

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 51509/2021

(1) REPORTABLE: NO

(2) OF INTEREST OTHER JUDGES: NO

(3) REVISED: YES

DATE: 1/2/2023

SIGNATURE:

In the matter between:

MAPULA SOPHIE MEHLAPE

Applicant

and

NATIONAL PROSECUTING AUTHORITY

First Respondent

**DIRECTOR OF PUBLIC PROSECUTION,
LIMPOPO PROVINCE**

Second Respondent

JUDGMENT DELIVERED ON 1 FEBRUARY 2023

CP WESLEY AJ

1. This is a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA). The application arises out of the facts that are enumerated hereunder. Although both respondents opposed the application, in this judgment I will refer only to the first respondent.

2. The applicant was employed on a permanent basis as a District Court

prosecutor on 1 July 2012 by the first respondent. On or about 4 February 2019 the ² applicant was charged with two counts of misconduct by the first respondent. The disciplinary hearing against the applicant commenced on 14 February 2019. Prior to the conclusion of the disciplinary proceedings, and on 8 April 2019, the applicant resigned from the first respondent in writing and with immediate effect. On the same day the applicant was informed that her resignation with immediate effect fell foul of section 168(6) of the Public Service Act, 1994 (Proclamation No. 103 of 1994) to the extent that that provision prescribed a 30 days' notice period. On 9 April 2019 the applicant purported to "withdraw" her resignation as far as the immediacy thereof was concerned. The applicant's last date of employment was accordingly 7 May 2019. There is disagreement about whether or not this was in fact the applicant's last date of employment, but nothing turns on this.

3. The position concerning employees who resign from the first respondent whilst disciplinary proceedings are pending is addressed in paragraph 13 of the Policy and Procedure on Employees Exiting the Department, published in 2012 by the Department of Public Service and Administration. This paragraph, to which I will return, provides in the relevant part:

"13. RESIGNATION BY EMPLOYEE SUSPENDED OR ACCUSED OF MISCONDUCT

13.1 If an employee who is ... accused of misconduct resigns, he/she shall not be permitted a notice period which is shorter than the required notice period for his/her nature of appointment.

13.2 The disciplinary action for the misconduct by an employee referred to in par 13.1 must as far as responsible be finalized before the end of the notice period of the employee. If the disciplinary action is not finalized a note must be made on his/her personnel file that he/she left the service while on suspension or while misconduct proceedings had been pending against him/her.

13.2.1 The employee/former employee must be notified in writing

that such note will be made on his/her personnel file and that he/she has an opportunity to make written representations regarding the note within 60 days after receipt of such notification. ³

13.2.2 If such representations are made, the fact thereof must be noted on his/her personnel file.

13.3 ...”

4. On 23 April 2019 the applicant was found guilty of the two charges proffered against her in the disciplinary proceedings, and a sanction of dismissal was made. The applicant was informed of the foresaid by the first respondent on 6 May 2019. On 10 May 2019, which according to the applicant was her last day of employment, the applicant lodged an internal appeal against the sanction of dismissal made against her in the disciplinary proceedings. This internal appeal was never taken any further by the applicant.

5. Over the course of the next few years the applicant sought employment in various positions, until the applicant was appointed as an Acting Additional Magistrate for the District of Bolobedu, Limpopo Province, for the period 10 May 2021 to 31 July 2021 by the Minister of Justice. On 25 May 2021 the Minister withdrew the applicant's appointment with immediate effect for her failure to furnish all material information concerning the abovementioned disciplinary proceedings during the process leading up to her appointment.

6. Various correspondences were exchanged between the applicant's attorneys and the first respondent concerning the foresaid withdrawal of the applicant's appointment and the reasons for the same. On 27 August 2021 the first respondent addressed a letter to the applicant and her attorneys in which it was recorded that a note had been made in the Government PERSAL system against the applicant's name to the effect that she had resigned whilst disciplinary proceedings were pending. More specifically, the note was a reference to PERSAL Code 90, "Resignation: Departmental/Criminal Charges Pending". At the hearing the making a

note in the Government PERSAL system as foresaid was considered to be 4
synonymous with making a note on the applicant's personnel file as per
paragraph 13.2 of the Policy and Procedure on Employees Exiting the Department.

7. Knowledge of the foresaid note in the Government PERSAL system against the applicant's name prompted the applicant to launch the application, which was dated 11 October 2021. In addition to costs on the scale as between attorney and client, in prayer 1 of the notice of motion the applicant seeks an order reviewing and setting aside the decision to make the said note, and in prayer 2 thereof the applicant sought an order that the said note be replaced with a note that references PERSAL Code 87, "Resign Out of Contract".

8. The relief sought in prayer 2 of the notice of motion can be disposed of immediately. The relief sought cannot be granted because when the applicant resigned, she was not a contract employee of the first respondent but rather a permanent employee. PERSAL Code 87 does not accordingly apply to the applicant.

9. At the outset the first respondent argued that the application should be dismissed because the applicant has not brought it timeously and in accordance with section 7(1) of PAJA. This section provides:

"7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

10. The fault with the first respondent's argument is that it is premised on the assumption that the time period within which one must bring review proceedings commences when the decision is taken. On this basis the first respondent argued that the time period in this matter commenced on 10 May 2019 already when the foresaid note in the Government PERSAL system was made against the applicant's name. The first respondent's assumption is incorrect in light of section 7(1)(b) of PAJA, the applicability of which was common cause during argument, which provides that the time period within which one must bring review proceedings commences when the applicant obtains subjective knowledge of the decision or reasonably should be expected to do so.

11. The applicant obtained subjective knowledge of the foresaid note in the Government PERSAL system against the applicant's name on 27 August 2021 when she received the letter bearing that date from the first respondent, as discussed above. As stated, the applicant then launched the application on 11 October 2021. In my view the applicant instituted this application without unreasonable delay and in accordance with section 7(1) of PAJA.

12. In the course of arguing the foresaid point counsel for the applicant stated that after the first respondent decided to make the foresaid note in the Government PERSAL system against the applicant's name, the first respondent failed to comply with paragraph 13.2.1 of the Policy and Procedure on Employees Exiting the Department by notifying the applicant in writing that the note will be made. This meant that the applicant was never given the opportunity to make written representations regarding the intended note to the first respondent. In the course of her argument counsel for the respondent correctly and properly conceded that the first respondent had failed to comply with paragraph 13.2.1 of the Policy and Procedure on Employees Exiting the Department. Both Counsel were in agreement that this omission constituted at least a failure by the first respondent to comply with a mandatory and material procedure or condition prescribed by an empowering provision in terms of section 6(1)(b) of PAJA.

13. In my view the first respondent's failure to comply with paragraph 13.2.1 of the Policy and Procedure on Employees Exiting the Department did constitute a failure by the first respondent to comply with a mandatory and material procedure or condition prescribed by an empowering provision in terms of section 6(1)(b) of PAJA. In my view, this omission potentially also rendered the action procedurally unfair in terms of section 6(1)(c) of PAJA, but I need not make a finding in this regard.

14. The upshot of the foresaid is that the relief that is foreshadowed in prayer 1 of the notice of motion falls to be granted.

15. Section 8(1) of PAJA provides that in proceedings such as this the court may grant any order that is just and equitable, including orders of the types that are then enumerated under sub-section (1).

16. In my view, a just and equitable order would be one that effectively takes the parties back to when the first respondent decided to make the foresaid note in the Government PERSAL system against the applicant's name, and that requires the first respondent to then comply with paragraph 13.2.1 of the Policy and Procedure on Employees Exiting the Department. Once the first respondent's complies with paragraph 13.2.1 of the Policy and Procedure on Employees Exiting the Department, the applicant will have the opportunity to make any and all representations to the first respondent concerning its decision that she may wish to make, many of which were raised in argument before this court. In this manner the applicant's rights will be protected.

17. Once it transpires that the relief that is foreshadowed in prayer 1 of the notice of motion falls to be granted, it also transpires that the applicant has been substantially successful in the application. The applicant is accordingly entitled to a cost order in her favour. As indicated above, the applicant seeks a cost order on the scale as between attorney and client. On consideration, I am not convinced that the respondents' conduct leading up to the application and in the course of the proceedings warrants an adverse cost order on the scale as between attorney

and client. In this regard I do not think that the respondent's conduct can be typified as being vexatious *per se* or vexatious within the extended meaning of the term,¹ warranting such an adverse cost order. 7

18. In the result the following order is made:

18.1 The decision taken by the first respondent in terms of paragraph 13.2 of the 2012 Policy and Procedure on Employees Exiting the Department to make a note in the Government PERSAL system against the applicant's name to the effect that she had resigned whilst disciplinary proceedings were pending, and more specifically a note referencing PERSAL Code 90, "Resignation: Departmental/Criminal Charges Pending", is reviewed and set aside.

18.2 If the first respondent persists with making the foresaid note in respect of the applicant, it shall within 10 days of the date of this judgment, in accordance with paragraph 13.2.1 of the Policy, notify the applicant that such a note will be made.

18.3 The respondents will pay the applicant's costs of the application, jointly and severally, the one paying the other to be absolved.

CP WESLEY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicant: K Mokwena

¹ See *Johannesburg City Council v Television & Electrical Distributors* 1997 (1) SA 157 (A) at 1770-E, citing *Alluvial Creek Ltd* 1929 CPD 532 at 535.

Attorney for applicant: Mmakola Matsimela Inc

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Counsel for respondents: MT Moshodi

Attorney for respondents: The State Attorney Pretoria

Date heard: 25 January 2023

Date of Judgment: 1 February 2023