

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/292/18

In the matter between

MATLISAKOANO MOHALE

APPLICANT

AND

THE TOWN CLERK- MASERU CITY COUNCIL

1ST RESPONDENT

MASERU CITY COUNCIL

2ND RESPONDENT

LOCAL GOVERNMENT SERVICE COMMISSION

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

Neutral Citation: Matlisakoano Mohale v The Town Clerk – Maseru City Council & 3 Others (CIV/APN/292/18) [2021] 71

JUDGEMENT

CORAM: BANYANE J

HEARD: 04/03/2020

DELIVERED: 08/06/2021

Summary

Claim for payment of arrears, incentive and acting allowance - non-involvement of the appointing authority in the alleged appointments - disputes of facts arising from the affidavits - proper approach restated - application dismissed.

ANNOTATIONS

Cases cited

1. Plascon Evan Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 432
2. Director of Hospital Services v Mistry 1979 (1) SA 626 (A)
3. Lesotho National Olympic Committee v Morolong LAC (2000-2004) 367
4. Attorney General v Teka Teka and Others LAC (2000-2004) 367
5. MNM Construction v Southern Lesotho Construction and Others LAC (2005-2006) 112
6. Khethisa v Khethisa LAC (1985-1989)225
7. Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155(T),
8. The National Director of Public Prosecutions v Zuma 2009(2) SA 277
9. Wightman T/A JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371(SCA)
10. Pillay v Krishna and Another 1946 AD 946
11. National Employers' General Insurance v Jagers 1984 (4) SA 432

Legislation

1. Local Government Service Act No.5 of 2008
2. Local Government Service Regulations 2011

BANYANE J

Introduction

[1] The Applicant is an employee of the second Respondent. She was initially employed as a Gardener. In 2011, she was laterally transferred to the position of revenue labourer tenable in the finance department. She was in turn transferred from the revenue section to the procurement department to occupy the position of Purchasing clerk in August 2012 which appears to be common cause that it is her current position.

[2] She is suing the respondents for confirmation in the position of the purchasing clerk, payment of arrears, incentive allowance and acting allowance for various periods. The reliefs sought are captured fully in the notice of motion. They are as follows;

1. The Respondents be ordered to issue the Applicants with a letter of confirmation of appointment to the position of purchasing Clerk effective from August 2012.
2. The Respondents be ordered to calculate and pay Applicant's salary arrears from the position of Purchasing Clerk from August 2012.
3. The Respondents be ordered to pay Applicant incentive allowance for the period August 2012 to January 2015.
4. The Respondents be ordered to pay the Applicant the acting allowance for the position of purchasing officer for the period from November 2017 to June 2018.
5. The Respondents be ordered to pay costs hereof.
6. Applicant be granted any further and/or alternative relief.

The pleadings

[3] It is the Applicant's case that in terms of job grading, her movement from Revenue labourer to purchasing clerk was a promotion. She attached to her founding affidavit a document labelled MM3(to be

interrogated later), on which she relies for an allegation that the positions of revenue labourer and that of purchasing clerk are differently graded. It is on the basis of this document that she seeks an order directing the respondents to issue her a formal letter of confirmation to the said position and concomitant salary arrears to be calculated from the period of her transfer to the procurement section.

- [4]** She also claims an incentive allowance from August 2012 to January 2015. She avers that there were two positions in the procurement department which were senior to hers, namely; purchasing assistant and purchasing officer; that at the time of her appointment to the position of purchasing clerk, the position of purchasing assistant was vacant. She therefore acted in the position of purchasing assistant and was not accordingly remunerated despite performing duties of that office. She avers that following complaints by herself and colleagues, the 2nd Respondent made a resolution that they be paid an incentive allowance. The resolution referred to is MM3.
- [5]** She further avers that she also acted in the position of purchasing officer from November 2017 to June 2018, when she reverted to her position of purchasing clerk. She avers that she acted in this position because she was the only officer who remained in the procurement office in the absence of the substantive holders of the positions of both purchasing officer and purchasing assistant. She complains that despite recommendations by the 1st Respondent that she be paid an acting allowance, none was paid.
- [6]** She attached to her replying affidavit, a document penned by the city treasurer addressed to the Town clerk. It is labelled MM4. In terms of this document, the author calculated what she/ he termed acting/incentive allowance, which in his/her view the applicant was

entitled for the reason that she singly performed all duties in the procurement department following resignation of the purchasing officer in October 2017.

- [7]** The Respondents conversely aver that the movement to the position of purchasing clerk was a lateral transfer as the former and the latter positions are similarly graded. They aver that added responsibilities only accrued in February 2015 and that the applicant has since been remunerated for such as they attracted incentive allowance. They aver that MM3 was a request made in 2014 in anticipation of added responsibilities and when approval was not forth-coming, responsibilities were not given to the officers including the applicant. They contend on this basis that entitlement to incentive allowance from any prior period was non-existent. They further aver that the Applicant has never acted in the position of purchasing officer as it was occupied by one Kopano Monku from November 2017 to June 2018 i.e during the period claimed by the applicant. They further aver that it is a misconception that the Applicant could act in all positions at the same time without appointment by the repository of power.

Issues

- [8]** Upon a close and careful reading of the pleadings, there is a glaring dispute of facts on the following pertinent matters; the grading of the positions of purchasing clerk and revenue labourer, b) whether the applicant in assuming the position of purchasing clerk was laterally transferred or promoted; c) when was the applicant given added responsibilities attracting incentive allowance, d) whether the applicant was appointed to act in the positions of purchasing assistant and purchasing officer.

[9] It seems to me that the main issues that must be determined are as follows;

- a)** Whether the position of revenue labourer and purchasing clerk were similarly graded;
- b)** Depending on the answer to above, the next question is whether the applicant was laterally transferred from the position of revenue labourer to that of purchasing clerk or whether the assumption of the position of purchasing clerk was a promotion.
- c)** Whether the applicant was acting in the position of purchasing assistant and purchasing officer respectively. Allied to this is the question whether an employee can act without the necessary authorization from the repository of power.

Submissions

[10] Both parties filed their written submissions. I should mention that on the date appointed for hearing of the matter, counsel for the applicant, Advocate Letompa failed to appear before Court at the schedule time. I have therefore relied on his written submissions while Advocate Phafane KC had the benefit of augmenting his written submissions with oral argument. These following were their submissions.

[11] The applicant's counsel, Advocate Letompa contended that the applicant presented before court, conclusive proof in the form of annexures MM3 and MM4 that she is entitled to the monies claimed while the respondents laid unadorned allegations that the applicant was laterally transferred to the position of purchasing clerk and that she never acted in the position of purchasing officer.

[12] He submitted that no real dispute exists in this matter. He relied on the case of **Wightman T/A JW Construction v Headfour (Pty)**

Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371(SCA) to argue that a real dispute of fact exists only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed and that where the facts averred are such that the disputing party must necessarily possess the knowledge of them and be able to provide an answer or countervailing evidence but instead of doing so rests his case on a bare or unambiguous denial, then it cannot be said that a real, genuine and bona fide dispute exists.

[13] As regards payment of arrears, he submitted that the determinant factor is whether the applicant had been performing the responsibilities of purchasing clerk from August 2012. And if the answer be in the affirmative, this means her claim to these monies must succeed.

[14] In relation to payment of incentive allowance, he is of the view that the position of purchasing clerk attracts an incentive allowance.

[15] The respondent's counsel conversely submitted that the applicant failed to place before court any evidence to bolster her allegations that the positions of purchasing clerk and revenue labourer were differently graded in order to prove that her transfer was a promotion entitling her to benefits higher than those attracted by the position she previously held. He contended that the granting of prayer 2 is dependent on the affirmation that the positions of the revenue labourer and that of the purchasing clerk are graded differently. He submitted that neither MM3 nor MM4 are conclusive as to the grading of these positions. He relied on **Pillay v Krishna and Another 1946 AD 946** and other authorities to submit that a litigant that brings a

claim before Court bears the overall onus in the sense of finally satisfying the Court that he is entitled to the relief sought.

[16] He further relied on the case of **National Employers' General Insurance v Jagers 1984(4)SA 432** to submit that where there are two mutually destructive stories, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false. He submitted that the applicant failed to discharge the onus that rests on her.

[17] With regard to the period from which the applicant was given added responsibilities and the question whether she was appointed to act in the position(s) of purchasing assistant and purchasing officer, he relied on the dictum in **Plascon-Evan Paints v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623**, an authority that has been consistently followed in our jurisdiction to submit that since the parties have differing versions of evidence on these issues, the respondents' version must be accepted.

Discussion

[18] It is trite that in motion proceedings, an applicant must make out a case in the founding affidavit. This is a case which the respondent is called upon to meet. The applicant must stand or fall by his/her petition and the facts alleged therein. **Director of Hospital Services v Mistry 1979(1) SA 626(A) at 635 H, Lesotho National Olympic Committee v Morolong LAC (2000-2004) 449@ 457.** He/she should not be permitted to make out a different case or travel beyond his/her pleadings, either in reply or in argument. **Attorney General v Teka Teka and Others LAC (2000-2004) 367 at p 373 para D-E.**

[19] With regard to factual disputes arising on the affidavits in motion proceedings, a proper approach to be adopted in resolving such disputes is that a final order, whether it be an interdict or some other form of relief, may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with facts alleged by the respondent, justify such an order. **Plascon-Evan Paints v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623, MNM Construction v Southern Lesotho Construction and Others LAC (2005-2006) 112 at 116** (and authorities there cited).

[20] In **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty)Ltd 1949(3) SA 1155(T)**, it was stated that (except in interlocutory matters) it is undesirable to attempt to settle disputes of facts solely on probabilities disclosed in contradictory affidavits as opposed to *viva voce* evidence. This was confirmed in **the National Director of Public Prosecutions v Zuma 2009(2) SA 277** where Harms GP significantly held at paras 26 and 27 that;

- a) Motion proceedings, unless concerned with interim relief, are all about resolution of legal issues based on common cause facts
- b) Unless circumstances are special, motion proceedings cannot be used to resolve factual disputes because they are not designed to determine probabilities.
- c) The court may not impose the onus on the respondent to prove a negative. The rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant, the plaintiff needs less evidence to establish a prima facie case, applies to trials.
- d) In motion proceedings, the question of onus does not arise, and the approach set out in **Plascon-Evans** governs irrespective of where the legal or evidential onus lies.

- [21]** Applying these guiding principles to the instant case, I proceed to examine whether admitted facts and respondent's averments justify the granting of the reliefs sought.
- [22]** The essence of the applicant's case is that she was promoted from the revenue labourer to purchasing clerk and that she also acted in the positions of purchasing assistant and purchasing officer, hence the prayers for payment of salary arrears, incentive and acting allowance respectively.
- [23]** It is common cause between the parties that the applicant was transferred to the procurement department in August 2012 to hold the position of purchasing clerk. They are at loggerheads on the nature of the transfer i.e whether it was promotional or lateral. The grading of the previous and current positions held by the applicant and consequently remuneration attracted by each is also a controversial issue as earlier stated. The applicant's counsel is of the view prayers 1 and 2 must be granted on the basis of the respondent's concession to the effect that that the applicant currently holds the position of purchasing clerk.
- [24]** The question that begs to be answered is whether the mere admission by the respondents that the applicant is a purchasing clerk justifies the granting of prayers 1 and 2 of the application. To answer this, the relevant legislative provisions regulating appointments of officers, either on acting or substantive basis in the Local Government Service under which the 2nd respondent falls, payment of allowances as well as promotions must guide the determination.

Appointment and promotion of officers

[25] The Local Government Service Act of 2008 and Regulations made thereunder regulate appointment of staff. In terms of Section 22(1) (b) of this Act, The Local Government Service Commission is vested with power to recruit, appoint, promote, transfer and retire officers in the service.

25.1 The Local Government Service Regulations of 2011 under Part 11 deals with staff mobility, under which promotions and transfers are addressed.

25.2 Under Regulation 14, the Human Resources department is mandated to advertise vacant positions within the relevant department, council or agency and after receipt of applications, same should be screened, and interviews for the candidates for positions on Grade F and below must be held. For Grade G and above, they shall undergo a competence assessment.

25.3 Regulation 31(1) provides that promotions shall be made through interviews or competency assessment where appropriate.

[26] While it is undisputed that the applicant was transferred to the procurement department to hold the position of purchasing clerk, There is nothing in the applicant's founding affidavit to suggest a) a promotion or lateral transfer, b) whether or not the recruitment process set out above was followed, c) whether the Local Government Service Commission authorised the appointment(if her movement was a promotion) or whether the request was placed before it for consideration, d) who transferred the applicant and; e) the terms and conditions of the transfer. The only aspect relating to the transfer is the applicant's request addressed to the town clerk to fill this position. For these reasons, confirmation of the applicant in

this position is not as straightforward an issue as his representative seems to suggest. The issue cannot therefore be resolved on the affidavits as they stand.

[27] I move next to the issue of payment of arrears. The issue of her entitlement to arrears is dependent upon proof of grading of the positions under scrutiny i.e the revenue labourer and purchasing clerk. As stated earlier, the affidavits reveal a dispute of fact on whether these positions were differently graded.

[28] The applicant's affidavits are contradictory and incoherent with regard to the issue of grading of these positions. She avers under paragraph 14 of her founding affidavit that the position of purchasing clerk was a grade higher than that of revenue labourer. She avers that the position of revenue labourer was graded at LA10 while purchasing clerk was at LA8. Paragraphs 7.2 and 7.3 of the same affidavit are at variance with paragraphs 14. She avers under these two that the position of purchasing clerk was at grade LA 7.

[29] The confusion is compounded further by the applicant's Counsel's interpretation of MM3 in his written submissions. According to him, the document means the applicant was to be elevated from LA9 (revenue Labourer) to LA7 (purchasing clerk).

[30] MM3 is a recommendation for elevation of the applicant and her colleagues' grading. This document is styled; *report to management team*. It is to the effect that management team made an approval that officers mentioned therein (applicant included) should be elevated from their current levels to the proposed levels. In case of the applicant she was to be elevated from grade LA9 to LA7. The justification for this is that council (2nd respondent) had been using their services without commensurately remunerating them. This was

in October 2014. Of crucial importance is the following part of the letter;

“...it is true that the human resources office has a directive to regularize the situation by seeking approval from the Ministry of local government and chieftainship, but it seems the process is taking too long. In order to avoid further lawsuits as their counterparts for another department are doing, I kindly request that the officers be given incentive allowance effective from April 2014 until the matter has been properly dealt with.” (my underlining)

[31] MM4 attached to her replying affidavit suggests that the position of purchasing clerk is graded at LA9.

[32] In view of these observations, her averments, taken together with the respondent’s allegations that the two positions were similarly graded do not justify the granting prayer 2 because this issue too cannot be resolved on the affidavits.

Acting appointments

[33] I deal now with the issue whether the applicant acted in the positions of purchasing assistant and purchasing officer respectively and whether an officer can act in a position without the necessary authorization.

[34] For this determination, Regulation 28 of the Local Government service Regulations is relevant. It sets out the procedure for acting appointments. It reads;

“28(1) an officer may be appointed to act for a period not exceeding there (3) months, in a post that is in his or her direct line of promotion in the event that the holder of the post is granted leave of absence or to perform those duties in the event that the position is substantively vacant while recruitment is underway.

28(2) where a vacant position is to be filled in an acting capacity, the Human Resource Department shall submit the proposal to the commission in accordance with the procedure set out in the commission rules.

[35] This provision should be read with regulation 57 which provides for payment of an acting allowance. It reads;

An acting allowance is payable to an officer who is appointed to act in a senior office in the absence of its substantive holder of the office in accordance with regulation 27(sic)

[36] It appears to me, from the reading of these provisions that acting appointments is the prerogative of the commission. Acting in a position therefore requires the necessary authorization from the repository of power. The word shall under section 28(2) makes adherence to these provisions imperative and unless there is compliance to these provisions, there will be no valid acting in a position. I underscored "*an acting allowance is payable to an officer appointed to act*" to demonstrate that in the absence of an appointment to act by the commission, an employee cannot validly act in a position and concomitantly be entitled to an acting allowance.

[37] In the instant matter, the applicant claims that she was simultaneously acting in the positions of purchasing assistant and purchasing officer. No details are given as to who authorised her to act. This is denied by the respondents. They contend firstly that the applicant was never appointed to act in these positions and secondly that one Mr Monku was acting in the position of purchasing officer during the period under review. There is clearly a real dispute on whether in fact the applicant ever acted in these positions.

Incentive allowance

[38] The applicant claims outstanding incentive allowance for the period of August 2012 to January 2014. She avers that when she was transferred to the procurement section, the position of purchasing assistant was also vacant so she was assigned duties of the purchasing assistant too; that she is consequently entitled to be remunerated accordingly. And that following a complaint lodged by similarly aggrieved employees, a resolution was made to upgrade them as reflected on MM3.

[39] On the strength of this letter, the applicant claims that her incentive allowance accrued from April 2014. This, too, the respondents vehemently dispute. They allege that added responsibilities only accrued in February 2015.

[40] It will be observed that the applicant claims that the allowance accrued in April 2014, and in the same breath claims that she should be paid incentive allowance from August 2012.

[41] It should be noted that MM3 suggests that the city treasurer recommended that the officers must be remunerated without the requisite approval. Regrettably the applicant does not tell us as to why she was only paid the allowance from February 2015. This issue too (as to when added responsibilities attracting an incentive allowance were given) cannot be resolved on the affidavits.

Conclusion

[42] In the light of all facts of this matter, the applicant's averments on the vital issues of; a)grading of the positions under review, b) the period during which added responsibilities were given, and c) the acting claims, taken together with and the facts stated by the

respondents on these aspects, do not justify the granting of the orders sought.

[43] She sought a final relief on the papers without resort to oral evidence. The disputes arising from the affidavits are real and substantial as they relate to crucial facts of the case. They can best be resolved by oral evidence. The application must therefore be dismissed.

[44] I should add that the dismissal on grounds of irresolvable disputes on the affidavits does not bar the plaintiff if she so wishes, from instituting fresh proceedings by way of summons so that the disputed issues can be resolved by oral evidence. See **Khethisa v Khethisa LAC (1985-1989)225 at 226B**

Costs

[45] On the issue of costs, the applicant approached the court to resolve the dispute with her employer regarding payment of her salary and allowances. It would not be fair to mulct her with costs for dismissal of the application.

Order

[46] In the result, the following order is made;

- a) The application is dismissed.
- b) There will be no order of costs.

**P. BANYANE
JUDGE**

For Applicant: Advocate Letompa

For Respondents: Adv Phafane KC

