

SOUTH AFRICA / JUDGMENT

Hackula v Premier of the Eastern Cape Province and Another (PS39/17)

[2023] ZALCPE 15 (4 August 2023)

[2023] ZALCPE 15**COURT**

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PS39/17

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA****Not Reportable****CASE****NO: PS39/17****In the matter between:****NOMBULELO****CALPURNIA HACKULA****Applicant****And****PREMIER****OF THE EASTERN CAPE PROVINCE****First****Respondent****MEC,****DEPT OF COOPERATIVE GOVERNANCE****AND****TRADITIONAL AFFAIRS, EASTERN CAPE****PROVINCE****Second****Respondent****Heard: 19****August 2022****Delivered: This****judgment was handed down electronically by circulation to the****Applicant's and Respondents' Legal Representatives****by****email, publication on the Labour Court website and release to SAFLII.****The date and time for handing - down is deemed to be 12h00**

on 4
August 2023.

JUDGMENT

LALLIE, J

- [1] The applicant instituted these proceedings against the respondents in terms of section 77 (3) read with section 77 A (e) of the Basic Conditions of Employment Act[1] (the BCEA). She claims that she was not paid remuneration she was entitled to in terms of her contract of employment and seeks relief in the form of an order of specific performance. The respondents opposed the applicant's claim on the basis that she is not entitled to the remuneration as she had already been dismissed at the material time.
- [2] The applicant's employment by the government of the Eastern Cape Province can be traced from February 2011 when she was employed on a fixed term contract as the Head and Accounting Officer of the Department of Social Development and Special Programmes. The duration of the fixed term contract was 3 years. In October 2014 the applicant was appointed as the Head of the Department of Social Development on a 5 year fixed term contract which due to expire on 30 September 2019. On 1 June 2015, the applicant was transferred to the Department of Co-operative Governance where she held the position of the Head of the Department. On 3 May 2016 she was suspended from duty by the Premier who, on 16 June 2016, issued her with a disciplinary notice. The disciplinary enquiry was held and the applicant was found guilty of acts of misconduct and the sanction of her dismissal was pronounced in December
2016. On 19 December 2016, the applicant received a letter in which the first respondent, inter alia, informed the second to give effect to the finding and sanction of dismissal in terms of section 16B (1)(a) of the Public Service Act[2] (the PSA).
- [3] The applicant's appointments were effected in terms of the PSA. It is common cause that the applicant's disciplinary enquiry which was chaired by an attorney who is not an employee of the respondents was held in terms of section 16B (1) of the PSA. The applicant conceded that the chairperson acted within his powers in reaching the finding that she be dismissed. She, however, contended that the chairperson exceeded his authority in making the order that she is dismissed because it is the second respondent who was vested with the power to dismiss her in terms of section 17(1)(b) of the PSA. The power had to be exercised in terms of section 16B (1)(a) of the PSA by the second respondent giving effect to the sanction of dismissal which had been pronounced by the chairperson. The applicant added that in terms of section 37
- (1) (4) and (5) of the BCEA only the state could terminate her

contract of employment on written notice. The applicant submitted that absent the proper termination of her contract of employment by the authorised factionary, her contract remained extant. She was, in her view, entitled to remuneration for the remainder of her fixed term contract.

[4] The issue for determination is whether the respondents acted in violation of the applicant's contract of employment and failed to terminate it lawfully. The applicant's case is premised on 2 broad grounds. The first is that her contract of employment was not terminated lawfully because the party who had the statutory empower to give effect to the sanction of the chairperson did not exercise it. She relied on *Schierhout v Minister of Justice*[3] where the court made the following finding:

'The removal of the plaintiff, contrary to the peremptory provisions of the Act, was therefore a nullity, and he is entitled to claim that it should be regarded as never having been done'.

In support of the applicant's case, reliance was also made on *Steenkamp and Others v Edcon Limited*[4] where the principle in *Schierhout* was referred to with approval in the following words"

'An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer'.

[5] The respondents' case was that the applicant was dismissed lawfully in December 2016 in terms of the SMS handbook read with sections 12 (1), 16(B) and 17 of the PSA. It was argued on behalf of the respondents that a proper interpretation of the relevant legislation and prescripts supports their version. In support of their contention, the respondents relied on *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] where the court adopted the following approach on the interpretation of an ambiguous statutory provision:

'[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[6] Section 16B of the PSA confers the power to give effect to the sanction of dismissal issued by the chairperson of a disciplinary enquiry on the executive authority. In section 1 of the PSA 'executive authority' in relation to a provincial department is the Member of the Executive Council. It is therefore the MEC of COGTA, the department the applicant was the head of who was empowered by section 16B of the PSA to give effect to the sanction. The Premier was aware of the MEC's legal obligation because in a letter he addressed to the latter on 15

December 2016, the Premier tells him to give effect to the finding and sanction in terms of section 16B (1)(a) of the PSA. It is common cause that after receiving the sanction from the chairperson of her disciplinary enquiry the applicant received only the copy of the letter the Premier addressed to the MEC and no further correspondence.

[7] The respondents' argument that a purposive interpretation of section 16B of the PSA supports their version that the applicant's contract of employment was terminated lawfully is untenable. The provisions of section 16B (1) of the PSA on who has to exercise the power of giving effect to the sanction of dismissal are clear and unambiguous. The subsection must therefore be given a literal interpretation. The need for a purposive or any interpretation other than the literal one does not arise. The respondents provided no cogent reason for the MEC's omission to exercise the power vested in him in section 16B and give effect to the sanction of dismissal. It is trite that when legislation grants a functionary authority to exercise certain authority, the authority may only be exercised by that functionary. The respondents tendered no evidence on how effect was given to the sanction of dismissal. I accept the applicant's version that in terms of a proper interpretation of section 16B (1) of the PSA, the chairperson's obligation was to chair her disciplinary enquiry and issue the sanction. As the chairperson had issued the sanction of dismissal it was for the MEC to give effect to it and terminate the applicant's contract of employment in writing. In the absence of communication in clear and unequivocal language by the MEC giving effect to the sanction of dismissal by informing the applicant that she had been dismissed, the applicant's contract of employment was never terminated in December 2016.

[8] In *Steenkamp and Others v Edcon Limited*[6] the Constitutional Court expressed the position of a dismissal effected in breach of legislation in the following words:

'[189] An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer...'

It is common cause that the applicant's last fixed term contract of employment expired on 30 September. The applicant therefore held her position as the HOD of COGTA until 30 September 2019. In her statement of claim which was served on the State Attorney on 30 June 2017, the applicant tendered to continue her employment. She claimed judgment in the sum of R865 275.42 in respect of remuneration for January 2017 to June 2017 and R144 212.57 in respect of each month in arrears from 1 July 2017 duly adjusted by any salary increases implemented to members of the SMS until 30 September 2019. The applicant's claim is based on specific performance.

[9] The unlawful termination of the applicant's contract of employment constituted a material breach of contract which entitled the applicant to sue for the specific performance that forms the basis of her claim. It is trite that a court has a discretion to either grant or refuse an order for specific performance. In *Benson v SA Mutual Life Assurance Society*[7] the manner in which the discretion has to be exercised is expressed as follows:

'It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance- and the basis principles thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstance, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy...'

[10] I have decided to exercise the discretion not to grant the order of specific performance the applicant seeks because granting it will produce an unjust result. The applicant held a senior position as the HOD of COGTA. She was subjected to a disciplinary enquiry the chairperson of which found her guilty of serious acts of misconduct including dishonesty and financial misconduct involving millions of Rand. The chairperson found that dismissal would be the only appropriate and fair sanction for each of the 4 charges she had been found guilty of. The applicant was informed by the chairperson in writing in December 2016 that she had been dismissed. Before the institution of the disciplinary enquiry the applicant had been suspended from duty from 3 May 2016. It would be contrary to public policy to order specific performance in light of the applicant's conduct which led to the breach of her contract of employment. The nature of the breach, on the applicant's version, is the failure by the Member of the Executive Council to inform her in writing that she had been dismissed. Justice, in the circumstances of this case demands that specific performance be denied.

[11] Fairness requires that the applicant should not be left out of pocket as a result of the respondents' unlawful conduct.

[12] In the premises, the following order is made:

1. The applicant remained employed by the respondents until 31 September 2019.
2. The relief of specific performance is refused.
3. The respondents pay the applicant's costs jointly and severally one paying the other to be absolved.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate Grobler

Instructed by:

McWilliams & Elliott Inc.

For the Respondent:

Advocate Buchanan SC with Advocate Boswell

The State Attorney

[1] 75 of 1997 as amended.

[2] 103 of 1994.

[3] 1926

[4] [2016] 4 BLLR 335 (CC).

[5] 2012

(4) SA 594 (SCA).

[6] [2016] 4 BLLR 335 (CC) at para 189.

[7] 1986

(1) SA 776 at page 783 C-E.

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Prepared on 11 October 2026 · Esheria