



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C149/2022

In the matter between:

MZUKISI LUBABALO NDARA

Applicant

and

**ACTING NATIONAL COMMISSIONER FOR THE
DEPARTMENT OF CORRECTIONAL SERVICES**

First Respondent

**DEPUTY MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

**GOVERNMENT OF THE REPUBLIC OF SOUTH
AFRICA**

Third Respondent

DEPARTMENT OF CORRECTIONAL SERVICES

Fourth Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Fifth Respondent

DEPARTMENT OF PUBLIC SERVICE

AND ADMINISTRATION

Sixth Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT

OF PUBLIC SERVICE AND ADMINISTRATION

Seventh Respondent

MINISTER FOR PUBLIC SERVICE

AND ADMINISTRATION

Eighth Respondent

Date heard: 28 April 2022

Judgment delivered by email on the 29 April 2022

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks the following relief:

“I. **Dispensing** with the forms and service provided for in the Rules of this Honourable Court to the extent necessary and directing that **this application be heard on an urgent basis** in terms of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court.

II. **A rule nisi do issue** calling upon the respondents to show cause, if any, before this Honourable Court on: _____ DAY OF _____ 2022 at 10H00 or so soon thereafter as counsel may be heard, why an Order in the following terms should not be granted:

PART A

A1. Interdicting and restraining the Acting National Commissioner for the Department of Correctional Services (“Acting National Commissioner”) and the Deputy Minister of Justice and Correctional Services’ (“Deputy Minister”) from putting in operation their purported decision terminating the applicant’s employment with the Government of the Republic of South Africa (‘Government’) at the Department of Correctional Services (“DCS”) with effect from **30 April 2022**:

A2. Directing the Acting National Commissioner and the Deputy Minister to reinstate the applicant’s Contract of Employment with immediate effect

and allow the applicant to continue performing his duties as if his Contract of Employment was never terminated;

- A3.** Suspending the operation of the Acting National Commissioner's letters dated 11 and 17 March 2022, purporting to dismiss the applicant's employment with the Government at DCS pending the final determination of these proceedings.
- A4.** The Government and DCS, shall continue paying the applicant's remuneration as captured in his 31 March 2022 Salary Advise on the last day of each and every month commencing on 30 April 2022, pending the final determination of these proceedings.
- A5.** Directing that paragraph **A1** to **A4** shall operate as an **Interim Order** with immediate effect pending the finalisation of these proceedings.
- A6.** The respondents may anticipate the return day on **48 hours' written notice** to the applicant's attorney of record.

PART B

- B1.** Declaring that the decision of the Acting National Commissioner and the Deputy Minister, purporting to terminate the applicant's employment with the Government DCS with effect from **30 April 2022**, is unlawful, null and void *ab initio* with no force and effect for want of compliance with subclause 3.3 of the Contract of Employment entered into between the Government and the applicant on **25 June 2019** read together with sections 14 and 17 of the Public Service Act, 1994 and further read with section 23(1) of the Constitution of the Republic of South Africa, 1996;
- B2.** Setting aside the Acting National Commissioner and the Deputy Ministers decision communicated in the letters dated 11 and 17 March 2022 on the same grounds as stated in paragraph B1;
- B3.** Declaring that on **25 June 2019**, the applicant was legally appointed by the Government as ***Director: Head of Office to the Deputy Minister's Office on Salary Level 13 ("Head of Office")***, with effect from **1 June 2019**. On appointment, the applicant's Salary Package was R1 183 932.00 (One Million One Hundred Eighty-Three Thousand and

Nine Hundred Thirty-Two Rand) per annum, which was adjusted by the Minister for Public Service (“MPSA”) in accordance with DPSA Circulars 19 of 2019 and 13 of 2022 to an Annual Salary Package of:

B3.1 R1 245 495.00 (One Million Two Hundred Forty-Five Thousand and Four Hundred Ninety-Five Rand) and a **Gross Salary of R103 791.25** (One Hundred and Three Thousand Seven Hundred Ninety-One Rand and Twenty-Five Cents) with effect from 1 June 2019 to 31 March 2021;

B3.2 R1 264 176.00 (One Million Two Hundred and Sixty-Four Thousand and One Hundred and Seventy-Six Rand) and a **Gross Salary of R105 348.00** (One Hundred and Five Thousand and Three Hundred and Forty-Eight Rand), with effect from 1 April 2021 to 31 March 2022.

B4. Declaring that the applicant legally occupied the position of ***Head of Office***, in the period between 1 June 2019 until 2 October 2019 when he was legally appointed and/or transferred as ***Special Advisor to the Deputy Minister on the last notch of Salary Level 14 (“Special Advisor”)***, with effect from **1 July 2019 to date**;

B5. In the alternative to **Paragraph B4**, an Order declaring that the appointment of the late Mr. Khaya Somgqeza into the position that was legally occupied by the applicant as ***Head of Office***, on **24 July 2019** was invalid and unlawful with no force and effect, unless it is declared that on **2 October 2019**, the Deputy Minister legally appointed the applicant as ***Special Advisor***, with effect from **1 July 2019 to date** and appointed Mr. Somgqeza into his position as ***Head of Office***, with effect from **1 July 2019 until his death on 24 September 2021**. In the event this Honourable Court finds that the applicant was legally appointed as ***Special Advisor***, with effect from **1 July 2019 to date**, then an Order adjusting the applicant’s Annual Salary Package and Gross Salary in accordance with DPSA Circulars 19 of 2019 and 13 of 2022 as follows:

B5.1 R1 495 956.00 (One Million Four Hundred Ninety-Five Thousand and Nine Hundred and Fifty-Six Rand) and a Gross Salary of **R124 663.00** (One Hundred and Twenty-Four Thousand Six Hundred and Sixty-Three Rand), with effect from 1 July 2019 to 31 March 2021;

B5.2 R1 518 396.00 (One Million Five Hundred Eighteen Thousand and Three Hundred and Ninety-Six Rand) and a Gross Salary of **R126 533.00** (One Hundred and Twenty-Six Thousand and Five Hundred and Thirty-Three Rand), with effect from 1 April 2021 to date.

B6. In the further alternatives to **Paragraph B5**, an Order declaring that the applicant remained legally appointed as ***Head of Office***, with effect from **1 June 2019 to date** with remuneration as set out in **paragraph B3, B3.1 and B3.2** above.

PART C

C1. Declaring that the conduct of the Government and DCS in deducting the amounts calculated in **Appendix: A** attached to this notice of motion, from the applicant's **Gross Salary as Head of Office**, in the total amount of **R254 468.44** (Two Hundred and Fifty-Four Thousand Four Hundred and Sixty-Eight Rand and Forty-Four Cents), is unlawful; invalid; and in contravention of section 34 of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA") when read together with the Constitutional Court judgment in **Public Servants Association Obo Oboqu v Head of the Department of Health, Gauteng and Others (2018) 39 ILJ 337 (CC)** ("**Uboqu**").

C2. In the alternative to paragraph **C1**, an order declaring that the conduct of the Government and DCS in deducting the amounts calculated in **Appendix: B** attached to this notice of motion, from the applicant's **Gross Salary as Special Advisor**, in the total amount of **R922 364.44** (Nine Hundred and Twenty-Two Thousand Three Hundred and Sixty-Four Hundred and Forty-Four Cents), is unlawful; invalid; and in

contravention of section 34 of the BCEA when read together with the Constitutional Court judgment in Ubogu.

C3. Directing the Government and DCS to pay back the amount of **R254 468.44** (Two Hundred and Fifty-Four Thousand Four Hundred and Sixty-Eight Rand and Forty-Four Cents) into the applicant's banking account, within a period of ten (10) days from the date of the grant of this Order.

C4. In the alternative to paragraph **C3**, and in the event that this Honourable Court finds that the applicant was legally appointed as **Special Advisor**, then an Order directing the Government and DCS to pay back the amount of **R922 364.44** (Nine Hundred and Twenty-Two Thousand Three Hundred and Sixty-Four Hundred and Forty-four Cents), into the applicant's banking account, within a period of ten (10) days from the date of the grant of this Order.

III. Directing the first, second, third, fourth and fifth respondents and/or any other respondent opposing this application, to pay the costs of this application, including the costs of appointing counsel, jointly and severally, one paying the other to be absolved.

IV. Granting the applicant any further and/or alternative relief."

[2] It is evident from the prayers set out above that there were disputes between the employer and the applicant as to which contract governed the employment relationship. This is reflected in the convoluted prayers for relief set out above. The respondents, in their answering papers, rely on a contract which was eventually signed and backdated by the parties on or about 5 August 2019. The contract is contained in annexure "TM3" to the answering paper. It is in all respects identical to that signed by the applicant when he was appointed as Head of Department in the Office of the Second Respondent, including his level of remuneration, save that his post is now indicated as Technical Specialist.

[3] In respect of the urgency of the application, the applicant makes various submissions in his founding papers relating to the economic distress he will suffer should his contract be terminated on the 30 April 2022. He also relies on the psychological strain he has suffered at the hands of his employer and his

need for medical aid in the future. He underlines that he has worked for the state since 2004 with an unblemished record. He stresses the negative effect on his minor child should his employment be terminated on the 30 April 2022.

- [3] The papers reflect that he was sent a 'Termination of contract letter on the 11 March 2022'. He received same on the 14th March 2022 and replied to it, reserving his rights, on the 15th March 2022. He makes no reference in his founding papers as to the period between the 14th March and the date on which his application for interim relief was launched, being the 6th April 2022. This is a period of some 23 calendar days.
- [4] It is trite that the circumstances relating to urgency have to be explicitly set out in the founding affidavit in an application such as the present. Secondly the Court must be told the reasons why the applicant in a matter cannot be afforded substantial redress at a hearing in due course. Although the applicant has not set out in detail the reasons as to why he did not bring this application at an earlier date after his notice of termination, I am of the view that it should be treated as urgent. This is more especially in view of the fact that full set of papers have now been filed and the application may be treated by this Court as one for final relief. In addition, it is common cause that the applicant's employment contract is to be terminated as of the 30 April 2022 and that such termination is not regarded as related to one of misconduct or incapacity.
- [5] Before the hearing of this matter on the 28 April 2022, the Applicant brought an application for an amendment to the Notice of Motion in the following terms:

"1. By including paragraphs **B7; B8** and **B9** under **PART B** of his notice of motion to read as follows:

PART B

B7. Declaring that the purported contract of employment allegedly entered into on 24 June 2019 at Pretoria by the Government of the Republic of South Africa allegedly represented by the then DC: Human Resource Management, Mr. Emmanuel Khoza in his capacity as DC: Human Resource Management and signed by the applicant on **24 June 2019**, at **Cape Town** on or about 5 August 2019 is null and void *ab initio* with no force and effect, for want of compliance with the essential

requirements of concluding a contract that: (a) the representatives must be authorised; and (b) it must be entered into freely and voluntarily.

B8. Setting aside the purported contract of employment on the same grounds as stated in paragraph **B7**.

B9. In the further alternatives to **Paragraphs B7 and B8**, if this Honourable Court finds that annexure: “**TM3**” to the respondents’ answering affidavit was legally entered into, was valid and binding, then the applicant seeks an order directing that his annexure: “**N6**” should be replaced by annexure “**TM3**” for all intents and purposes and that any reference to annexure: “**N6**” should be understood to be a reference to annexure “**TM3**”; and that any reference to ***Director: Head of Office to the Deputy Minister’s Office (Salary Level 13)*** should be replaced with ***Technical Specialist or Special Advisor (Salary Level 13)***, where appropriate and the notice of motion be amended accordingly. “

- [6] I considered the submissions in respect of this application but have declined to grant it. Counsel for the applicant conceded, correctly with respect, that the applicant should have averred that he signed annexure “TM3” under alleged duress in the founding affidavit, not in reply. A granting of the amendment would in the Court’s view, caused prejudice to the respondents that could not have been compensated by a costs order.¹
- [7] I must now decide the matter on the basis of whether the requisites for final relief have been met in respect of Part B and C of the Notice of Motion. On behalf of the respondents, Mr van der Schyff submitted that given the applicant had relied on the ‘Head of Department’ contract (alternatively that contract purportedly amended by an oral agreement that he be appointed as a Special Adviser to the Second Respondent) in his papers, his application must fail in all respects. This approach has no regard to the fact that the two contracts i.e. ‘TN3 contract’ and the ‘Head of Department Contract’ are identical *in essentialia*. Nor does it take into account that the applicant relies on certain

¹ *Devonia Shipping Ltd v MV Luis* (Yeoman Shipping Co Ltd intervening) 1994 (2) SA 363 © H at 369F-1

statutory prescripts in his application, including section 77(3) and section 37 of the BCEA, in bringing this application.

[8] Clause 3.3 of both the said contracts provide as follows:

“3.3 Subject to the provisions of the Act², and the Labour Relations Act, 1995 either party may, *after consultation and agreement*, terminate the Contract before the expiry of an original term of office or an extended term of office, by giving to the other party one month’s notice of termination, which notice shall –

3.3.1 Be given in writing; and

3.3.2 Be given on or before the last day of a month and take effect on the first day of the succeeding month.”

[9] The applicant himself, as contemplated in clause 3.3, sought a round table discussion to discuss a mutually acceptable termination agreement with his employer given, as he avers, his frustration as the failure of the Department to implement a proposal that he be appointed at level 14, and what he alleges are deductions to his remuneration, by his employer. The response to this approach by his attorneys was met with a termination letter which read as follows:

“11 MARCH 2022

Mr ML Ndara

Office of the Deputy Minister of Justice and Correctional Services

Dear Mr Ndara

RE: TERMINATION OF SERVICE: YOURSELF

1. You are been employed as Director Technical Specialist (level13) in the office of the Deputy Minister of Justice and Correctional Services linked to the term of the contract of the Deputy Minister signed on 24 June 2019.
2. Following your request for a possible transfer, I informed you in writing on 8 January 2022 that I am willing to accommodate you within the

² i.e. the Public Service Act 104 of 1994

Department of Correctional Services as a Director (level 13) linked to the term of office of the Deputy Minister and invited you to apply for such transfer on your own time and cost in writing. You never applied and such transfer is therefore no longer an option.

3. You further indicated your desire to leave your employment with the Deputy Minister. The Deputy Minister has similarly indicated that the working relationship between yourself and the Deputy Minister has broken down irretrievably.
4. The Deputy Minister has therefore in terms of clause 3 of your employment contract decided to terminate your employment with one months' notice. Your last day of service will therefore be on **30 April 2022**.
5. You are required to liaise with the DCS human resource office (head office) to finalise your service termination.

Yours sincerely,

MS Thobakgale

Acting National Commissioner

DATE: 11/03/2022 "

[10] It is common cause on the papers that the termination was not effected for any of the reasons contemplated in section 186 of the Labour Relations Act. The respondents do not allege that the applicant has alternative remedies under the LRA. The termination of employment was notice involved a premature ending of a five year contract tied to the term of office of the Deputy Minister. The applicant asks the Court to declare that the act of termination without the affording of his *audi* rights unlawful, null and void *ab initio* with no force and effect.

[11] On respondents own version a valid contract bound the parties (annexure 'TN3') which contained the *audi* clause. The respondents have provided no explanation as to why it was not honored in their answering papers. It is difficult to fathom why, short of exasperation on the part of the first respondent, the termination letter was issued, without regard to the necessary process being

undertaken. This being the case I am of the view that a clear right has been established (even on the respondents version) to the setting aside of the termination of the employment contract on the basis of the failure to follow due process.

- [12] The respondents in submission have emphasized that the Court should not grant specific performance of the applicant's contract and "reinstate" the him. They rely on the judgment of a full bench of the South Gauteng High Court in the matter between **Old Mutual v Moyo**³. In that matter the full bench set aside an interim interdict, in the interests of justice, which had reinstated Moyo as Chief Executive, pending the finalization of an action. The contract in question was for a fixed duration but with the right to terminate on six months' notice. The contract afforded the employer the right to decide whether or not to hold a disciplinary enquiry or pre-dismissal arbitration where allegations of misconduct have been raised. The decision to terminate the contract on notice was explicitly stated to be proffered as the best way forward, despite allegations of misconduct on the part of the chief executive⁴.
- [13] In this matter the Court is not concerned with allegations of misconduct, as is common cause on the papers. Nor are the contracts in this matter and Moyo on all fours. Furthermore, the Court is now dealing with a final application and there is no action pending in this matter. Reliance on the Old Mutual matter is therefore misplaced.
- [14] There is a further prayer in the applicants notice of motion which this Court is of the view should be granted (even on respondent's version based on its reliance on the annexure "TN3" contract of employment.) That is Prayer **C1. i.e.** "Declaring that the conduct of the Government and DCS in deducting the amounts calculated in **Appendix: A** attached to this notice of motion, from the applicant's **Gross Salary as Head of Office**, in the total amount of **R254 468.44** (Two Hundred and Fifty-Four Thousand Four Hundred and Sixty-

³ A5041/19 [2020]ZAGPJHC 1

⁴ See paragraph 37 of the judgment

Eight Rand and Forty-Four Cents), is unlawful; invalid; and in contravention of section 34 of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA")."

- [15] As I have dealt with above, the "TNS 3" Contract relied upon by the Respondents is identical to that of the initial contract he was appointed on in its terms and in its level of remuneration. On the papers before me, the applicant has shown that his gross remuneration was lowered with effect from his August 2016 salary advice from R103 674. 00 to R95 326.76 without his authorization or consent.
- [16] The respondents have simply made no case in answer to this claim. They have made no allegations or submissions to the effect that the post of Technical Advisor invited a lesser salary on a level 13 SMS post. The contract respondents rely on indicates the contrary in its terms. In proceedings before Court, I asked for clarification on the reduction of gross salary, but none was forthcoming. Certainly no case is made out on the papers by the respondents in this regard. The respondents thus, without explanation to him, or to this Court, reduced the applicant's salary from August of 2019 and in addition did not afford him any adjustments or notch increases during this period. I am unaware if this was due to the continuing attrition between the parties as to the correct post designation of the applicant or not. However, whatever the reasons were, the conduct amounts to the making of unlawful deductions to the remuneration of the applicant. In view of the decision in **Public Servants Association Obo Obogu v Head of the Department of Health, Gauteng and Others (2018) 39 ILJ 337 (CC) ("Ubogu")** I am of the view that prayer C1 of the Notice of Motion (in respect to the amount claimed back as a result of deductions) stands to be granted.
- [17] The respondents have satisfactorily answered the allegations that there was no purported appointment of the applicant to level 14 of the SMS as a Special Advisor. Counsel for the applicant conceded the non-variation clause contained in the contracts before court. Reliance could not therefore be placed on an oral agreement inter alia. I therefore have no need to deal with the various prayers drafted by the applicant in this regard which do not have merit.
- [18] I am of the view that the order I make in this matter is in line with the principle of legality and prescripts that all parties involved in this dispute are obliged to

uphold. I do not accept the approach taken on behalf of the respondents that given the applicant had relied on his contract of employment with the title of Head of Department (the appointment made on the correct level of remuneration) in his papers, that this should vitiate all his remedies. This would be contrary to the principles and statutory prescripts governing the Public Service and contained in the BCEA. In respect of both the orders granted the applicant has shown that the requirements of final relief have been met. A clear right has been established on the papers and the applicant has no alternative relief in respect thereto.

- [19] In as far as costs are concerned, both sides have asked for costs. I am of the view that the applicant as an individual, should not have had to incur the costs of bringing this urgent application. He would not have had to if the first respondent had allowed for the consultation the applicant lawfully requested before notice of the termination of the contract of employment was issued. I therefore, on grounds of equity and law exercise my discretion to make the costs order set out below. The order in respect of this application is as follows:

Order

1. The purported termination of the employment of the applicant as of 30 April 2022 is declared to be unlawful and of no force and effect.
2. The *status quo ante* is thus restored in order that due consultation can take place as to the early termination of the five year employment contract between the parties.
3. The conduct of the Government and DCS in deducting the amounts calculated in **Appendix: A** attached to the Applicant's is notice of motion, from the applicant's Gross Salary in the total amount of **R254 468.44** (Two Hundred and Fifty-Four Thousand Four Hundred and Sixty-Eight Rand and Forty-Four Cents), is unlawful; invalid; and in contravention of section 34 of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA").
4. The first and second respondents are to ensure the payment of the said amount of **R254 468.44** (Two Hundred and Fifty-Four Thousand Four Hundred and Sixty-Eight Rand and Forty-Four Cents) into applicant's bank account within 10 Court days of receipt of this Order.

5. The respondents are to pay the costs of this application jointly and severally, the one paying, the rest to be absolved, including costs of the postponements on the 22 and 24 April 2022, but excluding costs of the application to amend the Notice of Motion.



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: Liziwe Xoliswa Dzai instructed by Nonoza Potelwa Attorneys

Respondents :J Van der Schyff and CJM Daniels instructed by the State Attorney