

SOUTH AFRICA / JUDGMENT

MEC for Economic Development, Environment & Tourism v Mogahlane (JA42/2016) [2018] ZALAC 29; (2019) 40 ILJ 315 (LAC); [2019] 4 BLLR 347 (LAC) (31 October 2018)

[2018] ZALAC 29

COURT

Labour Appeal Court

BEFORE

Waglay, Davis, Kathree-Setiloane

CASE / FILE NUMBER

JA42/2016

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IN THE LABOUR APPEAL COURT OF SOUTH
AFRICA, JOHANNESBURG

Reportable

Case no: JA42/2016

In the matter between:

MEC
FOR ECONOMIC DEVELOPMENT
ENVIRONMENT
& TOURISM
Appellant
and
MADIMETJA ABRAM MOGAHLANE
Respondent
Heard: 13 September 2018
Delivered: 31 October 2018

Summary:

Unreasonable delay in the prosecution of a review application in terms of section 158(1)(h) of the LRA – court finding that although there is no prescribed time limit for launching a review under section 158(1) (h) of the LRA it should be initiated within a reasonable time – held that a delay of almost six months is excessive particularly where, as found by the Labour Court in this matter, the explanation was wholly unreasonable – further that if there is no merit in the legal challenge to the impugned decision, no purpose would be served by overlooking the delay – Court finding on the merits that employee's appointment was in compliance with the regulations – Labour Court judgment upheld and appeal dismissed with costs.
Coram: Waglay JP, Davis JA and Kathree-Setiloane AJA

JUDGMENT**KATHREE-SETILOANE AJA**

[1] The Appellant is the Member of the Executive Council (MEC) for Economic Development, Environment and Tourism for Limpopo Province. He brought an application in the Labour Court, in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 (LRA), to review and set aside the appointment of the Respondent, Mr MA Mogahlane as Senior Manager: MEC Support Services in the Department of Economic Development, Environment and Tourism. On 25 November 2015, the Labour Court (Banks AJ) dismissed the Appellant's application.

[2] The Appellant applied for leave to appeal the judgment and order of the Labour Court. It dismissed the application. The Appellant

petitioned this Court for leave to appeal. It granted the Appellant leave to appeal on 2 November 2016.

[3] The appeal was set down for hearing in this Court on 9 November 2017. The Appellant failed to appear at the hearing, and this Court (Coppin JA, Phatshoane and Savage AJJA) dismissed the appeal with costs.

Application for Rescission

- [4] The Appellant applied for an order rescinding the order of 9 November 2017 on the basis that this Court granted it erroneously and in the absence of the Appellant who did not receive the notice of set-down. The Respondent did not oppose the application for rescission as it was common cause that the Appellant did not receive the notice of set-down. In the light of this, the order of 9 November 2017 must be rescinded and set aside.

The Appeal

Background

- [5] The Respondent was appointed as Appointment Secretary to the MEC in the Department of Transport, Limpopo Province with effect from October 2009. He was transferred to the Department of Economic Development, Environment & Tourism, Limpopo Province on 19 March 2012, where he held the position of Appointment Secretary to the MEC.

- [6] The position of Senior Manager: MEC Support Services in the Department became vacant during April 2013 (post). The Department

advertised the vacant post. The Respondent applied and was duly appointed acting Senior Manager: MEC Support Services with effect

from 1 July 2013.

- [7] The interviews for the post took place on 15 July 2013. The selection committee (appointed by the HOD) interviewed six candidates including the Respondent. The Respondent obtained the highest score (76.5%). The candidate with the second highest score (70.5 %) was Mr MR Mosila (Mr Mosila).

- [8] The Senior Manager: Human Resources made a formal request to the Senior Manager: Security and Investigation Services on 16 July 2013 for verification of qualifications of the Respondent and Mr Mosila. Ms KM Moselane, the scribe for the Human Resources Division, telephoned both the Respondent and Mr Mosila on the same day to arrange for them to go to Security Investigation Services for vetting of their qualifications. She contacted the Respondent, who made himself available to Security Investigation Services for vetting on the same day. She also contacted Mr Mosila but was unable to get hold of him. So Security Investigation Services only vetted the Respondent on the afternoon of 16 July 2013.

- [9] On the same day, Ms Moselane prepared a submission recommending the appointment of the Respondent or Mr Mosila to the Head of Department, Mr NS Kgopong (HOD) and the erstwhile MEC Economic Development, Environment, and Tourism, Ms Pinky Kekana (erstwhile MEC). However, since Mr Mosila did not attend the vetting with Security Investigation Services, Mr T Mdau (Mr Mdau), the Senior Manager: Human Resource Management, recommended the appointment of the Respondent on 16 July 2013. Mr KJ Motene (Mr Motene), the General Manager-Corporate Services, and Mr DF Mothapo (Mr Mothapo), the Acting Chief Financial Officer, did so as well. All three of them were members of the selection committee. Mr Kgopong, the Head of Department (HOD) and the erstwhile

MEC approved the recommendation of the select committee.

- [10] The HOD signed the Respondent's appointment letter on 16 July 2013. It stated that the appointment was "subject to a positive personal security clearance." The Respondent received the appointment letter on 17 July 2013. On 24 July 2013, the HOD, on instructions from the Appellant, reversed the Respondent's appointment on the basis of a purported irregularity, as the decision to appoint the Respondent was not made in conformity with the applicable procedures for appointment in the public service, namely Chapter 1. Part VI, clauses D.7 and D.8 of the Public Service Regulations, 2001 (Regulations).

In the Labour Court

- [11] The Appellant applied for an order declaring the appointment of the Respondent as Senior Manager-MEC Support Services at the instance of the erstwhile MEC and HOD to be unlawful and null and void.[1] The appointment which the Appellant sought to set aside was made on 16 July 2013, yet the Appellant's application for review was delivered only on 13 January 2014. The Respondent opposed the relief sought by the Appellant and filed a counter-application in which he sought an order confirming his appointment to the position of Senior Manager-MEC Support Services with effect from 1 August 2013, and for an order directing the Appellant to reinstate him into that position with full retrospective effect to 1 August 2013 without loss of benefits.
- [12] The Respondent took the point, in his answering affidavit, that the Appellant had unreasonably delayed in launching the review

application and challenged it to explain the delay. The Appellant did not file a reply to the Respondent's answering affidavit. Nor did it oppose the counter-application. It did, however, apply for condonation for the late filing of its review application. The Appellant's application for condonation was only delivered on 21 August 2014. The Respondent opposed the application on two bases. The first was that the Appellant had failed to advance a reasonable and acceptable explanation for the delay in launching the review application. The second was that the review application had no prospects of success. The Appellant did not file a reply to the Respondent's answering affidavit in the condonation application.

Application for Condonation

- [13] On determination of the condonation application, the Labour Court held that, although no statutory time-limit has been set for a review in terms of section 158(1)(h) of the LRA, a review delay of more than six weeks has been held to be unreasonable requiring an application for condonation. With reference to the decision of the Constitutional Court in *Khumalo v MEC for Education: KwaZulu – Natal (Khumalo)*,[2] the Labour Court observed that courts have the power, as part of their inherent jurisdiction to regulate their proceedings, to refuse a review application in the face of an undue delay in initiating proceedings or, in appropriate circumstances, to overlook the delay. The Labour Court was not persuaded by the Appellant's explanation for the delay between the Respondent's

appointment on 16 July 2013 and the launch of the review application almost six months later on 13 January 2014. It found the delay to be excessive and the explanation for the delay to be highly unsatisfactory.

[14] Concerning the prospects of success on the merits of the review application, the Labour Court held as follows:

‘[27] Having regard to the Appellant’s prospects of success on the merits of the matter I do not believe that the alleged defect in the appointment procedure can be said to be ultra vires or defective. It is beyond dispute that the other incumbent, Mr Mosila, could not be contacted and was therefore disqualified from further consideration for the position. Mr Mokgahlane was thus the only incumbent who could possibly have filled the post. The mere fact that one or other signature appears to have been missing from the form in question cannot, in my view, be said to constitute a defect of such magnitude that it could in any way serve to vitiate the entire appointment process. In fact, it is of minimal significance and could easily have been rectified. Mr Mokgahlane’s qualifications had long before been verified by the [Appellant] and there appears to be no good reason why his appointment could not have been ratified by the new MEC once appointed. The fact that this did not occur compels me to agree with the submission that Mokgahlane appears to have been a pawn in a political power play.

[28] I am also not satisfied that the remaining grounds of review have any prospects of success. I am unpersuaded that the Public Service

Regulations, 2001 were contravened as the [erstwhile] MEC indeed approved the recommendation of Mr Mokgahlane and his selection was in turn made by the selection committee. As an internal, not external candidate, there was no need to again verify his credentials as this was done when he was first employed by the Department of Transport in

2009. There is nothing to suggest that Mr Mokgahlane’s qualifications were not in fact positively verified, and I agree with the submission on his behalf that it must be accepted that verification thereof must have taken place at the time that Mokgahlane’s letter of appointment was issued. None of the other purported grounds of review takes the Appellant’s case much further.’

[15] The Labour Court accordingly dismissed the Appellant’s application for condonation as well as its application for review. It granted the Respondent’s counter-application for an order “confirming the appointment of the Respondent to the position of Senior Manager: MEC Support Services: Department of Economic Development, Environment, and Tourism: Limpopo Province with effect from 1 August 2013”. It also ordered the Appellant to pay the costs of both applications. The appeal lies against these orders.

[16] Although there is no prescribed time limit for launching a review under section 158(1) (h) of the LRA, this type of review application should be initiated within a reasonable time.[3] A period of six weeks has been regarded by our courts to be “within a reasonable time.”[4] In a legality review, the review application must be initiated without undue delay.[5] Courts have the power, as part of their inherent jurisdiction, to regulate their proceedings, to refuse a review application where

there has been an unwarranted or undue delay in initiating proceedings, or to overlook the delay in appropriate circumstances.[6] There is, however, no requirement for a party who has unduly delayed the initiation of its review application under section 158(1)

(h) of the LRA, to bring a formal condonation application.[7] The Labour Court, therefore, erred in holding that where the application is more than six weeks late, a formal application for

condonation must be brought. However, this does not mean that the defaulting party is not required to provide the Court with an

explanation for the undue delay in initiating the review application under section 158(1)(h) of the LRA, and persuade it to exercise its discretion in favour of overlooking the delay and entertaining the review application.

[17] In *Gqwetha v Transkei Development Corporation (Gqwetha)*,[8] the Supreme Court of Appeal (SCA) held that an assessment of a plea of undue delay involves examining (i) whether the delay is unreasonable or undue, and if so, (ii) whether the Court's discretion should be exercised to overlook the delay and nevertheless entertain the application. In relation to the first leg of the inquiry, the explanation offered for the delay is considered. In the absence of any explanation (or any reasonable explanation), the delay would be unreasonable.[9] Concerning the second leg of the inquiry, the Court is required to assess the delay with reference to its potential prejudice to the affected parties and having regard to the possible consequences of setting the impugned decision aside.[10]

[18] A delay of almost six months is excessive particularly where, as found by the Labour Court in this matter, the explanation was wholly unreasonable. The Appellant does not challenge this finding of the Labour Court on appeal. It is only its failure to overlook the delay that the Appellant seeks to challenge on appeal. I am of the view that there is no point in overlooking an undue delay if there are no prospects of success on the merits. In other words, if there is no merit in the legal challenge to the impugned decision, no purpose would be served by overlooking the delay. Significantly, in *Khumalo*, the Constitutional Court held:

‘An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires

analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.’[11]

[19] As is demonstrated below, the Labour Court correctly found that the Appellant's challenge to the impugned decision lacked prospects of success. The Labour Court did not misdirect itself by not overlooking the undue delay of almost six months. It would have been remiss to do so in the face of a meritless challenge to the Respondent's appointment.

The Merits

[20] The Appellant's contentions on the merits can be summed up as follows:

- (a) The Respondent's appointment to the post is in contravention of clause D.7 of the Public Service Regulations, 2008 (Regulations) as the erstwhile MEC did not record in writing her reasons for not approving the appointment of Mr Mosila.
- (b) It is not clear from her approval that she approved the appointment of the Respondent, as she deleted the words "not approved"

and left in the words "approved" but omitted to enter the Respondent's name as the candidate being approved.

- (c) The MEC acted in contravention of D.8 of the Regulations because, at the time of approving the Respondent's appointment, the verification of his qualifications was outstanding.
- (d) The HOD acted in contravention of the Recruitment and Selection Policy 2012[12] by signing the letter of appointment while the process of verification was incomplete. And the authority to appoint vested with the erstwhile MEC and was not delegated.

[21] Clause D. 7 of the Regulations[13] provides that when a MEC does not approve a recommendation of the selection committee for an appointment, she shall record reasons for her decision in writing. Properly construed, this means that where the MEC does not approve the select committee's recommendation

of a candidate for appointment to a particular post, the MEC must record her reasons for not approving that candidate in writing.

[22] In the present case, there was only one vacant position that needed to be filled. Although the submission prepared by the Human Resources Division recommended the appointment of the Respondent and Mr Mosila for appointment to the post, the selection committee only recommended the Respondent for appointment to the post. This was because Mr Mosila did not attend the vetting with Security Investigation Services. The document entitled "Consideration for Filling of the Advertised Post of Senior Manager: MEC Support Services" reveals that the selection committee recommended one candidate for appointment to the post. In making his recommendation, Mr Mudau deleted the words "not recommended" and left in the word "recommended." Underneath the word "recommended"

he inserted, in manuscript, the words "[t]he appointment of Mr Mogahlane MA as Senior Manager: MEC Support Services." Mr Motene and Mr Mothapo's dittoed Mr Mudau's recommendation for appointment to the post. After that, the HOD and erstwhile MEC approved

their recommendation for appointment to the post. There was simply no need for the HOD or the erstwhile MEC to insert the Respondent's name below the word "approved" as it was clear that each of them approved the recommended candidate. To, therefore, suggest, as does the Appellant, that "it is not clear from the erstwhile MEC's approval that she approved the appointment of the Respondent" is disingenuous.

[23] There is furthermore no merit in the contention that the Respondent's appointment is in contravention of Clause D.7 because the erstwhile MEC had omitted to provide reasons for not approving Mr Mosila for appointment to the post. As I see it, since the erstwhile MEC had approved the select committee's recommendation, there was no need for her to record any reasons in writing as contemplated in clause D.7 of the Regulations. The failure to give reasons for an administrative decision is only reviewable where there is a duty in law to do so. The Regulations impose no such duty where a MEC has approved the recommendation of the selection committee.

[24] On 29 March 2012, the erstwhile MEC delegated her function, to appoint any person to her Department, to the HOD in terms of Part A: Executive Authority Delegations to HOD for Economic Development, Environment, and Tourism in Limpopo Province. Clause 8.2.1 of the Recruitment and Selection Policy of 2012, which was "issued under the authority of the MEC," provides that the HOD shall appoint a selection panel to make recommendations on shortlisted candidates and appointments to posts. Clause 8.2.5(a) of the Recruitment and Selection Policy provides that before deciding on an appointment or the filling of a post, the HOD must be satisfied that, the recommended candidate qualifies in all respects for the post and, her qualifications have been verified. Clause 8.7(3) provides that:

'Before making its final recommendation, the selection committee should ensure that the information provided by the nominated candidate has been verified. This typically includes information pertaining to her/his educational qualifications, citizenship, and experience. The final decision maker should be advised accordingly.'

What is clear from the Recruitment and Selection Policy, is that the erstwhile MEC's function of being satisfied that the candidate qualifies in all respects for the post as required under clause D.8[14] of the Regulations is delegated to the HOD and the selection committee.

[25] The Respondent was not an external candidate when he applied for the post. His qualifications were verified when he was appointed in the Department of Transport during 2009, and again in 2012 when he was appointed as Appointment Secretary to the MEC in the Department of Economic Development, Environment, and Tourism in Limpopo Province. The Respondent says as much in his answering affidavit. He also says that "the verification of his qualifications must have been completed" by the time the appointment letter was signed by the HOD on 16 July 2013 and issued to him on 17 July 2013. The Appellant does not deny these allegations.

[26] Since the Appellant has failed to deny, by way of a replying affidavit, that the Department had verified the Respondent's

qualifications, this Court must accept that it verified his qualifications before the HOD signed and issued his appointment letter on 16 July 2013.[15] Although the HOD signed the letter of appointment, he did this on the authority of the erstwhile MEC. The Appellant does not deny this. Only the results of the Respondent's security clearance were outstanding at the date of issue of the letter of appointment. As indicated in the letter, the appointment was "subject to a positive personal security clearance." Positive security

clearance results were received on 18 July 2013. This was before the effective date of the Respondent's appointment (1 August 2013). Crucially, the Appellant does not dispute this allegation.

[27] The Respondent's appointment to the position of Senior Manager: MEC Support Services is not in contravention of D.07 and D.08 of the Regulations. The Respondent scored the highest score of all the candidates who applied for the post. The Department positively verified his qualifications, and he received a positive security clearance. The selection committee recommended his appointment to the post. The HOD and erstwhile MEC approved their recommendation and appointed the Respondent to the position.

[28] In the circumstances, I consider the finding of the Labour Court that the Appellant has no prospects of success in the review application to be unassailable. Accordingly, the Labour Court did not misdirect itself by dismissing both the Appellant's condonation application and its review application.

Counter-application

[29] The Appellant did not oppose the Respondent's counter-application. The Respondent was consequently entitled to the relief sought in that application on the Labour Court's dismissal of the review application.

Costs

[30] I see no reason why costs of this appeal should not follow the result. This would be a fair outcome as the Respondent funded these proceedings and was not supported by his trade union.

[31] The Respondent seeks a cost order in his favour for the 9 November 2017 hearing. It would be iniquitous to mulct the Appellant with those costs, because its absence from court, on that occasion, was due to it not having received the notice of set down which is common cause. It is for this reason that the Respondent did not oppose the Appellant's application to rescind the 9 November 2017 order which erroneously dismissed the appeal in the absence of the Appellant. In the circumstances, I see no reason for also awarding the Respondent the costs of the 9 November 2017 hearing.

Conclusion

[32] For these reasons, the appeal should be dismissed with costs.

Order

[33] In the result, I order that:

1. The previous order of the Labour Appeal Court of 9 November 2017, under case number JA 42/16, dismissing the appeal is rescinded and set aside.
2. The appeal is dismissed with costs.

F Kathree-Setiloane

Acting Judge of Appeal

B Waglay JP and D Davis JA concur

APPEARANCES:

FOR THE APPELLANT: Mr

SB Nhlapo

Instructed by: The State Attorney, Pretoria

FOR THE RESPONDENT:

Mr R Grundlingh

Instructed by: Thomas Grobler Attorneys

[1] The relief was framed in the form a declaratory order, but the case put forward by the Appellant in his founding papers was for a review in terms of section 158(1) (h) of the LRA. Section 158(1) of the LRA provides that the Labour Court may review any decision taken or act performed by the State in its capacity as employer, on such grounds as are permissible in law. This is the so-called legality review.

[2] Khumalo v MEC for Education: KwaZulu - Natal [2014] 35 ILJ613 (CC) at 626 – 627.

[3]Khumalo at para 42.

[4] Weltevrede Kwekery (Pty) Ltd v CCMA (2006) 27 ILJ 182 (LC) at paras 51and 61; SACCAWU obo Manzana v Pick 'n Pay, Kimberley

[2003] 10 BLLR 1065 (LC) at paras 114 and 151.

[5] Khumalo at para 44.

[6]Khumalo at para 44. Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at para 46.

[7] Khumalo at para 44.

[8] Gqwetha v Transkei Development Corporation 2006

(2) SA 603 (SCA) at paras 33-34.

[9] Khumalo at para 50.

[10] Gqwetha at paras 33-34.

[11] Khumalo at para 27.

[12] This policy is applicable to all employees of the Department of Economic Development, Environment and Tourism.

[13] Clause D.7 of the Regulations provides: "When an executing authority[13] does not approve a recommendation of a selection committee, she or he shall record reasons for her or his decision in writing."

[13] Clause D.7 of the Regulations provides:

"When an executing authority[13] does not approve a recommendation of a selection committee, she or he shall record reasons for her or his decision in writing."

[14] Clause D.8 of the Regulations provides: "Before making a decision on an appointment or the filling of a post, an execution authority shall- (a) Satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims in her of his application for the post have been verified; and (b) Record in writing that verification."

[14] Clause D.8 of the Regulations provides:

"Before making a decision on an appointment or the filling of a post, an execution authority shall-

- (a) Satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims in her of his application for the post have been verified; and
- (b) Record in writing that verification."

[15] On the Appellant's own version, Mr Mudau, the Senior Manager-Human Resources made a formal request to the Senior Manager-

Security and Investigation Services to verify the qualifications of the Respondent and Mr Mosila, and inform his office accordingly. Mr Mudau recommended the appointment of the Respondent to the post.

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