IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA5/2014

In the matter between:

THE MEC, DEPARTMENT OF HEALTH

EASTERN CAPE **Appellant**

and

SAVILLE KOPS AND 16 OTHERS **Respondents**

Summary: Claim for payment of acting allowances – employees in emergency medical services transferred from the local municipality to the province – employees claiming payment of acting allowances they were paid while working for the municipality - Court finding that there was no acting appointment in writing authorising the employees to act- further that there were no vacant positions within the province to be filled by acting appointment and that the employees could not act for more than 12 months - Court setting aside Labour Court's judgment while upholding appeal. Court substituting Labour Court's judgment with a finding that the employees' claim be dismissed.

Coram: Waglay JP, Coppin JA *et* Makgoka AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal with leave of the Labour Court against its judgment in terms of which it found that the respondents were entitled to payment of acting allowances.

[2] The respondents were previously employed by the Cacadu District Council or the Port Elizabeth Municipality (now the Nelson Mandela Bay Municipality) within their Emergency Medical Services (EMS). The competence of EMS was then transferred from the respective local municipalities to the Eastern Cape provincial government. Consequently, the EMS became a provincial government competence and all employees of the EMS were transferred from their respective local government to the provincial government.

[3] To give effect and to regulate the transfer of the employees, an agreement was concluded on 30 September 2003 between the Appellant and the South African Local Government Association, The South African Municipal Workers Union and The Independent Municipal and Allied Workers Union. The effective date of the transfer was recorded as 1 October 2003. Relevant for the purpose of the dispute is *inter alia* clause 3 relevant parts of which reads as follows:

> '3 TRANSFER OF STAFF
>
> 3.1 On the effective date, the staff who are listed in Annexure "2" hereto which reflects also each staff member's salary (subject to adjustment to reflect any increases after 1 July 2003 up to the effective date) and rank, notch, allowances, bonuses, hourly tariffs and rates will be transferred to the Province on the terms and conditions as agreed between the Province and the parties to this agreement.
>
> 3.2 The transfer of staff as is provided for herein, shall not interrupt the individual staff member's continuity of employment and the employment of staff continue with the Province as if they had been on the employ of the Province as from the date of commencement of their employment with Local Authorities.'

[4] Prior to the transfer, all of the respondents were acting in various higher positions and paid acting allowances. Although the effective date of the transfer is recorded as 1 October 2003, the respondents allege that the transfer only took effect two months later on 1 December 2003. The transfer did not lead to any physical movement of the respondents. The respondents continued to occupy the positions they held prior to the transfer. They also continued to perform the functions which, under their previous employer were to be performed by persons in positions higher than the positions they occupy. As they were receiving an acting allowance prior to the transfer, the new employer (Province) continued to pay the respondents the acting allowances which they were receiving prior to the transfer until about June 2004 and then ceased doing so.

[5] It is the appellant's refusal to pay the acting allowances despite the fact that the respondents continued to render the services they did in the acting positions prior to the transfer that was the subject of the action and now this appeal.

[6] The respondents' claim is founded on a breach of contract and is made in terms of Section 77 of the Basic Conditions of Employment Act 75 of 1997. The respondents aver that:

(i) they were transferred in 2003 from their respective local government to the provincial government which was a transfer as contemplated in s197 (197 transfer) of the Labour Relations Act (LRA) 66 of 1995; and,

(ii) they were entitled to acting allowances from the time of transfer to the time the action was instituted as they continue to act in the acting positions they were in at the time of transfer.

[7] The appellant in the court *a quo* opposed the action on two grounds. The first is that the court *a quo* lacked jurisdiction because the acting allowances claimed by the respondents were regulated by a collective agreement and that as such, the dispute is about the interpretation and application of the agreement. The appellant averred that in terms of the LRA, the Labour Court did not have

jurisdiction to adjudicate such a dispute. The second ground is that there was no proof evincing that the respondents were appointed in their various acting positions or entitled to an acting allowance in terms of the relevant legislation or the resolution of the Bargaining Council which applied to their employment.

[8] In considering the respondents' claim, although the court *a quo* expressly did not entertain the issue of jurisdiction, it considered the collective agreement in respect of acting appointments, and while accepting that the agreement provided for an acting appointment to be in writing and not exceed a period of 12 months, came to the conclusion that the appellant had acquiesced in the acting appointments as the respondents "could not have appointed themselves" and therefore held that the respondents could not be deprived from being paid their acting allowances.

[9] The appellant reiterates the submissions it made in the court below. Concerning the issue of jurisdiction, the appellant avers that the court *a quo* did not have jurisdiction because and on its own finding, there was a collective agreement that regulated the relationship between the parties including the payment of the acting allowance. That being the case it stated that the issue was simply one of interpretation and application of a collective agreement and the Labour Court did not have jurisdiction to deal with that issue. Regarding the fact that the respondents made their claim in terms of the Basic Conditions of Employment Act and not the LRA, the appellant argued that it was improper for the respondents to clothe a dispute about the interpretation and application of a collective agreement as a contractual claim. I am of the view, for reasons set out later, that there is no need to address those points as there are erroneous in the context of this matter because they overlook the fact that the transfer related to the permanent positions the respondents occupied.

[10] The real issue for consideration in this appeal is whether employees transferred from the local governments to the provincial government are still entitled, in terms

of the law, to acting allowances they had received while employed by their erstwhile local governments.

[11] Even though the transfer, as contemplated in s197, took place and was regulated by the collective agreement referred to in paragraph [3] above, the respondents are employed within the public sector and fall within the General Public Sector Bargaining Council. Consideration of this matter therefore requires that regard be had to the relevant section of the Public Service Act (PSA)[1] and the relevant clause of the General Public Sector Bargaining Council Resolution No 01 of 2002 (Resolution) regulating acting appointments in the public service.

[12] Section 32(2) of the PSA reads as follows:

> '(2)(a) An employee may be directed in writing to act in a post subject to such conditions as may be prescribed.
>
> (b) Such acting appointment shall be made-
>
> (i) in the case of the post of head of department, by the relevant executive authority;
>
> (ii) in the case of any other post, by the employee occupying the post, unless otherwise determined by the head of department.' [own emphasis]

Similarly, clause 3 of the Resolution provides:

> '3.11 An employee appointed in writing to act in a higher post, by a person who is duly authorised, shall be paid an acting allowance provided that
>
> (a) the post is vacant and funded…
>
> (b)…
>
> 3.1.2 The employee must accept the acting appointment in writing.

[1] 103 of 1994.

…

3.1.7 An employee may not act in a higher post for an uninterrupted period exceeding twelve months.' [own emphasis]

[13] In addition to the PSA's requirements that an acting appointment must be made in writing by the duly authorised authorities, the Resolution adds three more requirements: (i) that the post should be vacant and funded and (ii) the employee must accept the acting appointment in writing; and (iii) the employee cannot act for a period exceeding 12 months. There can be no doubt that these requirements are peremptory.

[14] The PSA as well as the Resolution, clearly provides that an employee who is appointed in writing to act in a higher position must also accept the acting appointment in writing. Moreover, the authorised authority must be the one to initiate the acting appointment. In this matter and in respect of the authorisation of the acting appointment, the appellant averred that there was no written appointment of the respondents by any official of the appellant. Indeed, Mr Du Plessis, who testified on behalf of the respondents, conceded under cross-examination, that no formal appointments were made, and that the respondents did not receive letters of appointment to act. In response to the appellant's representative's question that not one of the respondents was ever appointed to act, Mr du Plessis replied as follows:

'They were not given letters to act. They continued doing the work and they were paid, they were honoured, the payment was honoured. The department failed to give official letters like the council…The province never issued letters to say you are going to act now…'[2]

Mr Du Plessis's testimony indicates that the respondents were acting without being appointed to do so either in writing or by an authorised person. The argument was that it was a *de facto* acting appointment because the respondents were acting in those positions prior to the transfer. What this suggests is that

[2] Record vol 4 at 248-249.

because the respondents were receiving acting allowances while working for the municipalities, that acting allowance was also transferred from the municipalities to the province. This cannot be possible. It is the permanent position that is transferred not the add-ons like an acting position.

[15] An acting appointment is not permanent. It is a temporary arrangement to fill a vacant position pending the filling of that position. Therefore, the contention of the respondents to the effect that that no letters of appointment to act were necessary as they remain in their acting position by virtue of being placed in those positions by their erstwhile employers is totally misconceived. One cannot by reason of a 197 transfer continue to hold an acting position. A transferred employee is only guaranteed his/her permanent position with his/her salary, rank, notch allowances bonuses, uninterrupted and continuity of service.

[16] In my view, the respondents were also aware, or, at least, should have been aware, that there was no obligation on the appellant to continue with the acting allowances once they were transferred. This is evident from the testimony of Mr Du Plessis when he states:

> 'I asked the question to Mr Maharaj we are now in province, this was early 2004 in our senior management meeting, <u>are you going to honour the payment to my officers which they got at local government level,</u> because I do not want them to act without any acting allowances.'[3] [own emphasis]

[17] It is undisputed that the respondents were acting in various positions prior to the transfer and were paid from the provincial budget. It cannot be said that those acting positions survived or were also transferred to the provincial government. What is essential after the transfer is to provide proof of any writing of a sort evidencing that any official authorised to do so had appointed the respondents to act. Absent a written authorisation, no acting appointment took place. It follows that the court *a quo* was incorrect in finding that the appellant was aware that the respondents were acting or had acquiesced to them acting. That finding failed to

[3] Record vol 4 at 237.

take into account s32(2) of the PSA and clause 3 of the Resolution, both of which are binding on the respondents and their employer. One cannot read into the PSA or the Resolution, that acting appointments are based on assumptions, acquiescence, or the fact that someone was actually doing more work than was required of him or doing the work of a more senior personnel. Acting appointments are not valid unless there is, at the very least, compliance with the prescripts of the PSA.

[18] Furthermore, the Resolution stipulates that the positions in which the employee(s) is acting must be vacant and funded. The appellant contends, and it is not disputed that the positions in which the respondents claim to be acting in do not exist within the appellant's structures. The appellant submits that those positions existed within the erstwhile municipalities but were not filled. Indeed, Mr Du Plessis confirmed when explaining the background that *"these positions [were] not on the structure of the province, they are on the structure of local government*". This demonstrates that the respondents once transferred to the appellant could not be said to be in the acting positions, as there were no provisions within the appellant's establishment for the positions they claim to be acting in. Hence, not only were there no vacant positions, those positions did not exist in the organisational structure of the appellant. Clearly one cannot act in a position that does not exist. It follows that the court *a quo* was wrong in ordering the appellant to pay acting allowances in circumstances where the positions for which acting allowances were sought to be paid were non-existent.

[19] Perhaps it is apposite to state that the imbroglio about the acting allowance arises out of the fact that the EMS has always been a provincial competence which, at some point, was delegated to the municipalities. But even though the EMS was seemingly being discharged by the municipalities, EMS salaries were being paid from the province's budget. This is why Mr Du Plessis said, "*bearing in mind at local government level it was also the provincial monies which were*

paid to the staff and when we went over that was paid."[4] A clear distinction should be made about acting appointment approved by the municipalities and by the province. The respondents seem to blur this distinction simply because their salaries were paid from the provincial budget prior to the transfer. Where the monies came for the payment of salaries is irrelevant. The assumption that because the province paid their salaries while they worked for the municipalities, they could still continue receiving acting allowances although they are no longer working for the municipalities is erroneous. Mr Du Plessis' evidence is clear that the positions did not exist at provincial level. If the positions did not exist, there cannot be vacancies justifying their acting appointment.

[20] Finally, and for sake of completeness, it must be said that it is a requirement of the Resolution that an acting appointment should not exceed 12 months. The respondents on their own version acted for more than 12 months. In fact, it appears that the 12 months had lapsed in June 2004 when the appellant ceased paying the acting allowances.

[21] The respondents' final contention, namely, that on the assumption that the acting appointments may be attacked based on lawfulness, they remain in the acting position until such time as their acting appointment is set-aside and as such they must continue to receive their acting allowances has no merit. As stated above (i) there had not been any appointments in the first place; (ii) acting appointments cannot be permanent, there are temporary in nature; and they serve to fill a vacancy that exists.

[22] In the result, the appeal must succeed and the following order is made:

(1) The appeal is upheld;

(2) The Labour Court's judgment is set aside and replaced with the following order:

[4] Record vol 4 at 237.

"The applicants' application is dismissed".

(3) There is no order as to costs.

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Waglay JP

I agree

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Coppin JA

I agree

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Makgoka AJA

APPEARANCES:

FOR THE APPELLANT:	Adv Kroon SC
	Instructed by the State Attorneys
FOR THE RESPONDENTS:	Adv F E le Roux
	Instructed by Chris Unwin Attorneys