



**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Not Reportable  
Case no: **C326/2022**

In the matter between:  
**MARIBE MAMABOLO**

**Applicant**

and

**THE DEPARTMENT OF SPORT, ARTS AND  
CULTURE (LIMPOPO PROVINCE)**

**First Respondent**

**THE MEMBER OF THE EXECUTIVE COMMITTEE  
FOR THE DEPARTMENT OF SPORT, ARTS AND  
CULTURE (LIMPOPO PROVINCE)**

**Second Respondent**

**THE HEAD OF DEPARTMENT OF THE  
DEPARTMENT OF SPORT, ARTS AND CULTURE**

**Third Respondent**

**Heard: 4 August 2023**

**Delivered: 13 September 2023**

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**JUDGMENT**

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**CONRADIE AJ**

Introduction

- [1] This matter first came before me on 27 June 2023. At that stage the relief sought by the Applicant was a declaratory order to the effect that he was appointed to the position of Chief Director: Sports and Recreation, Limpopo Province (the position) as of 1 March 2021, and that he was entitled to full back pay and benefits from that date. Alternatively, the Applicant wanted this court to review, in terms of section 6 of the Promotion of Administrative Justice Act (PAJA)<sup>1</sup>, the Respondents' decision not to appoint him into the position.

- [2] Although a notice of opposition was filed by the Respondents, there was no answering affidavit on file. I was only handed a copy of an answering affidavit in chambers prior to the matter commencing, along with the Respondents' heads of argument.
- [3] As the answering affidavit had only been deposed to days before the hearing, the Applicant understandably requested time to prepare a reply. The matter was therefore postponed to 4 August 2023.
- [4] By 4 August 2023, not only was a replying affidavit filed by the Applicant, but the Respondents also applied to file further affidavits. This was opposed by the Applicant.
- [5] At the commencement of the matter on 4 August 2023, I was informed that there would no longer be a fight about the admission of the further affidavits. In addition, the Applicant's representative, Ms McChesney, made the wise decision to abandon the request that this court grant relief in terms of PAJA.
- [6] All that is therefore left for determination is whether or not this court should grant the declaratory relief.

#### Background

- [7] During December 2019 the First Respondent (the Department) advertised the position and the Applicant applied for it.
- [8] The Applicant claims that at the time he had 4 years' experience as an advisor to the Minister of Sport and Recreation and 3 years' experience in a senior position in the private sector. In addition, he claims to have a year's experience as the director in the office of the Director General. The Applicant also claims that he has the necessary academic qualifications for the position.
- [9] Although the closing date for the application was 21 February 2020, the Applicant received no response to his application until 15 October 2020 when he was informed that interviews for the position were postponed until further notice.
- [10] On 21 November 2020, the Applicant, along with six other candidates, were interviewed for the position. After the interview the Applicant was asked to attend a competency assessment which took place on 26 November 2020. After this there was again silence until 17 February 2021 when the Applicant claims he received a call from the Second Respondent, who is the Member of the Executive Committee (MEC) for the Department. According to the Applicant he was driving at the time, with his wife in the car, and took the call on speaker. The MEC introduced herself and allegedly informed him that his application for the position was successful and that his employment would commence on 1 March 2021. She allegedly also indicated that his appointment letter would be sent to him shortly.
- [11] The Applicant was satisfied after the call from the MEC that all due process and internal requirements were complied with and that he was appointed because

- he was the best candidate. He informed his employer at the time of his impending departure and shared the news with his family and friends.
- [12] On 26 February 2021, in the lead up to his commencement date of 1 March 2021, the Applicant messaged the MEC to ask when he could expect his letter of appointment. The MEC responded that same day saying that she would follow up.
- [13] The promised letter of appointment did not arrive, and the Applicant did not commence employment on 1 March 2021. The MEC however texted the Applicant on 9 March 2021 informing him that *“there was an issue with the deployment committee”* and that she would revert in due course.
- [14] The Applicant claims that later in March he received a call from a person who identified himself as Samson Mamabolo from the deployment committee of the African National Congress (ANC).
- [15] Mr Mamabolo, who coincidentally shares the same surname as the Applicant, asked the Applicant who his grandfather was, which school he attended and which branch of the ANC he belonged to.
- [16] There were apparently further messages between the Applicant and the MEC, although these have not been provided to the court, before the MEC ceased communicating with the Applicant.
- [17] The Applicant claims that between March and October 2021 he called the Department several times to enquire about the finalisation of the process. He was informed that the process was ongoing. While this confused him, he assumed it meant that there was an administrative delay in finalising his formal letter of employment.
- [18] On 10 October 2021 the Applicant considered the delay to be inordinate and wrote a formal letter to the Department requesting a written outcome to the recruitment process. Interestingly, in the letter he does not refer to his discussions with the MEC.
- [19] On 22 October 2021 the Department responded informing the Applicant that his application was unsuccessful. The Applicant says that he was astounded by this response as it was contrary to what the MEC had told him.
- [20] On 26 October 2021 the Applicant requested information relating to the recruitment process from the Department in term of the Promotion of Access to Information Act<sup>2</sup> (PAIA). The Department responded on 8 and 29 November 2021 indicating that the matter was receiving urgent attention. According to the Applicant this pleased him as he had been following up for 10 months, all the while believing that the delay was administrative in nature.
- [21] On 20 December 2021 the Department provided the Applicant with the requested information which shows that he was the successful candidate, and

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<sup>2</sup> Act 4 of 2013.

that this decision was sent to the MEC on 5 February 2021 to make the appointment.

- [22] On 21 February 2022 the Applicant's attorneys wrote to the Department demanding confirmation of the Applicant's employment. As the Applicant had also learnt at some stage that the position was re-advertised, he also requested a retraction of the advert.
- [23] While the advert was withdrawn on 1 March 2022, no confirmation of the Applicant's employment was received.
- [24] The Applicant eventually launched this application on 19 July 2022.

#### Submissions

- [25] As indicated above, the issues in dispute have been whittled down to the Applicant seeking a declaratory order that he was appointed as of 1 March 2021 and that he is entitled to backpay from that date.
- [26] In this regard, the Applicant maintains that he was the preferred candidate and that the panel recommended him to be appointed to the position which was approved by the MEC. Further, when he was informed of his appointment, and he accepted it, a contract of employment was concluded.
- [27] The Respondents argue that a declarator should not be granted as the Applicant has alternative remedies, in terms of the Labour Relations Act<sup>3</sup> (LRA). They argue that the Applicant should have referred a dismissal dispute or an unfair labour practice (promotion) dispute as he was a public service employee applying for a higher position.
- [28] Given the view that I take in this matter I only need to address the argument relating to the referring of a dismissal dispute in terms of the LRA.

#### *Respondents' submissions on alternative remedy in terms of the LRA*

- [29] According to the Respondents, the Applicant wants this court to confirm his employment on the basis that his appointment was final, and that a contract of employment was concluded between himself and the Department.
- [30] As the Applicant never commenced employment, the Respondents argue that he was effectively dismissed. In these circumstances, the unfair dismissal provisions in the LRA apply and as such this court does not have jurisdiction to adjudicate this dispute as the LRA offers an appropriate remedy.

#### *Applicant's submissions on alternative remedy in terms of the LRA*

- [31] The Applicant disagrees that this court lacks jurisdiction to hear this matter on the basis that the dispute amounts to a dismissal and must be resolved in terms of the LRA.
- [32] According to the Applicant, he is not obliged to institute his claim under the LRA and has a right to pursue a contractual claim which is what he has done.

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<sup>3</sup> 66 of 1995.

[33] In support of this argument, the Applicant refers to *Ngubene v The National Youth Development Agency & Another*<sup>4</sup> where the Court held as follows:

*“Insofar as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubene has no right to pursue a claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages...”*

[34] The Applicant also refers to section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 (**“the BCEA”**), which provides as follows:

*“The Labour Court has concurrent jurisdiction with the civil court to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”*

[35] The BCEA further sets out the powers of the Labour Court in section 77A(e) which includes *“making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation”*.

[36] Furthermore, in terms of section 158 of the LRA, this Court has the power to make any appropriate order including:

*“158(1)(a)(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary object of this act; and*

*(iv) a declaratory order;”*

[37] Reference is also made to the case of *Fatima Abrahams v Drake & Scull Facilities Management (Pty) Ltd*<sup>5</sup> where it was stated that the Court’s powers include an order for specific performance, and directing an employer to remedy its breach of contract of employment and to abide by its terms.

[38] The Applicant further argues that one must consider when and how the contract of employment was allegedly terminated and that the letter informing him that his application was unsuccessful does not constitute a termination of the contract of employment nor could it have been interpreted as such.

[39] The Applicant relies on the decision of *Chubisi and South African Broadcasting Corporation SOC Ltd*<sup>6</sup> where the Applicant’s appointment to the position of producer / presenter of the Morning Live show of the SABC became the subject of an investigation by the Public Protector, who concluded that her appointment

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4 (2014) 35 ILJ 1356 (LC) para 21

5 (C 1105/10) [2011] ZALCCT 30; [2012] 5 BLLR 434 (LC); (2012) 33 ILJ 1093 (LC) (11 November 2011)

6 (2021) 42 ILJ 395 (LC).

was unlawful and which resulted in the Applicant receiving a notification titled *“Re: Notification of the non-recognition of your purported contract of employment with the SABC”*. As a result, the Applicant sought urgent relief declaring that the termination of her employment by the SABC was unconstitutional, unlawful and invalid and of no force and effect and that the decision be set aside with immediate effect and that she be entitled to report for duty with immediate effect. The Court granted the relief.

- [40] The Applicant concludes by arguing that in the present matter, it cannot be contended that he was dismissed. The Applicant was informed that his application had been unsuccessful. This is patently not the true factual position and is akin to the *“non-recognition”* of the contract of employment in the Chubisi matter referred to above.
- [41] In these circumstances the Applicant argues that he does not have access to remedies under the LRA and as such has sought declaratory relief.

#### Evaluation

- [42] Section 158(1)(a)(iv) of the LRA specifically empowers the Labour Court to grant declaratory orders. It may grant such an order in its discretion depending on the circumstances of the matter before it. The fact that remedies other than a declaration of rights are available, is a consideration which the court will consider in exercising its discretion.<sup>7</sup>
- [43] On the Applicant’s version the MEC advised him telephonically that his application for the position was successful, and that the offer of employment would be sent to him. The MEC also told him that his employment would commence on 1 March 2021.
- [44] Following this discussion, the Applicant informed his family and friends of his new appointment. He also informed his current employer of his pending departure.
- [45] By 26 February 2021 the promised offer of appointment had not arrived and the Applicant contacted the MEC, as opposed to the Department, to find out what was happening. By 1 March 2021 he had still not received the offer of appointment and did not commence employment on that date.
- [46] As the Applicant believed that he was offered the position, the failure to take him into employment on 1 March 2021 amounted to a dismissal. In *Wyeth SA (Pty) Ltd v Manqele & others*<sup>8</sup> the Labour Appeal Court expressly recognised that *“the definition of employee in s 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates”*.

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<sup>7</sup> See *Mantzaris v University of Durban-Westville & others* [2000] 10 BLLR 1203 (LC) at 212.

<sup>8</sup> (2005) 26 ILJ 749 (LAC) at para 52.

- [47] The Applicant could therefore refer an unfair dismissal dispute in terms of the LRA to the applicable bargaining council. The commissioner appointed by the bargaining council would be best placed to deal with the matter, including determining, if need be, whether a contract had indeed come into effect.
- [48] In addition to the above failure on the part of the Applicant to take the simplest of steps to resolve his dispute, he had another opportunity to do so. According to him, on 22 October 2021 the Department informed him that his application was unsuccessful, which he claims astounded him as it was contrary to what the MEC had told him. At this juncture he also failed to refer an unfair dismissal dispute to the bargaining council. Rather, on 26 October 2021 the Applicant requested information relating to the recruitment process from the Department in term of PAIA.
- [49] In addition to the above failures, the Applicant also took an inordinate amount of time to approach this court for a declarator which is apparent from the facts summarised above. Everything said and done the Applicant only launched this application on 19 July 2022 nearly 18 months after the date he claims he should have commenced employment. The Applicant now wants this court to order that he be appointed into the position from 1 March 2021 and that he be paid from that date.
- [50] The Applicant's argument that he is entitled to elect to sue for specific performance as opposed to referring a dismissal dispute does not assist him for the simple reason that he never approached this court for an order of specific performance. That is not the case that he pleaded.
- [51] For all of the above reasons I am not prepared to exercise my discretion to grant the requested interdictory relief.
- [52] As far as costs are concerned, there is no basis for departing from the established principle that costs should not be awarded in labour matters. Both parties are to blame for this matter ending up in court. The Respondents clearly have a lot to answer for the way that the recruitment process was handled, and the Applicant should have approached the bargaining council for relief as soon as it became clear that the employment he was allegedly offered was not going to materialise, instead of approaching this court. The only exception is in respect of the wasted costs occasioned by the postponement on 27 June 2023. Despite this application being launched on 19 July 2022, the Respondents only filed their answering affidavit a few days before the matter was scheduled to be heard. The Applicant understandably needed an opportunity to properly consider and reply to the answering affidavit and the matter had to be postponed. The Applicant is therefore entitled to his wasted costs occasioned by the postponement.
- [53] In the circumstances I make the following order:

#### Order

1. The application is dismissed.

2. The Respondents are to pay the Applicant's wasted costs occasioned by the postponement on 27 June 2023.



**BN Conradie**  
**Acting Judge of the Labour Court of South Africa**

Appearances

For the Applicant: Ms MA McChesney instructed by Van Niekerk & Jansen van Rensburg Attorneys

For the Respondent: Mr MC Setlhako instructed by the State Attorney