August 2023
This
judgment was delivered electronically to the parties by email. The
date and time for hand-down is deemed to be 19 January 2024.

JUDGMENT

WHITCHER J

- [1] This is an application in terms of section 158(1)(h) of the Labour Relations Act, 1995.
- [2] The applicants are in the employ of the Department of Correctional Services, Pietermaritzburg as reintegration officers.
- [3] On 12 October 2022, the first respondent made a decision to transfer the applicants from their posts at Community Corrections, Pietermaritzburg to respectively Medium B Correction Centre and Medium A Correctional Centre, Pietermaritzburg.
- [4] The applicants seek to have the decision of the first respondent reviewed and set aside.
- [5] It is common cause that on 30 September 2022, the first respondent handed to each applicant a letter. The letter to the first applicant reads as follows:

“Horizontal Placement...

The reasons for your horizontal placement emanate from the issues currently occurring at PMB Community Corrections. The reasons are as follows:

Labour representatives (PSA and POPCRU) during May 2022 reported to the AC: Executive that the situation at PMB Community Corrections is no longer conducive, the officials at Community Corrections are not happy with your behaviour.

The engagement with Labour led to the follow-ups by the Executive which established that;

Managers at Community Corrections are no longer feeling safe at the workplace

Community Corrections Management reported that there is a high disturbance, as you play loud music during working hours;

The Managers are facing difficulties to allocate you with other officials because you became unruly;

PMB Community Corrections Management have declared that they feel that they have to manage you, because they have executed all the avenues available to them, hence they have requested AC Executive to assist them in the matter.

All of the above operational reasons were reported after you and the other official had a meeting with the former acting Regional Commissioner (Mr TK Mthombeni) and you agreed that you will be ambassadors of peace and make Community Corrections a conducive place to work.

Taking into account that Community Corrections is a Centre based institution, the management is of the opinion of placing you at Medium B Correctional Centre.

You are kindly requested to respond to this letter within 48 hours in terms of this horizontal placement. Therefore your response is expected to reach this office on Wednesday, the 5th October 2022 at 07h00.

Should you fail to respond on the stipulated time you will be regarded as you have waived your right to be heard and Management will not hesitate to take a decision regarding this consultation.”

- [6] The reference in the letter to “you and the other official” is a reference to the first and second applicant.
- [7] The second applicant was handed a replica of the above letter, save that his letter indicated a ‘horizontal placement’ at Medium A Correctional Centre.
- [8] The applicants did not send a response as invited to in the letter.
- [9] Instead, on 6 October 2022, they lodged a formal grievance via the internal grievance procedure claiming victimisation by the first respondent.
- [10] On 12 October 2022, the first respondent sent a further letter to each applicant. The letter stated:

“You have failed to respond within the stipulated time frame. Therefore, you have waived your right to be heard and Management took a decision to horizontal place you at [PMB Medium B in the case of first applicant and PMB Medium A in the case of the second applicant],

effective from 13 October 2022.”

- [11] On 14 October 2022, the Acting Area Coordinator: Corporate Services, PMB advised the applicants as follows:

“Your grievance received has been received by the Employee Relations office...Upon perusal your grievance was found to be unsubstantiated... because your nature of grievance is separate to the horizontal placement...”

- [12] The applicants did not report as instructed to their new stations. Instead, they referred a dispute to the PCSBC on 26 October 2022. The outcome required was that the respondents be compelled to attend to their grievance.

- [13] Following a threat of disciplinary action for insubordination and the withholding of their salaries, the applicants agreed on 22 February 2023 to report to their new stations, but reserved their right to challenge their transfer.
- [14] On 22 February 2023, the applicants' attorneys instructed the respondents that if the applicants' grievance was not addressed by 3 March 2023, the applicants intended to file an application to have the decision to transfer them reviewed and set aside.
- [15] The review application was filed on 22 May 2023, which is seven months after the decision the applicants want this court to review and set aside and two and half months after the deadline of the 3 March 2023 had passed. I shall return to this matter.
- [16] As grounds of review, the applicants contend that the first respondent's decision to transfer them was effected arbitrarily, and/or indiscriminately and/or on the basis of ulterior motives, without any meaningful consultation and in contravention of the policy that a transfer must not be used as a punitive measure.
- [17] I have set out the clauses of the transfer policy that appear to relate to the above complaints.
- [18] In terms of clause 1.2, the relevant authority is given "the power to transfer an official in the interests of the Department, efficient utilisation of Human Resources and at an employee's own request."
- [19] The transfer must be well-considered in the public interest and ought to be the result of careful human resources and/or career planning (clause 5.1).
- [20] Transfers may not be used as a punitive measure (clause 5.2).
- [21] The transfer must take place in consultation with the officer as well as his supervisor (clause 5.4).
- [22] There must be a valid and sufficient reason to transfer (clause 6(a)).
- [23] The employee whose transfer is being considered must be informed that the transfer is being considered, and given the reasons for the proposed transfer. He must be allowed seven working days to make representations concerning the transfer (clause 7.2.3).
- [24] If the employee fails to make any representations, the necessary notice may be issued and the transfer carried out (clause 7.2.4).
- [25] If the employee makes representations, the final decision must be communicated in writing to the employee within seven days after his representation, with detailed explanations of reasons (clause 7.2.6).
- [26] The respondents deny the applicants were not consulted and not given an opportunity to be heard prior to the decision to transfer them. They further deny the decision arose "on a whim."

- [27] The respondents say the decision followed various meetings to resolve the impasse in the relationship between the applicants and management at Community Corrections. This included the convening of a Labour Forum Meeting on 18 May 2022. According to the minutes of the meeting, the applicants own union representatives “requested the intervention of management as the situation at Comcor is not conducive to work.”
- [28] The respondents further contend that while the letter of 30 September 2022 afforded a period of two working days (30 September to 07h00 on 5 October 2022) to make representations before a final decision was made, the applicants were in fact afforded a period of 12 calendar days. The applicants, however, rebuffed the invitation and embarked on “merry-go-round” and delaying tactics by lodging grievances and referring disputes to the Bargaining Council over which it has no jurisdiction.
- [29] The respondents contend that in arriving at his decision the first respondent considered “departmental interests”.
- [30] In my view, the application falls to be dismissed. First, because the application was not made within a reasonable time, and, secondly, because the applicants failed to establish that the decision was arbitrary and/or indiscriminately and/or on the basis of ulterior motives, without any meaningful consultation and in contravention of the policy that a transfer must not be used as a punitive measure.
- [31] This is a legality review, under section 158(1)(h) of the LRA. While such reviews do not have to be brought within a fixed period, the period must be reasonable.[1] The rule against delays in instituting a legality reviews under section 158(1)(h) exists for good reason: to curb the potential prejudice not just for those who rely on the decision but also for the efficient functioning of the decision-making body itself[2] and because in labour disputes, expedition is the watchword.[3]
- [32] In this case, the delay was unreasonable given when the decision was made by the first respondent, the nature of the dispute, the fact that the applicants had occupied the posts to which they were transferred for almost three months before they filed the review application and the deadline of 3 March 2023 stipulated by the applicants.
- [33] The applicants made no attempt to explain the delay. Even if I take the applicants’ explanation of the history of the application as an indirect explanation for the delay, it does not explain why they waited another two and half months after they informed the department that they intend to bring this application if the department does not adhere to its demand by 3 March 2023.

- [34] The merits of the review do not assist the applicants. The problem here is that the court is confronted with essentially legal conclusions, with no explicit explanation as to how the applicants arrived at these conclusions. There is no explicit explanation with direct reference to facts as to why the decision was effected arbitrarily, and/or indiscriminately and/or on the basis of ulterior motives, without any meaningful consultation and in contravention of the policy that a transfer must not be used as a punitive measure.
- [35] In terms of clause 7.2.3 of the policy, the employee whose transfer is being considered must be informed that the transfer is being considered, and given the reasons for the proposed transfer. There can be no argument that this clause was strictly complied with, as is evidenced by the letter of the 30 September.
- [36] In terms of the same clause, the employee must be allowed seven working days to make representations concerning the transfer (7.2.3)
- [37] The purpose of the clause is to provide the employee with an opportunity to make representations before a final decision is made. The first respondent did invite the applicants to make representations. The fact that he gave them four calendar days (two working days) to make the representations instead of seven working days does not justify the setting aside of his decision in the circumstances surrounding this matter. This is because the applicants simply failed to respond to the decision-maker; the person to whom the representations had to be made. If the applicants had complained that the time afforded is insufficient and not in accordance with the policy and in turn the first respondent had ignored or explicitly rejected their complaint that would have been another matter.
- [38] The point is that on the evidence there was no real obstacle to attaining the purpose of the clause except for the deliberate decision to ignore the invitation.
- [39] As to the applicants' point that a transfer must not be used as a punitive measure, it was not explained how the move from one office to another in the same (small) town amounted to punishment, and not, in the circumstances of this case, the "efficient use of human resources." The applicants own union representatives at the Labour Forum stated that "the situation" between them and management "at Comcor is not conducive to work."
- [40] Finally, insofar as costs are concerned, the purposes and requirements of the law and fairness are best met by each party bearing its own costs.

[41] In the result, I make the following order:

The application is dismissed, with no order as to costs.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Austen Smith Attorneys

For the Respondents: State Attorney, KwaZulu-Natal

[1] See: SCA judgment in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*.

[2] *Cameron J in Merafong City Local Municipality v AngloGold Ashanti Limited*

[2016] ZACC 35.

[3] *Sutherland JA in Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*

[2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCD/2024/5.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mncwango-and-another-v-area-unknown-topic-alcd-2024>

Prepared on 8 October 2026 · Esheria