

SOUTH AFRICA / JUDGMENT

Ndudane v Premier of the Eastern Cape & Another (20/2020) [2021] ZAECHBHC 39; (2022) 43 ILJ 439 (ECB) (1 June 2021) [2021] ZAECHBHC 39

COURT

Eastern Cape High Court, Bisho

BEFORE

Maswazi

CASE / FILE NUMBER

20/2020

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: BISHO]

CASE NO: 20/2020

In the matter between

SIPHOKAZI NDUDANE

Applicant

And

THE PREMIER OF THE EASTERN CAPE First Respondent

MEMBER OF EXECUTIVE COUNCIL FOR Second Respondent

THE EASTERN CAPE DEPARTMENT OF RURAL

DEVELOPMENT AND AGRARIAN REFORM

JUDGEMENT

Maswazi AJ

Introduction

- [1] In this matter the applicant seeks an order against the first respondent to instate her in her position as the Head of Department in the Department of Rural Development and Agriculture, Eastern Cape and to allow her to perform her duties in that capacity. Applicant also seeks a declarator to the effect that a contract exists between her the first respondent which renders her an employee of the latter.
- [2] The matter is opposed on behalf of all the respondents and they have filed their answering affidavits together with various confirmatory affidavits which themselves are quite bulky and voluminous.
- [3] In addition to the answering affidavit, the respondents have filed a “conditional counter application” on the basis of which they seek to set aside the decision of the first respondent to appoint the applicant. This means that the first respondent is applying to set aside his own decision to appoint the applicant. It was declared on behalf of the respondents that their answering affidavit must stand as the founding affidavit in the counter application whilst the applicant’s replying affidavit stands as the answering affidavit to the counter application.
- [4] The respondents also filed an application to strike out various annexures and documents filed by the applicant on the basis that same are irrelevant.
- [5] At the hearing of the matter having been addressed by Mr Quinn who together with Mrs Cossie appeared for the respondents on the question whether the counter application was before me, Mr Quinn submitted that the counter application is not before me, it can only be dealt with after my consideration and decision on the main application whose relief I have already alluded to above. I understand this to mean that, if I am not inclined to dismiss the main application, then

the counter application will fall for a decision, conversely, if I dismiss the main application, the counter application will fall away. I was rather ambivalent about the suggested approach. Ordinarily, when a litigant puts up a counter application, she puts up a defence to the main application which can only stand if the court first grants a relief sought in the counter application. The conditionality of the counter application in this matter comforted me somewhat since I understood it to mean that it is application that will fall for a decision if the main application fails.

- [6] On the other hand Ms Da Silva, who together with Ms Van Vuuran, appeared for the applicant submitted that the counter application and application to strike out are before me and I must deal with them in one fell swoop. I then gave the parties an opportunity to discuss the issue being of the view that I should not in addition to the substantive issues in the matter be saddled with a responsibility to make a ruling on the matter.

[7] It became clear that the parties were poles apart and I then ruled that it would be prudent for me to deal with the application on the basis of the notice of motion, and in that regard, the application to strike out would have to be dealt with. Since the respondent had brought the conditional counter application and was not keen to proceed with it, I became of the view that, such is a choice that the respondents made. In any event the counter application is conditional

to the decision in the main application. Thus the matter proceeded to the exclusion of the conditional counter application.

[8] In any event the applicant in her Practice Note made it clear that the matter was to be argued to finality whilst the respondent did not file any Practice Note. Nothing turned on the failure of the respondent to file Practice Note as the party who is dominis litis complied with the Joint Rules, it would have been offensive to the very notion of justice to deprive applicant of the hearing as a result of the conduct of a wayward respondents. This in my view is the correct interpretation of our Joint Rules particularly when they pertain to prehearing processes and requirements. A party who has brought a matter to court ought not to be prejudiced on the basis of the failure of the party who is merely invited to respond to the case. Put differently, the applicant's right of access to court ought not to be held at ransom as a result of the respondent's refusal to play by the rules.

[9] On the other hand, case flow management to which rule 15A of our Joint Rules belongs, is there for a salutary purpose, one whose intention is to ensure optimum utilisation of the scarce public resources, including judicial resources. Rule 15A allows the Case Flow Management Judge to see the issues from the angle of both parties without having to scroll through the heads of argument. The requisite details required of the Rule 15A may assist, for instance, in deciding the length of time for which the matter must be allocated. The usefulness of Rule 15A became evident in this matter when, through the hearing, it became clear that the matter was not going to be finalised in one day, and yet it was allocated one day. Interestingly, it was the respondent, who without having filed a rule 15A notice, was of the view that the matter would not be heard in one day, an eventuality that transpired. The matter ended up being heard for a period of three staggered days.

The factual background

[10] On the 21st and 22nd of July 2019, the second respondent advertised the position for Head of Department to be appointed in terms of section 10 of the Public service Act, 1994. Applicant was one of the four individuals that were shortlisted and were in due course invited for an interview with the selection panel.

[11] At the time the applicant applied for the position she was employed as Deputy Director General in the National Department of Agriculture and fisheries, responsible for a directorate known as the Marine Living Resources and Fisheries.

- [12] Applicant was also one of the candidates shortlisted for the position and was thus to be interviewed in due course. The interviews, at least in respect of the applicant, took place on the 23rd of October 2019.
- [13] On the 21st of November 2019, the second respondent in her capacity as the Chair of the selection Panel that had been appointed presumably by the first respondent to facilitate the selection, wrote to the first respondent advising him of the selection process and its outcomes. In that report she took the first respondent from the publication of the notice of the advertisement in terms of which potential candidates were invited to apply for the position. At the end she concluded with the recommendation of the applicant as the most suitable candidate for the position.
- [14] In her report, which is countersigned by one Ms Mbina-Mthembu, a note was added in manuscript in terms of which the first respondent was being invited to note that the applicant had disclosed a misconduct investigation against her that is pending. This disclosure must have taken place at the interview which the applicant attended on the 23rd of October 2019. The significance of this disclosure is going to loom large in due course. The first respondent also signed in approval of the recommendation of the panel on the 27th of November 2019. On the same day, the first respondent penned a letter appointing the applicant in the position for which she had been interviewed and recommended by the selection panel. The appointment was for a period of five years subject to the probation period of one year.
- [15] It is not in dispute that at the time the first respondent was taking a decision to appoint the applicant into the position, the applicant had filed a notice of resignation with her then employer, the National Department of Agriculture, Forestry and Fisheries (DAFF). Thus when the first respondent appointed the applicant, she was serving notice. DAFF had also accepted her resignation in writing without any demure.
- [16] On the 29th of the November 2019, true to the invitation extended to her in the first respondent's letter of her appointment, the applicant signed in acceptance of her appointment as Head: Rural Development and Agrarian Reform within a period of five days contemplated in her letter of appointment. The applicant says that her letter of her appointment was an offer which after her signature brought into existence her contract of employment, the respondents are adamantly of a different view. I shall return to this issue in due course.
- [17] It appears that there are certain events which had been unfolding at the applicant's work place. On the 19th of August 2019, the applicant had been served with disciplinary charges in a charge sheet that contained seventy five counts of misconduct. This therefore does mean that at the time the applicant attended the interview she was aware of the charges against her.

[18] It is also evident that on the basis of charges that had been served to the applicant in August of 2019, a disciplinary hearing was convened from the 25th until the 29th of November 2019. That disciplinary process was finalised on the 29th of November 2019 when the applicant was found guilty of the charges against her. The applicant expresses this episode as follows in her founding affidavit;

“Between the dates 25-29 November 2019, DAFF hastily arranged what must have been a costly sitting of a disciplinary hearing against me and despite knowing that I had resigned and them signing off on my notice”.

[19] The insignificance of this allegation is as clear to me as its neutrality on the issues before me. This is because on the 25th of November 2019 when DAFF organised the disciplinary hearing, the applicant was still an employee of DAFF and thus subject to its Disciplinary Code. Similarly, if there was disciplinary proceedings, there had to be an outcome thereto. How hastily this was done comes across to me as an unsubstantiated suspicion of ulterior motives against DAFF.

[20] This follows too for the fact that the disciplinary hearing took place in the absence of the applicant. The fact of the matter is that the applicant was dismissed from her employment and the fairness of that disciplinary process is not before me. What is related to the issues before me is the fact of its existence and its import for the appointment of the applicant by the first respondent.

[21] As already stated above applicant’s letter of appointment was signed by the first respondent on the 27th of November 2019 and applicant signed in acceptance thereof two days later with the date of assumption of her duties being the 1st of January 2020.

[22] On the 5th of December 2020, the first respondent wrote to the applicant in which he recorded his offer of employment to the applicant and the latter’s acceptance of that appointment. In addition, first respondent notified applicant that he had received information

informally that applicant had been dismissed from her employment by DAFF on the 29th of November 2019. He requested the applicant to submit full details of the relevant charges and findings and the letter of her dismissal before the 9th of December 2019.

[23] The form and character of the letter of the 5th of December 2020 from first respondent is investigative. It cannot be put at any higher level than that. This is because the first

respondent did not come out too clearly to demonstrate what he intended to do with the details he required from the applicant. This is hardly surprising as it is clear that the first respondent was at this stage only eager to quench his thirst for facts, in order to grapple with the import of the implication thereof to his decision to appoint the applicant.

[24] On the same day and in answer to a media inquiry, one Mvusiwekhaya Sicwetsha, first respondent's spokesperson, wrote a media statement in which he confirmed that at the time applicant was appointed she had not been dismissed by DAFF and had voluntarily declared her suspension to the interviewing panel. The statement concluded by stating that the first respondent was in communication with the Minister at DAFF and with the applicant to ascertain the outcome of the disciplinary process and in that regard first respondent was also consulting his legal team. This communication is significant in relation to the quality of the disclosure that the applicant made to the first respondent as an aid to any decision he needed to make regarding her appointment. It is significant too for the version proffered by the first and second respondents in their papers.

[25] On the 12th of December 2020 the applicant responded to the first respondent's letter of the 5th of December 2020. In that correspondence applicant described her disciplinary situation with DAFF. She rounded off her representations

to the first respondent by stating that she was seeking legal advice in respect of the disciplinary findings made against her at DAFF.

[26] On the 18th of December 2019, the applicant through her attorneys, Messrs ZUMPT, sent a letter to the first respondent in which it was suggested in part that;

"We remind your office further that your decision to appoint Ms Ndudane was not in contravention of any law and that her subsequent dismissal which she is challenging had not occurred when you employed her thus you are not entitled to revoke or delay her appointment and if you did so she would take legal action. Further, we reiterate that even if it were to be found that her appointment was irregular, you are still not entitled to revoke her employment or delay it unless you have approached a court of law in a process that would also involve her filing papers before court."

[27] Irrespective of the correctness or otherwise of the legal submission made in the letter partly quoted above, its essence was a demand to the first respondent to allow applicant to commence her duties in terms of the appointment letter of the 27th of November 2019.

[28] On the 23rd of December 2019, the first respondent wrote to the applicant and advised her that in the light of her dismissal from DAFF, the salary payment system, used by the Public Service in the country "blocked" her appointment, he then proposed to the applicant that;

"(a) [That] you proceed with the dispute with former employer, the Department of Agriculture and Fisheries;

(b) That your "appointment" to be held in abeyance pending the reversal of your dismissal- which requires that you do not report for duty on 2 January 2020.

(c) That the undertaking above remain valid for a period of 3 (three) moths (until 31st March 2020)."

[29] The first respondent rounded off this letter by inviting the applicant to communicate her acceptance of the proposal by Tuesday the 31st of December 2019 failing which the first respondent would approach court to review his own decision to appoint the applicant. He also indicated that in either event, that is, whether the applicant accepts the proposal or the first respondent approaches court for a review as demonstrated in the letter, the applicant would not be able to commence employment on the 2nd of January 2020.

[30] The applicant, through the same attorneys that had written to the first respondent on the 18th of December 2019, responded to the proposal made by the first respondent. The nature of the content of the applicant's letter

is a counter proposal to the first respondent. The essence of her counter proposal was that the she be allowed to commence her work on the 2nd of January 2020 subject to the irrevocable undertaking that should she fail in challenging her dismissal by DAFF, the applicant would resign.

[31] It appears that from that point, with the exception of a letter dated 6 January 2020, there was no further correspondence between the parties. Thus on the 21st of January 2020, the applicant launched the present proceedings by way of urgency seeking in the interim that;

“4.2 respondents are directed to give effect to the contract concluded between the applicant and first respondent on the 29th of November 2019.

4.3 the respondents are directed to take all steps necessary to ensure that the applicant is loaded onto the PERSAL payment system of the Department;

4.4 that the respondents are directed to allow applicant to discharge the functions of the HOD of the Department with immediate effect;”

[32] The applicant also sought a declarator to the effect that there is a valid and binding contract between her and the first respondent which was concluded on 29 November 2019 in consequence of which the applicant became the Head of Department of the Department of Rural Development and Agrarian Reform: Eastern Cape.

[33] In terms of the notice of motion the applicant sought the audience of the court on the 11th of February 2020 alternatively on opposed semi-urgent basis on the 25th of February 2020. Both dates had come to pass when I heard the matter for the first time on the 19th of November 2020.

[34] On the face of staunch opposition from the respondents, the applicant no longer sought an interim relief when the matter appeared before me, she was content with final relief in the form of a declarator and the ancillary relief that has a final effect.

[35] On the 6th of November 2020, a few weeks before the hearing of the matter, the respondent launched an application to strike out various annexures of the applicant's replying affidavit. I deem it prudent to start with that application before getting into the merits of the matter.

The application to strike out

- [36] Singled out for a strike out application are annexures in the replying affidavit. These are annexures SNR1, SNR2 and SNR4 to the applicant's replying affidavit. I am prepared to readily accept that the respondents could not have had an opportunity to deal with the annexures they seek to strike out in their answering affidavit because such annexures only emerged in the replying affidavit.
- [37] It is necessary to describe, with relative particularity, the essence of the documents sought to be struck out by the respondents. The first annexure sought to be struck out is annexure SNR1 which contains the memorandum penned by the Director General of the Eastern Cape Province counter signed by the second respondent and other documents. Its essence to these proceedings is the recommendation for the appointment of the applicant by the first respondent.
- [38] Annexure SNR2 is a score sheets which also served before the first respondent along with the recommendations of the selection panel. Annexure SNR3 is record of proceedings under case number 6189/2019 of the Western Cape Division including the record of the applicant's disciplinary proceedings that took place from the 25th to 29th of November 2019. These annexures take the largest volumes of the record comprising as they do about three bulky volumes.
- [39] The respondents seeks the strike out of these documents on the basis that same are vexatious and irrelevant. The basis for this application, which they out in their heads of argument, is that;

"3. The Applicant filed and delivered a Replying affidavit in excess of a thousand pages.

3.1 It is trite that all allegations necessary to found a cause of action must appear in the founding affidavit.

3.2 The Supreme Court of appeal has employed strong language to deprecate the practice of making lengthy replying affidavits."

- [40] Mr Quinn also went on in his heads of argument to state that applicant is not allowed to supplement its papers to complete a cause of action by adducing supporting facts in a replying affidavit or introduce new matter. He then argued that all these annexures were irrelevant to the issues for determination.
- [41] The starting point in the determination of whether an application to strike out be granted is the rule governing such applications. Rule 6(15) of the Uniform rules provides as follows;

"The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious and irrelevant with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced if the in his case if the application is not granted."

- [42] It is thus apparent that a material that is sought to be struck out in terms of this rule, must be scandalous, vexatious or irrelevant, in addition, such material must prejudice the applicant in the conduct of the case.
- [43] The applicant's affidavit on its own without annexures comprises about fifty two pages. None of its paragraph are sought to be struck out for one or other or all of the reasons underpinning such application. It is rather the annexures to the replying affidavit that are sought to be struck out.
- [44] I deem it necessary to set out singularly in respect of each annexures the relevance to which the applicant directs me. In respect of annexure SNR1, for instance, the applicant states as follows in her replying affidavit;

"16 I am in possession of the document referred to above because I had caused a notice in terms of rule 35(12) of the Uniform Rules of the court to be served on the Premier. I attach hereto this document as annexure SNR1"

This is the only statement made regarding the annexure in the replying affidavit. This rather opaque statement in my view adds no value to the response that the applicant must supply to the respondents' answering affidavit. Why was the respondent made to read this annexure if it had already been part of the respondents' supplementary answering affidavit is a question whose answer is very difficult to ponder.

- [45] Regarding annexure SNR2, the applicant articulated her position as follows in her replying affidavit;

"32 I accept that section 5(7)(a) would have entitled the Premier to apply to this court to set aside my appointment if there was fraud in the manner that I was appointed or in the process itself. It is demonstrably clear that the panel recommended me for the position

because of my competency only. This is based on the scoring obtained from Premier including the record of the recommendation. I attach hereto this record as annexure SNR2. I humbly request this court to have regard to the entire content of annexure SNR2 as specifically incorporated into this affidavit."

- [46] As already indicated, annexure SNR2 contains the scoresheets as well as an elaborate analysis of the performance of the candidates interviewed by the selection panel,

including the applicant. When consideration is given to fact that the applicant's replying affidavit is also an answering affidavit to the applicant's conditional counter application, its relevance in this matter becomes unquestionably appropriate. The conditional counter application is not before me, I thus eschew any consideration of its merits or lack thereof.

- [47] Concerning annexure SNR3 of the replying affidavit, applicant articulated her position as follows regarding its relevance or lack thereof;

“74 In order to place this court in a better position regarding the Rogers’s judgment and the negative conclusion drawn therein, I attach a copy of my intervention application, wherein the founding affidavit deals with facts which the court did not have when it made the adverse comments against me. I annex the intervention application and founding affidavit hereto as annexures SNR3, I humbly request the court to have regard to the contents of this intervention application as specifically incorporated into this

affidavit.”

[48] In the subsequent paragraphs the applicant continues;

“75 The intervention application together with a rescission application by other parties thereto has already been heard (22-26 June

2020) and judgment is reserved. While I maintain that it is irrelevant and has no bearing to the present application, I do not want to leave the court with impression that I have anything to hide or that I do not care about my reputation as a civil servant”

76 I am a proud professional who is recognised as a thought leader in my field, I have achieved this through hard work and dedication. For this reason I take offence in the coordinated unfair manner the Premier intends to portray me”

[49] These two paragraphs are not directed at any specific allegation arising from either the counter application or the answering affidavit. It is thus difficult to ascertain what is it that the first respondent had alleged for the applicant to respond this way. It is further not clear how the annexure attached in support of the allegations made herein relate to the issues in this matter. There is not a single paragraph or page referred to in the annexure from which one may glean relevance. Perhaps even more startling is that the applicant herself attest in no unclear terms to the irrelevance of the annexure.

[50] The sum total of the conclusion that one can make to the reasons for SNR3 is that the applicant attached it to protect her reputation whilst knowing same to be irrelevant in these proceedings. Whilst protection of a reputation is a laudable purpose to which one may be driven in the face of allegations that seek to impugn it, such, however ought to be linked to the issues before a court otherwise they risk to be struck out for want of relevance. I am thus convinced that the annexure SNR3 is of no relevance to the issues in the matter. Understandably, the applicant attests to this herself.

[51] Annexure SNR4 is a letter from the Minister of Public Administration to the applicant’s Cape Town attorneys, being Messrs Ndumiso Attorneys. It is a response to a letter received by the writer from these attorneys. The applicant deposes as follows regarding this letter in her replying affidavit;

“98.5 Subsequent thereto I instructed my attorneys to write Minister Mchunu regarding

his letter to the Premier, and on paragraph 5 of Minister Mchunu's reply he states that he wrote his letter to the Premier to ensure that there was compliance in respect of my appointment and that it was and still is the competence of the Premier to make a final decision on my appointment. I attach hereto as SNR4."

[52] Again, if the principle of relevance that in applications as contemplated in rule 6(15) is to be given its salutary place, communication between the first Respondent and the Minister who is not a party to these proceedings nor does he hold any impactful decision on the question whether there is a contract between the applicant and first respondent or not, must occupy the lowest pedestal, if any, in the consideration of relevance. My doubts about the relevance of annexure SNR4 are further fortified by the fact that applicant does not refer to any part of the annexure which is of relevance to her cause of action or the issues regarding the fate of her application.

[53] I am therefore satisfied that annexures SNR1, SNR2 and SNR4 are not relevant at all to the issues before me. A finding of irrelevance in respect of material filed by a party does not complete the requirement for a strike out relief. I am commanded by rule 6(15) not to strike out any averments if there is no prejudice to the applicant for an application to strike out. The wording of this rule seems peremptory[1].

[54] The respondents in their heads of argument have dedicated a small portion to the application to strike out and they have cited only one case in support of the strike out relief[2]. Sadly this case does not deal with the nature of prejudice that warrant a strike out relief. They have not dealt at all with the

requirement of prejudice which is also a requirement for the application. It is easier to understand why the application to strike

out arises only after the respondents have exhausted their opportunity to file their answering affidavit. As I have said, the annexures which are the target of the application to strike out came up only in the replying affidavit. In that case it would have been well for the respondents to file an affidavit in support of the application and to establish prejudice which is fundamental to the finding of an application to strike out. That they did not means that it is impossible for me to infer prejudice only in the submissions made by the respondents in their heads of argument.

[55] I remain unpersuaded that respondents and their legal representatives had to trawl through annexures whose relevance in the matter is virtually naught if not worthless, is the kind of prejudice contemplated in the rule. I was not directed to any authority that makes it so, I have also found none.

[56] The application to strike out must accordingly fail. I am not persuaded that costs of the application to strike out must follow the result. In my view a no costs order is appropriate.

The merits of the application

- [57] The applicant seeks a declarator that there is a contractual relationship between her and the first respondent. She relies for her contention on the fact that the first respondent signed a letter offering her employment and she in turn accepted the offer. Thus, so the applicant argues, a contract came into existence.
- [58] The applicant contends that the effect of her acceptance of the offer brought into existence a contract which is valid. On the other hand the first respondent bases his decision to refuse applicant assumption of duty on the provisions of section 17 of the Public Service Act, 1994 (“the PSA”) read with Regulation 61 of the Regulations promulgated under the PSA. That much is clear from annexure M in the respondents’ answering affidavit where the first respondent addresses the applicant in part as follows;
- “I sought legal advice, and I am advised that by reason of the provision of Section 17 of the Act and Regulation 61, your appointment is invalid and falls to be set aside notwithstanding that I am given to understand that you have initiated proceedings to challenge your dismissal.”*
- [59] Section 17 of the PSA to which the first respondent relied as the basis to prevent the applicant from assuming her duties in terms of the contract deals with termination of employment in the Public Service or part of it and it provides;
- “(1)(a) Subject to paragraph (b), the power to dismiss an employee shall vest in the executive authority and shall be exercised in accordance with the provisions of the Labour Relations Act.*
- [60] Regulation 61 of the Regulations promulgated under the PSA provides that a former employee dismissed in terms of section 7(2)(d) of the Act for misconduct listed therein shall not be reappointed in the public service for the applicable period from the date of dismissal in relation to the kind of misconduct indicated in the regulations.
- [61] The acts of misconduct set out in the table referred to in the regulation vary and corresponding each act of misconduct is a period of prohibition applicable to that misconduct. I do not deem it necessary to specifically traverse the specific periods of prohibition referred to in the regulation, suffice it to mention that these are regulations on the basis of which the first respondent sought to prevent the applicant from assuming her duties in terms of the contract.
- [62] It is common cause between the parties and is clearly apparent from the papers that at no stage was the applicant dismissed by the first respondent from her position in respect of which the first respondent appointed her. What seems to be a bone of contention is whether having been dismissed by DAFF the applicant qualified for employment by the first respondent and whether she had disclosed her suspension by DAFF. The applicant says she did disclose whilst the respondent say she did not. I turn to deal with this aspect in the next segment.

Did the applicant disclose her suspension by DAFF?

- [63] As already indicated above, the applicant was invited for an interview before a panel composed of senior public office bearers in the Eastern Cape Government. In the interview, the applicant says she did inform the panel that she was on suspension and it is matter that involve disagreements between herself and the Director-General of DAFF her then immediate supervisor.
- [64] In reply the respondents have attempted to refute any suggestion that the applicant disclosed her disciplinary infractions in her employment by DAFF. An attempt was made to cause a Mr Van Zydum who was present in the interviews and who is employed by the office of the first respondent responsible for the recruitment of all senior heads of department.
- [65] Mr Van Zydum states that the interviews were recorded and attaches transcript of the recordings of the interview. Relative to the issue of disclosure or absence thereof what appears from the transcripts is the following;

“CHAIRPERSON: [Inaudible] disclose.....

Ms S NDUDANE: MEC it is the issue that relates to my current work. There is an issue that relates to myself and the department and today is the 23rd actually October and we are waiting for the Public Service Commission to release the report into that. It's a tension, very serious tension that is highly political, if I may put it in that manner. It has been on the public domain so that's why I thought it is important that I can talk to it”

- [66] What is evident here is that the applicant was being given the usual opportunity to disclose anything that is necessary for her prospective employer to know prior to making a decision to appoint her. It is evident too that the recording was not very legible. Thus it is clear on the recording as it appears that it can hardly be said that the applicant disclosed anything during her interview.
- [67] However this picture is not standing on its own. As already indicated above, once the applicant was appointed by the first respondent, news of her dismissal by DAFF started circulating in the media and naturally inquiries were made from the first respondent as to whether he had appointed a person who had been dismissed previously. In a statement issued on behalf of the first respondent it was stated by first respondent's spokesperson as follows;

“At the time when Ms Ndudane was appointed by the Eastern Cape Provincial Government she was not fired by her former employer and had not gone to Disciplinary hea (sic) voluntarily declared the suspension to the interviewing panel”.

- [68] There is a clear dispute of fact regarding whether the applicant disclosed the disciplinary action against her during the interview. These being motion proceedings and the relief sought being final in nature such a relief is only available if the undisputed facts justified such a relief, however in the event the version of the respondent is clearly untenable, I am justified to prefer applicant's version and include such a version in the determination of whether I can grant the final relief if I am satisfied of the inherent credibility of her version.

[3] Probabilities play no role in the inquiry.[4] Equally significant is a proposition that I must not shy away from deciding the matter on the papers merely because to do would be difficult, I must adopt a sensible approach[5].

[69] The version of the first respondent is that the applicant did not disclose the disciplinary action against her. For this version, the first respondent can only rely on the version of the person who was present in the interviews since the first respondent was not himself present. That person upon whose version the first respondent places reliance is Mr Van Zydum. Mr Van Zydum, relies in turn, on the recordings of the interview which first are incoherent and second are refuted by various parts of the first respondent's version. Chief amongst such parts is the assurance given to the first

respondent in a memorandum sent to him by second respondent in which one Ms Mbina-Mthembu, the Director General of the Province who was present in the interview also invited the first respondent to note that the applicant "declared a misconduct investigation against her that is pending. This dampens any suggestion that the first respondent's version is to be accepted and thus diminishes its tenability. The second is the statement issued by the first respondent's spokesperson which is elaborately quoted above.

[70] I am thus satisfied with the inherent credibility of the applicant's version in relation to the question of disclosure by the applicant of the disciplinary actions against her whilst at DAFF. In any event, the first respondent accepts that non-disclosure in an employment setting constitute a misconduct and the employer is entitled to institute disciplinary proceedings. This, he has not opted to do, rather he seems to have instituted a suspension of the applicant without pay. This cannot be correct even if the first respondent is convinced of the applicant's misconduct.

[71] The cases cited by the parties are not in all fours with the facts of this case, they range from instances where there was an absolute absence of disclosure[6] to cases of partial disclosure where the relevant facts necessary to be disclosed were or ought to have been within the purview of the employer.[7] Then the respondent referred to *Trollip v Mlokothe*[8], there, there was clear evidence of repeated communication between the employer and employee represented by its executive mayor in which the employee was asked to disclose. The candidate was found to have failed to so disclose on all those occasions, resulting in the rescission of the decision to employ the candidate. Here, the dispute seem to be on whether there was disclosure or not during the interviews. There is, as I have said, a dispute of fact in this regard. On the applicable formula to which reference has been made, I have decided the dispute in favour of the applicant. So here the issue is not whether or not the employee has a duty to disclose facts that are material to a decision by a prospective employer whether to employ her or not. That aspect is not controversial in our law, an employee has an absolute duty to disclose such facts as are within her knowledge which are material to a prospective employer's decision whether to employ her or not.

Is there an enforceable contract between applicant and first respondent?

- [72] The applicant seeks a declarator that there is an enforceable contract between her and the respondent. The latter resists this contention. In addition to filing an answering affidavit, the respondents also launched a conditional counter application seeking to set aside the applicant's appointment. That conditional counter application is not before me, that much I was told by Mr Quinn during the hearing.
- [73] The net effect of the conditional counter application must be that I am not dealing with the review of the first respondent's own decision to employ the applicant. I am rather dealing with the question whether there is an employment contract between the applicant and first respondent and whether same is enforceable.
- [74] It is not in dispute that the first respondent did pen a letter appointing the applicant as the Head of the Department for the Eastern Cape Department of Rural Development and Agrarian Reform. I accept too that this is a power that the first respondent exercises in the further exercise of his executive power in terms of the Constitution read with the PSA.[9] It is also accepted that the applicant did accept her appointment by the first respondent. What seems to be in dispute is the effect of her dismissal by DAFF soon after she accepted her employment with the first respondent. Put differently, I understand the issue to be whether her dismissal by DAFF nullified her appointment by the first respondent.
- [75] It is also true that the Public Service Regulations suspend the re-appointment of a former employee who has been dismissed in the public service for acts of misconduct listed therein. Included in the acts of misconduct to which the Regulations apply is theft and fraud. The applicant was found guilty of theft and fraud. Taken to its logical conclusion then, the contention of the respondents must be that once the applicant was dismissed, such dismissal rendered her contract of employment unenforceable.
- [76] I am not in agreement with this proposition. In my view the first respondent ought to have approached court to have the contract set aside if he was of the view that the applicant was, for some reason, disqualified from employment in the public service. He was entitled to do this even before the applicant initiated the instant application. In any event, in such an application, the first respondent would have to accept, at the very least, the factual existence of the contract.
- [77] Any attempt by the first respondent to resile from the agreement he entered into with the applicant would constitute self-help. Our constitution has a pertinent aversion to self-help, no doubt for its inimicality to the rule of law[10]. None of this though precludes the first respondent from approaching court to have his own decision to enter into the contract set aside and even reviewed. To my mind that is the only available mechanism for the applicant to resile from the agreement.

[78] The first respondent have made findings by other courts regarding applicant's conduct whilst at DAFF central to their defence. In my view such findings speak to the propriety or otherwise of the applicant's employment in the public service, an issue not before me. I am thus persuaded that there is an enforceable contract between the applicant and first respondent.

[79] In the course of preparing this judgment, I did, for the sake of caution, require the parties to file further heads of argument and deal with the relevance of section 16B of the PSA. I was spurred, as of caution, to that direction on the basis of the text of the section itself. This calls for its reproduction here. It provides;

"16B DISCIPLINE

- (2) Where an employee may lodged an internal appeal provided for in a collective agreement or in an determination in terms of section 3(5), a sanction referred to in subsection (1) may only be given effect to-
- (a) If an internal appeal is lodged, after the appeal authority has confirmed the sanction pronounced by the Chairperson of a disciplinary hearing or;
- (b) if no internal appeal is lodged, after the expiry of the period within which the appeal must have been lodged."

[80] The text quoted above means in my view that an employee's dismissal in the public service takes effect after the period allowed for such an employee to lodge an appeal. This would in my view mean that the applicant's dismissal did not take effect on the 29th of November 2019 when she received the letter of dismissal. This is quite apart from the fact that at the time she received a letter of dismissal her resignation had already taken effect.

[81] Both parties filed elaborate heads of argument for which I am grateful irrespective of the fact that the respondent's heads of argument went somehow beyond the scope of the directive. Both parties contended that the applicant's dismissal did take effect on the 29th of November 2019. The essence of the directive was for the parties to ventilate the question whether in the light of the section 16B, the applicant's dismissal by DAFF came into effect. On purely technical basis, it seems to me, if the applicant's dismissal did not and could not have taken effect on the 29th of November 2019, then in that instance, it would mean that the applicant is not hit by the provisions of Regulation 61 of the PSA Regulations. This would, of course be the technical interpretation of the Regulation, a course of action worthy to be

shunned in our constitutional setting.

[82] I am therefore of the considered view that even if the applicant's dismissal came into effect on the 29th of November 2019 thus implicating the regulation. The first respondent, having already entered into a contract with applicant, is not entitled to unilaterally undo the consequences of the contract.

[83] I therefore conclude that there is an enforceable contract between the applicant and first respondent. It therefore follows that the application must succeed. It remains of me to consider the issue of costs.

COSTS

[84] The general rule is that costs are in the discretion of the court which discretion the court must exercise judicially. It was never suggested during the hearing that costs ought not to follow result, I know no reason why they should not. The first respondent must bear the costs of the application with the exclusion of the costs of the application to strike out. The first respondent ought to have taken the matter on review or even take disciplinary process against the applicant.

[85] The following order shall accordingly issue;

1. The application to strike out annexures SNR1, SNR2, SNR3 and SNR4 is dismissed with no order as to costs.
2. It is declared that there is a valid and binding contract between the applicant and first respondent which was concluded on the 29th of November 2019 in terms of which the applicant was appointed to the position of Head of Department (HOD) of the Department of Rural and Agrarian Reform: Eastern Cape.
3. The respondents are directed to give effect to the contract concluded between the applicant and the first respondent on the 29th November 2019.
4. The first respondent is hereby directed to pay costs of the application subject to paragraph one of this order such costs to include the employment of two counsel.

B. Maswazi

Judge of the High Court (acting)

For the applicant Adv

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Heard on 19/11/2020, 03/02/2021 and 16/02/2021

Supplementary heads of argument delivered on the 8th of May 2021

Delivered on the 1st of June 2021

- [1] Beinash v Wixley 1997(3) SA 721 SCA at 733B
- [2] Minister of Environmental Affairs and Tourism v Phambili Fisheries 2003(2) ALL SA 616 SCA at para 80
- [3] Stellenbosch Farmers Winery Pty Ltd v Stellenvale Winery Pty Ltd 1957(4) (C) 235E-G, the exception to this general rule is found in Plascon Evans (TVL) Ltd v Van Riebeeck Paints Pty Ltd 1984 (3) 623 AD at 634E-635A
- [4] National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) para 26.
- [5] Soffiantini v Mauld 1954(4) 150 SCA 150E.
- [6] MEC for Education Gauteng v Mgijima and Others [2011] 3 BLLR 253 (LC)
- [7] Fipaza v Eskom Holdings Ltd and Others (2010) 31 ILJ 2903 (LC)
- [8] Trollip v Mlokothe [2017] ZAECPEH 43 (4 September 2017)
- [9] Section 125 of the Constitution, 1996 and section 12 of the PSA
- [10] MEC Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014(5) BCLR 547 para 98, see also Chief Lesapo v Northwest Agricultural Bank and Another 2001(1) SA 409 CC para 17.

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