

29 January 2010

Case No. SADCT: 05/2009

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL

CLEMENT KANYAMA
v.
SADC SECRETARIAT

JUDGMENT

BEFORE: PRESIDENT: A. G. Pillay
JUDGES: Dr. R. Kambovo; F. M. Chomba

Citation: Kanyama v. SADC Secretariat, Judgment, Case No. SADCT: 05/2009 (SADC, Jan. 29, 2010)

Represented APPLICANTS' AGENTS: G. Narib and Mr. A. Kamanya
By: RESPONDENT'S AGENTS: Dr. T. L. Uate

JUDGMENT

DELIVERED BY THE PRESIDENT OF THE TRIBUNAL H.E. JUSTICE A.G. PILLAY.

[1] The important issue to be decided by us in this application is whether the Applicant was entitled to a renewal of his contract of employment as Principal Finance Officer which was entered into by him with the Respondent in November 2004 (Doc.CK1). The Applicant assumed office in January 2005 and the period of employment was initially for four years. The contract of employment referred to the SADC Administration Rules and Procedures Handbook (the Handbook) issued by the Respondent.

[2] In accordance with clause 15.3.5 of the Handbook:

“An employee in a Regional Post shall inform the Head of the Institution, in writing, whether he/she wishes to be considered for a further term of office, not less than six months before the expiration of his/her contract of secondment. In the event that he/she wishes to be considered for a further term, the Head of Institution shall inform the officer, in writing not less than four months before the expiration of his/her contract, whether it is the intention of the Institution to renew his/her contract.”

[3] In July 2008, the Applicant applied for a renewal of his contract. It was sent six months before 4 January 2009 which was the date of expiry of his contract. The reply of the Executive Secretary of the Respondent (the Executive Secretary) was just over 2 months before the date of expiry of the contract and was to the effect that the Applicant's request for an extension of his contract will depend on the outcome of the skills audit being undertaken on all existing staff of the Respondent (CK6).

[4] On 13 December 2008, the Applicant was granted an extension of his contract as Principal Finance Officer (Director of Budget and Finance) for one year effective 5 January 2009 to 4 January 2010 (CK7), without any reason being given. The Applicant accepted the term of twelve months under protest (CK8) and explained during his testimony before us that he accepted the offer since he did not have an alternative employment in Malawi, his home country, and he had school-going children to provide for.

[5] It is noteworthy that the Applicant is still occupying his present position of Director of Budget and Finance, having succeeded in August, 2009 in persuading this Tribunal to maintain the status quo and grant an order restraining and prohibiting the Respondent from advertising, recruiting for, and filling, the position of Director of Budget and Finance, pending the determination of his present application on the merits-*vide* Clement Kanyama vs SADC Secretariat Case No SADC (T) 05/2009.

[6] It is significant that during the course of 2006-2008 a Job Evaluation exercise was carried out within the Respondent, the purpose of which included, among other matters, the determination of a new organizational structure for the Respondent, job specifications, descriptions and grading. In the course of this exercise, a skills audit of the Respondent's existing staff was also undertaken, the purpose of which was to facilitate the migration of the existing staff members into the new organizational structure. New posts were created and there was also a change in the nomenclature of some of the existing posts within the Respondent.

[7] Whereas in the old structure the Applicant held the post of Principal Finance Officer, in the new one he occupied that of Director of Budget and Finance. Doc. CK 7 confirms this as well as Doc. CK 10 of January 14, 2009 which in its heading specifies that the Applicant's post was just a migration into the New SADC Secretariat Structure and that, following the outcome of the skills audit undertaken by the Applicant who had obtained a 100% proficiency evaluation score, the Applicant was then re-appointed Director (Budget and Finance) – Personal to Holder, with all other benefits and conditions of his original contract of November 2004 remaining unchanged.

[8] The Applicant in essence claims that, by not renewing his contract, the Respondent, through its Executive Secretary, has acted in breach of its contractual obligations towards him and that his reasonable and legitimate expectation of having his contract renewed for a second and final four-year period has been dashed, the more so as he had been expressly told in December 2008, (Doc. CK 7) that, if his performance in the skills audit were satisfactory and that he were to perform his duties diligently pending the review, he would obtain a renewal of his contract.

[9] The essential arguments on which the Respondent's case was based, as we understood them from the evidence of the sole witness of the Respondent and indeed from the statement of defence as pleaded, were mainly the following:

1. The Applicant did not apply for a renewal of contract per se, but he also wanted to be

appointed to the newly created post of Director (Budget and Finance).

2. The posts of Director (Budget and Finance) and Principal Finance Officer were not at par. The functions of the former had more in content than those of the latter. Secondly, the qualifications for the post of Director (Budget and Finance) were higher than those for Principal Finance Officer as, for example, the pre-appointment professional experience was 10 years, including 8 years in a similar position for the post of Director (Budget and Finance) whereas for the post of Principal Finance Officer, it was 10 years with three years in a similar position.

3. It was argued that, by a policy decision made at Grand Baie in the Republic of Mauritius by the Council of SADC Ministers (Council) on 24-25 February 2005 (Doc. LAU 2), there was to be a “Fair and Equitable Member States Representation at the SADC Secretariat” i.e. the quota system would apply to new appointments made.

That meant that no one State was allowed to have more than one officer holding senior positions at the Respondent between the ranks of Director and Executive Secretary at the expense of other member states. In the case of the Applicant, a Malawian national, if he acceded to the position of Director (Budget and Finance), he would be the second Malawian to fall in those ranks, the other being a Mrs. Margaret Nyirenda who was Director of Food, Agriculture and Natural Resources.

4. The Tribunal should declare that the decision made by Council on 26 February 2009 in Cape Town, South Africa (Doc. LAU 4), whereby the Applicant was appointed as Acting Director (Budget and Finance) and to hold such post until 31 December 2009, was fair and just.

Moreover, there could not be any breach of the Respondent’s contractual obligations towards the Applicant, given that, in any event, the Respondent, through its Executive Secretary, was bound not to renew the Applicant’s contract, in the light of Council’s decision above.

[10] At this stage it is significant to note the following points:

1. At the meeting of Council in Lusaka, Zambia in November 2007, Council, in reviewing the Job Evaluation exercise, decided that the functions of the Strategic Advisor should be fused in a Unit under one of the Deputy Executive Secretaries and that two new additional posts were to be created, a second position of Deputy Executive Secretary and the creation of a position of Director Human Resources (Doc. LAU 6).

2. The Report of the Executive Secretary on the Implementation of the Job Evaluation (the Report) subsequently sets out the three new posts, with their functions, skills and experience profile, namely Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration). The Report also highlights the fact that the respondent will adhere to the quota system and gender representation “before any recruitment of personnel in the new structure” is made (paragraph 2.1.20 (a) and the emphasis is ours).

As for “the skills audit of the existing staff members to determine the suitability of translating to new ranks and positions in the proposed structure”, the Report in paragraph 2.1.25 states as follows:

“In the event that some positions within the organization are no longer required, rendering current incumbents redundant, or the individual does not have the requisite skills needed for the job the following alternatives are proposed:

...
...
...

Apply the Personal to Holder principle in the event that the staff member occupies a position whose grade is lower than the grade the staff member currently occupies” (the underlining is ours).

We have deliberately mentioned this paragraph of the Report just to show that it is not in any respect applicable to the Applicant, least of all the Personal to Holder principle, so that we are at a loss to understand why it was mentioned in Doc. CK10.

3. The SADC Troika considered the Report at its meeting of February 2008 in Pretoria, South Africa and approved, inter alia, the three new posts and the skills audit of the existing staff members.

4. Council, at its meeting, in February 2008 in Lusaka, Zambia approved the decisions of the Troika (Doc. LAU 6). In the Management Structure, there were only three new posts, namely, Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration).

5. Council, at its meeting, in August 2008 in Sandton, South Africa noted that the SADC Treaty must be amended to accommodate the recruitment of a second Deputy Executive Secretary and that, if that position were approved by Summit, “this post would be advertised immediately, in line with the quota system and ensuring gender balance”. Council also mentioned that the Job Evaluation exercise had resulted in the creation of new positions as well as the downgrading, upgrading and standardization of nomenclature of other positions. All staff should be assessed through the skills audit to determine their suitability or non-suitability vis-à-vis those positions on the new structure.

6. Council at its meeting, in closed session, in February 2009 in Cape Town, South Africa, in the presence of the Executive Secretary but not that of the Applicant, noted that the Director of Human Resources and Administration was appointed and assumed duty in December 2008 and took the following decisions: (Doc. LAU 4) –

(a) it approved the Report and the outcome of the skills audit;

(b) the two acting Directors for “the newly created positions of Directors”, among them the applicant in respect of the position of Director (Budget and Finance), were appointed until 31 December 2009. After that date, those new posts would be advertised and filled, in line with the recruitment procedures, the quota system and gender representation, just as in the case of the two new positions of Deputy Executive Secretary;

(c) the current Deputy Executive Secretary will be able, however, to apply for one of the new positions of Deputy Executive Secretary.

[11] It is quite clear, therefore, that it is only in February 2009 that, for the first time, the position of Director (Budget and Finance) is referred to as a “newly created position of Director” by Council. No reason has been advanced by Council for its decision so that it is not possible for us to gauge the reasoning behind such a decision.

[12] We consider, however, that the position of Director (Budget and Finance) is not a new post, but is a new rank or position in the new organizational structure of the respondent, as is made clear by the documents mentioned above. Indeed, the Executive Secretary, himself, made it clear in Doc. CK10 that the applicant only migrated from the old structure into the new one and that his job content, profile and responsibilities as former Principal Finance Officer remain the same as Director (Budget and Finance), following the skills audit conducted to determine his suitability for the new rank or position in the new organizational structure. That is why the post was filled by the Applicant and not advertised, as in the case of the two new posts of Deputy Executive Secretary and the new post of Director of Human Resources and Administration.

[13] The clinching argument which demonstrates beyond doubt that there has only been at most only a change of nomenclature is that the applicant was offered by the Executive Secretary the

post of Director (Budget and Finance), following the results of the skills audit. If the Executive Secretary had some qualms about the job content and responsibilities of the new rank or position of Director (Budget and Finance) not being similar to those of Principal Finance Officer, he would surely not have appointed the applicant.

After all, the Executive Secretary was in a better position than us, with his array of consultants, to come to the conclusion that there were no marked differences in the functions, responsibilities and job profiles of the two positions.

[14] It is common ground between the parties that the quota system only applies to the creation of new jobs (Doc. LAU 2, paragraphs 6.12.14 and 6.12.15), since it would be unlawful to apply the quota system retrospectively to existing staff, as rightly pointed out by Counsel on both sides. Since we consider that the post of Director (Budget and Finance) is not a newly-created position, the quota system, as indicated already, is not applicable to the present case.

[15] We consequently hold that the appointment of the Applicant by the Executive Secretary was legally in order (Doc. CK 10), the more so as the Report had been approved by Council, as mentioned already. No doubt the Executive Secretary can only appoint the Applicant under terms and conditions of service determined by Council under Article 15(1)(f) of the SADC Treaty, but that is precisely what he did, as demonstrated by the facts highlighted above.

[16] Since the Applicant has been appointed on the same terms and conditions of his original contract, we consider that he is not only entitled to a renewal of his contract of employment but also has a reasonable and legitimate expectation that his contract would be renewed, for a second and final four-year period, in the light of his track record and outstanding performance.

[17] We accordingly declare that –

(a) there has been a breach of the contract of employment of the Applicant by the Respondent;
(b) in terms of the contract of employment of the Applicant, as well as the Respondent's policies and practices, the Applicant is not only entitled to a renewal of his contract of employment but also has a reasonable and legitimate expectation that his contract would be renewed, for a second and final four-year period, in the light of this track record and outstanding performance.

[18] With regard to the issue of costs, we shall first refer to Rule 78 of the Rules of Procedures of SADC Tribunal (The Rules).

Rule 78 provides as follows:

“1. Each party to the proceedings shall pay its own legal costs.

2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.”

In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

[19] We take the view that there are exceptional circumstances, on the particular facts of the present case, justifying the award of costs in favour of the applicant in the interests of justice. In this regard, we have taken into account the fact that the applicant who is a high-ranking official of the Respondent has had to suffer intolerable prejudice, trouble and annoyance when he was first offered employment as Director (Budget and Finance) for only one year and then subsequently told, for no valid reason whatsoever, that he was in fact appointed as acting

Director and that his actingship would lapse on 31 December 2009, without a hearing and without being able to make any representations, so that in effect he was demoted and he would not be eligible, as he is entitled, to obtain a second and final four-year contract of employment with the Respondent, in spite of having a reasonable and legitimate expectation for such a renewal of his contract, in the light of his track record and outstanding performance.

[20] For the reasons given, we consequently make a costs order against the Respondent under Rule 78 (2) of the Rules. The costs are to be determined by the Registrar in the case of disagreement between the parties.

Delivered in open court this 29th day of January 2010, at Windhoek in the Republic of Namibia.

H.E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Dr Rigoberto Kambovo
MEMBER

H.E. Justice Frederick Mwela Chomba SC
MEMBER