

SOUTH AFRICA / JUDGMENT

Mokhanda v Rammutla (27316/2011) [2018] ZAGPPHC 857 (19 August 2018)

[2018] ZAGPPHC 857**COURT**

North Gauteng High Court, Pretoria

BEFORE

RJA Moultrie

CASE / FILE NUMBER

27316/2011

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****no: 27316/2011****In****the matter between:**

JOSEPH
MAILA
MOKHANDA Plaintiff
and
HANS
DIMPANYANA
RAMMUTLA Defendant

JUDGMENT**MOULTRIE AJ**

- [1] The plaintiff sues the defendant, his erstwhile attorney, for damages allegedly suffered as a result of the latter's negligence in failing to diligently pursue a claim that the plaintiff alleges he had against the Mpumalanga Department of Education ("the Mpumalanga Department") for its failure to appoint him as Head of the Natural Science and Mathematics Department at Lekholane School. The defendant admits that he was negligent in allowing the plaintiff's claim to prescribe, but disputes that such a claim would have been successful and contends that the defendant's negligence thus did not cause any damage to the plaintiff. With the

merits and quantum having been separated, the parties agree that the question for determination in this matter is therefore whether the plaintiff indeed had an enforceable claim against the Mpumalanga Department.

- [2] The plaintiff was employed as a secondary school educator at a school falling under the jurisdiction of the North-West Provincial

Department of Education (“the North-West Department”).

- [3] During October 2004, the Mpumalanga Department advertised an “open vacancy list” of various positions (“the advertisement”), including post number 67002-130 in the Marapyane circuit of the Nkangala Region of the Mpumalanga Department. The post was identified as “ED Specialist (HOD): Natural Science, Mathematics”, being that of Head of the Department of Natural Science and Mathematics at Lekholane School (“the post”).

- [4] The advertisement contained the following relevant information regarding the advertised posts under the heading “IMPORTANT

NOTICE”:

“These posts are advertised in terms of section 6(1)(2)(3) and 7(1) of the Employment of Educators Act, 1998, read with ELRC Resolution No 2 of 2003. While the vacancy list is open for any suitably qualified applicants, it is compulsory for all educators in promotional ranks who are in addition to the approved posts establishments to apply

Applicants who are in addition to the approved posts establishments should indicate "IN ADDITION" at the top of Application Form EDU1. The Department will verify their additional status. Preference will be given to the selection of applicants who are in addition. This preferential status will however only apply to advertised posts on the same level as the current level of the educator in addition and not to advertised posts on a higher level.”

- [5] The advertisement recorded the following under the heading “MINUTES OF PROCEEDINGS”:

“Only legally constituted school governing bodies may make recommendations for appointment.

The minutes of the selection and interviewing process serves as a record of such proceedings as well as the reference documents in case of any grievances. ...

Minutes of the selection and interviewing process should contain the following: ...

- Discussion of interviewed candidates who are recommended to be potential candidates, in preferential order with due motivation
- ...
- Final recommendations of Governing Body in order of preference.”

[6] It is relevant here to note the significance of the concept of an educator ‘in addition’. The term has its origin in Collective Agreement 2 of 2003 concluded by the parties to the Education Labour Relations Council (“the ELRC agreement”), where it was recorded that:

“(b) Subject to regulations on post provisioning, a head of a Provincial department of education must, from time to time, inform each institution of its new educator post establishment. As a result of operational requirements the new staff establishments may provide for fewer posts than the existing staff establishment or the skills requirements of the new establishment may not match the skills profile of the incumbent educators. As a result, some serving educators may be in addition to the new establishment.” [emphasis supplied]

[7] The ELRC agreement goes on to stipulate a detailed formal process whereby “the Circuit/District manager together with the Principal shall identify the educators in addition” and “[a]n educator who has been identified as in addition shall be so informed in writing by the provincial education department concerned”. It also stipulates that when filling vacancies in cases where a department has educators in addition of a staff establishment,

“1. Applications of suitably qualified educators in addition as a result of operational requirements must be considered before any other applications may be considered.

2. A provincial education department may publish a CLOSED VACANCY LIST for which only serving educators in addition may apply.” [emphasis supplied]

[8] It is apparent from the requirements that: (a) candidates should be informed of their ‘in addition’ status by the department in writing; (b) it was compulsory for qualified ‘in addition’ educators to apply for the positions; (c) applicants should indicate whether they had been identified as such on their application forms; and (d) such applicants had to be considered before any other applications were considered.

[9] The plaintiff (who had not been identified as being ‘in addition’ to the staff establishment at his school) applied for the post, and was shortlisted for an interview together with four others by a panel convened by the Lekholane School Governing Body (“the SGB”). The interviews were held on 14 June 2015. The minutes of the proceedings (“the SGB minutes”) subsequently obtained by the defendant on the plaintiff’s behalf record that a careful process was followed. After opening formalities, the SGB panel agreed that each candidate would be asked the same 14 questions, the appropriate answers to which were discussed and agreed by the panel in advance. Two scorers were appointed.

[10] The four candidates who were interviewed (one shortlisted candidate having not attended the interview) received the following scores:

Scorer 1	Scorer 2	Total	Candidate 1	35	31	66	Candidate 2	42	39	81	Plaintiff	53	59	112	Candidate 4	43	45	88

[11] The minutes indicated that the SGB panel identified the plaintiff as the “first preferred” candidate on the basis that:

“[h]e answered all the interview questions well and correctly. Therefore the panel declare him as the one to be given the first preference for this post.”

[12] The fourth candidate (Ms MB Mokubane) was identified by the panel as the “second preferred” candidate. The minutes recorded that “if the candidate who is given the first preference declined, she is the one to take over”.

[13] The plaintiff testified that sometime after the interviews were conducted, but prior to October 2005, he enquired at the circuit

office about the outcome of his application. He spoke to the circuit manager, Mr Motshwane, who advised him that an appointment had been made. Even though the SGB had recommended the plaintiff as the first preferred candidate, the recommendation of the SGB had been overruled by officials of the Mpumalanga Department.

[14] After this, in October 2005, the plaintiff approached the defendant for advice and assistance in taking such steps as may be legally appropriate to challenge the Department’s decision not to appoint him into the position.

[15] In July 2006, after having sent letters to the Mpumalanga Department in January and May of that year the defendant launched an application in the High Court on the plaintiff’s behalf under case number 23041/06 seeking to compel the Mpumalanga Department to furnish the plaintiff with a copy of the minutes. In this application, the plaintiff stated that the decision not to appoint him had been unconstitutional and stated that he had been ...

“... advised that I have the right to fair administrative action that is lawful, reasonable and procedurally fair.”

[16] Having initially filed a notice of opposition, the Mpumalanga Department withdrew its opposition and furnished the minutes on 8 September 2006.

[17] In March 2007, again after sending a number of letters to the Mpumalanga Department, the defendant launched a second application in the High Court on the plaintiff’s behalf under case number 7569/07 seeking an order requiring the Mpumalanga Department to disclose the name of the successful candidate. In the founding affidavit, the plaintiff stated inter alia that he had been ...

“... advised that I have the right to fair administrative action which should be lawful, procedural and reasonable. I further submit that I have the right to a legitimate expectation, which expectation was created by the Respondents in advertising the aforementioned post and in further recommending that I be declared to be the one to be given first preference for the aforementioned post. I would therefore like to know as to whether there is any appointment (if any) and further be entitled to get the particulars of any person who has been appointed in that regard. That would enable me to exercise my options whether to appeal and/or review such an appointment (if any) and if there is no appointment to bring any application for an order to compel the Respondents to make an appointment in terms of their interviews.”

- [18] On 17 April 2007, the Mpumalanga Department advised the defendant by letter that Ms Mokubiyane had been appointed to the post.
- [19] Between May 2007 and November 2007, the defendant addressed a number of letters to the Mpumalanga department requesting a copy of Ms Mokubiyane's letter of appointment. When no response was forthcoming, in February 2008, the defendant launched a third application in the High Court on the plaintiff's behalf under case number 5133/08 seeking an order requiring the Mpumalanga

Department to furnish a copy of the letter of appointment. In the founding affidavit, the plaintiff stated inter alia that he had been ...

"... advised which advise [sic] I accept, that I have the right to fair administrative action which is reasonable, procedural and lawful. If it turns out that the said one M B Mokubiyane is officially appointed as per official copy of letter of appointment which I seek, then such appointment as per advise, infringes upon my constitutional right."

- [20] It appears that the third application was placed on the unopposed roll during April 2008, was removed to the opposed roll but that it was subsequently struck from the opposed roll.
- [21] In April and October 2010 and again in February 2011, the plaintiff contacted the defendant enquiring about the progress of his matter. In March 2011, the defendant wrote to the plaintiff advising that he had consulted with counsel and had "reached the conclusion that it would not be in your best interest to proceed with this matter on review as a reasonable time has already lapsed."
- [22] During the pre-trial process, the defendant agreed with the plaintiff's proposal that the merits should be separated from the quantum and determined first.
- [23] The defendant recorded that he "concedes negligence in letting the Plaintiff's claim against the Department of Education to prescribe" and identified the only remaining question on the merits as being "whether the Plaintiff had an enforceable claim against the Department of Education". The defendant indicated that all remaining questions posed by the plaintiff in seeking to narrow the scope of the issues at the trial were therefore "not applicable". The defendant summarised its defence as being that "it is specifically denied that the Plaintiff would have been successful in his claim against the Department of Education." The Defendant's written heads of argument identified the issue as being "whether Plaintiff, on probabilities, would have been successful with a claim against the Department of Education, Mpumalanga due to the failure of the Head of Department to appoint him".
- [24] It was in this context that one of the pre-trial questions posed by the defendant to the plaintiff was "[o]n what basis does the Plaintiff claim he was entitled to the post", to which the plaintiff responded that such entitlement was based inter alia upon the appointment policy as set in the South African Schools Act, 84 of 1996 ("the Schools Act") and the Employment of Educators Act, 76 of 1998 ("the Educators Act").

[25] The plaintiff was not employed by the Mpumalanga Department at the time that the decision regarding the post was made. His employer at the time was the North-West Department. Even though the post that the plaintiff applied for was a more senior post than the one that he occupied at the time, it would thus be incorrect to suggest that the plaintiff had a claim for an unfair labour practice against the Mpumalanga Department in the form of an “unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion ... of an employee” as contemplated in section 186(2)(a) of the Labour Relations Act, 66 of

1995. Furthermore, failure to appoint a non-employee applicant for employment does not fall within the scope of any other aspect of the

definition of unfair labour practice in section 186(2). Although the plaintiff referred me to the judgment of Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele (2004) 25 ILJ 2179 (LAC), this case is irrelevant given the observation of Zondo JP (as he then was) in paragraph 17 to the effect that a provincial employee might be said to be employed by “the State” was subject to the proviso that this would not apply where “there is a statutory provision which suggests strongly that there is another entity other than the state which was the respondent's employer”. In this case, there is indeed such a statutory provision: section 3(1)(b) of the Educators Act explicitly provides that:

“the Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment.”

[26] In the circumstances, there can have been no question of instituting an unfair labour practice claim against the Mpumalanga Department for its failure to appoint the plaintiff to the post.

[27] It is, however, clear from what is set out above that the defendant had from the outset (correctly) contemplated and advised the plaintiff that his potential cause of action would be a “review” founded on the unlawfulness of the decision, and not a claim of an unfair labour practice under the Labour Relations Act, 66 of 1995.

[28] For the reasons set out below, I am of the view that the advice that the defendant gave to the plaintiff that the decision by the Head of the Mpumalanga Department not to appoint him was unlawful was correct. I am furthermore of the view that the Mpumalanga Department was in fact legally bound to appoint the plaintiff and would have been ordered to do so had the defendant not negligently allowed the claim to prescribe. This is the same kind of claim that was instituted and relief that was granted in Mlokoti.[1]

[29] Section 20(1)(i) of the Schools Act states that:

“Subject to this Act, the governing body of a public school must ... recommend to the [provincial] Head of Department the appointment of educators at the school, subject to the Employment of Educators Act, 1998 (Act 76 of 1998), and the Labour Relations Act, 1995 (Act 66 of 1995).”

[30] As I have noted above, the advertisement indicated that the appointments were to be made “in terms of section 6(1)(2)(3) and 7(1) of the [Educators] Act”. It is apparent that the conditions set out in the advertisement sought to summarise the requirements of these sections. Only sub-sections of (1) and (3) of section 6 of the Educators Act are relevant for current purposes. Section 6(1) provides that “the appointment of any person, or the promotion or transfer of any educator ... in the service of a provincial department shall be made by the [provincial] Head of Department.” At the time that the appointment was made (i.e. during 2005), section 6(3) of the Educators Act provided in relevant part as follows:

“(a) Subject to paragraph (d), any appointment, promotion or transfer to any post on the educator establishment of a public school ... may only be made on the recommendation of the governing body of the public school ... and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school ... due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are so in excess and suitable for the post concerned.

- (b) The Head of Department may only decline the recommendation of the governing body of the public school ... if-
 - (i) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has not been followed;
 - (ii) the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;
 - (iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Educators;
 - (iv) sufficient proof exists that the recommendation of the said governing body ... was based on undue influence; or
 - (v) the recommendation of the said governing body ... did not have regard to the democratic values and principles referred to in section 7 (1).
- (c) If the Head of Department declines a recommendation in terms of paragraph (b), the governing body ... concerned shall make another recommendation in accordance with paragraph (a), for consideration by the Head of Department.
- (d) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body ... was requested to make a recommendation, failing which the Head of Department may make an appointment without such recommendation. ...” [emphasis supplied]

- [31] As the defendant rightly conceded his written heads of argument, it is clear on a plain reading of the sub-section that the provincial Head of Department is obliged to accept the recommendation of the SGB and appoint the recommended candidate save in certain specified circumstances, one of which is where the recommended candidate was not “in excess of the educator establishment of a public school ... due to operational requirements” but another candidate was indeed such a candidate. It is evident that this bears the same meaning as the phrase ‘in addition’ employed in the advertisement and the ELRC agreement.
- [32] The only relevant factual dispute at the trial was whether the candidate who was ultimately appointed, Ms Mokubiyane, was ‘in excess’ as contemplated in section 6(3)(a). If this was indeed the case, then her appointment ahead of the plaintiff would have been lawful. If not, the plaintiff’s non-appointment was unlawful because the Head of Department would have been obliged to appoint him as recommended by the SGB.
- [33] The plaintiff testified that he personally knew Ms Mokubiyane, who lived near him, and that he knew that she was not ‘in addition’ to the staff establishment. The plaintiff’s demeanour was calm and matter-of-fact. He struck me as an honest and reliable witness.
- [34] After the plaintiff closed his case, the defendant applied for absolution from the instance, which I declined.
- [35] Apart from Mr D M Maja, who was employed in the Nkangala District office and who only testified that the decision to make the appointment had been delegated by the Head of Department to the District director, the only witness to testify on behalf of the defendant was Mr C P Motshwane, the circuit manager of the Marapyane Circuit of the Mpumalanga Department.
- [36] Mr Motshwane testified that it was apparent from the advertisement that the application process was open to anyone, even those not currently employed by the Mpumalanga Department. Although Motshwane testified that his experience was that the school where Ms Mokubiyane was previously employed had experienced a “dwindling enrolment”, he stopped short of testifying in chief that she had been in fact been “identified” as being ‘in addition’ following the process described in the ELRC agreement or that she had been informed of this in writing by the Mpumalanga Department. He testified that while the practice of the circuit management was to identify which of the interviewed candidates recommended by the SGB was ‘in addition’ before forwarding the SGB documentation to the District, who would in turn pass it on to the Head of Department, he could not recall whether Ms Mokubiyane had been so identified in this case or not. Under cross-examination, when Mr Motshwane was asked if he had dealt with the SGB’s recommendation “in whatever way”, he initially responded that “I did not deal with it” and that he believed that the recommendation was dealt with at District level. He only became involved in the matter

when the plaintiff approached him after the decision had been made. However, after emphasising that he could not recall the specifics of the matter, Mr Motshwane subsequently observed that he was “in a corner”, and then proceeded to contend vehemently that he had “decided not to concur” with the SGB and had made a recommendation to the District that Ms Mokubiyane should be appointed because she was in fact ‘in addition’. The impression I gained was that he was seeking to contend that he had formed the view that she was ‘in addition’ after he received the SGB’s recommendation, and that it was for this reason that he had recommended her appointment over that of the plaintiff.

[37] It was apparent to me that Mr Motshwane relied for the most part on the documentation that had been shown to him and that he did not have a clear independent recollection of the circumstances of Ms Mokubiyane’s application and appointment. He gave directly contradictory evidence regarding the role that he played in the process and gave an overall poor impression as an at-best confused, but at times evasive, witness who was prepared to make general statements only to subsequently qualify or even change them. In my view Mr Motshwane’s evidence that Ms Mokubiyane was ‘in addition’ cannot be accepted over the plaintiff’s

evidence to the contrary. My conclusion in this regard is bolstered by the absence of any indication in the SGB minutes that any of the candidates, let alone Ms Mokubiyane was ‘in addition’. This is particularly relevant given that all the candidates were specifically asked why they had applied for the position. In her response, Ms Mokubiyane gave various reasons but did not indicate that it had been compulsory for her to do so, which would have been the case had she been ‘in addition’, as is apparent from the terms of the advertisement referred to above. Moreover, being ‘in addition’ would have given Ms Mokubiyane a significant advantage in the process, and the fact that she did not specifically mention this is a strong indication that it was not the case. It is also relevant that neither Mr Motshwane nor Mr Maja (who was in the District Office at the time, and may have been expected to have more direct knowledge on the matter) testified that Ms Mokubiyane had been identified as being ‘in addition’ and informed in writing of this fact by the Mpumalanga Department. Finally, it is relevant that the SGB did not consider Ms Mokubiyane’s application “before any other applications”, as required by the ELRC agreement. The fact that her application was considered at the same time as the other applications suggests that she had not been identified as being ‘in addition’.

[38] I therefore find on the probabilities that Ms Mokubiyane had not been “identified by the Head of Department” as being “in excess of the educator establishment of a public school ... due to operational requirements.” There was thus no basis for the Head of Department (or the delegate) to decline the SGB’s recommendation and fail to appoint the plaintiff.

[39] It was argued by the defendant that if the plaintiff had an enforceable claim for a review of the department’s decision on this basis, it would not necessarily have resulted in an order requiring his appointment to the post. I disagree. In view of my finding that Ms Mokubiyane was not ‘in excess’, the only lawful outcome permitted by the Educators Act in the current

instance was the appointment of the plaintiff. Furthermore, given that it cannot be said that the Head of Department declined the SGB recommendation “in terms of” section 6(3)(b) of the Educators Act, there was no scope for the application of section 6(3)(c) thereof. The plaintiff would thus have been entitled to a mandamus requiring the Mpumalanga Department to effect his appointment. As such, this is not a case where the court would have had to consider potential harm to the separation of powers and thus exercise a remedial discretion as to whether “exceptional” circumstances existed to justify the substitution of the Department’s decision, as was argued on behalf of the defendant.

[40] However, even if this were such a case, the Constitutional Court has held that the “default position” would have been to apply the “corrective principle” and grant an order setting aside the unlawful conduct and requiring the department to comply with its legal obligations.[2] There is no evidence before me that circumstances existed militating against the application of the corrective principle in this instance. I note in particular in this regard that the mere fact that Ms Mokubanye had been appointed into the HOD position at Lekholane school would not have constituted sufficient reason to depart from the corrective principle. Indeed, this was precisely the situation in the Mlokoti case referred to above. The Constitutional Court noted in its recent Corruption Watch judgment, “consequential acts which follow on constitutionally invalid conduct are commonplace” and raised no concerns about invalidating the appointment of a replacement National Director of Public Prosecutions where it was found that his appointment was consequential upon the invalid vacation of the office by his predecessor.[3]

[41] Furthermore, this scenario arises commonly in the closely analogous context of unfair dismissal disputes in the labour courts, where the mere fact of having appointed a replacement for an unfairly dismissed employee does not constitute any barrier to the primary relief of reinstatement, even though the court is specifically empowered not to grant that remedy when it is “not reasonably practicable”. [4] It has been held that the object of this section ...

“... is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee’s job no longer exists, or the employer is facing liquidation, relocation or the like. The term “not reasonably practicable” ... does not equate with “practical” It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile.” [5]

[42] In the current matter, while an order appointing the plaintiff may well have been inconvenient for the Mpumalanga Department, there is no evidence to suggest that it would have been “not reasonably possible” to implement. In any event, to the extent that there may have been any reasonable concern in this regard, the appropriate course of conduct of a non-negligent attorney would have been to institute an urgent interim application staying the implementation of the Mpumalanga Department’s decision pending the outcome of the review.[6]

[43] I therefore find that the plaintiff has shown that he did indeed have an enforceable claim against the Mpumalanga Department for an order requiring his appointment to the post. The defendant is consequently liable to compensate the plaintiff for the damages caused by the defendant's admitted negligent conduct in allowing that claim to prescribe.[7]

[44] No reason exists to depart from the usual principle that the losing party should be ordered to pay the successful party's costs. In the premises, I make the following order:

- a. It is declared that the defendant is liable to compensate the plaintiff for such damages as he may prove, or as may be agreed, to have been caused by the defendant's failure to obtain an order requiring the Mpumalanga Department of Education to comply with the provisions of Employment of Educators Act, 76 of 1998 and appoint the plaintiff to the post of ED Specialist HOD.
- b. The defendant is ordered to pay the plaintiff's party and party costs.

RJA Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the Plaintiff: Adv LGP Ledwaba

Instructed by: M N Moabi Attorneys, Pretoria

For the Defendant: Adv S J Coetzee

Instructed by: Mothle Jooma Sabdia Inc., Pretoria

[1] *Mlokoti v Amathole District Municipality & another* 2009 (6) SA 354 (E). It is unnecessary for me to express any view here as to whether the review would have been governed by the provisions of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 or section 158(1)(h) of the Labour Relations Act or the doctrine of legality, or whether it would have fallen within the exclusive jurisdiction of the Labour Court.

[2] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014

(4) SA 179 (CC) at para 30.

[3] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 (13 August 2018) at paras 31 – 35.

[4] Labour Relations Act, 66 of 1995, section 193(2)(c).

- [5] Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others (2016) 37 ILJ 2313 (LAC) at para 11; Mashaba v SA Football Association (2017) 38 ILJ 1668 (LC) at para 10. See also Steenkamp v Edcon Limited 2016 (3) SA 251 (CC) at para 190.
- [6] cf Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) at para 22.
- [7] In the interests of clarity, I note that one aspect that will be necessary to decide in determining the quantum of the damages so caused will be the date on which it is probable that the order requiring the appointment of the plaintiff to the HOD position would have been made but for the defendant's negligence. This issue was not canvassed in evidence before me.

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Prepared on 12 October 2026 · Esheria