

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7591/2019

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

In the matter between:

THE HEAD OF DEPARTMENT EDUCATION LIMPOPO	FIRST APPLICANT
THE MEC FOR EDUCATION	SECOND APPLICANT

And

LEKGANYANE RAMOKONE CYNTHIA	FIRST RESPONDENT
SGB PRIMARY SCHOOL	SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The first respondent together with other candidates were interviewed for the vacant position of an educator at Moria Primary School. After the interviews were concluded, the second respondent recommended for the appointment of the first respondent to the vacant position.
- [2] The normal procedure is that before the appointment of the first respondent can be formalised, several officials must first comment on that recommendation on

route form for appointment. The circuit manager supported the recommendation of the first respondent. The senior personnel practitioner recorded on the route form that the first respondent was previously employed and had resigned on 1st November 2007. The assistant director as well as the deputy director corporate services did not support the appointment of the first respondent, but supported the appointment of one Mmathi RW.

- [3] On 28th May 2019 the district director of education approved the appointment of Mmathi RW to fill the vacant post at Moria Primary School. On 29th May 2019 an official from the district director's office with the name of Mr Mashiane MJ generated an appointment letter appointing the first respondent to fill the vacant post at Moria Primary School. That letter was presented to the district director for signature. The district director signed that appointment letter that was addressed to the first respondent. That appointment letter was transmitted to the first respondent who resumed duties at Moria Primary School based on that appointment letter.
- [4] The normal pay date for educators of Limpopo Province is the 22nd of each month. However, on 22nd June 2019 the first respondent did not receive payment of her salary, and when she enquired from the officials of the department, she was told that there was a technical error as the system did not load his salary and that she will be paid in July 2019. On 19th July 2019 the school principal of Moria Primary School informed the first respondent that the department had phoned her (principal) to notify her that the applicant will not be paid her salary as she was blocked by the Waterberg District.
- [5] On 8th November 2019 the applicants launched the present application seeking orders that it be declared that the appointment of the first respondent as an

educator at Moria Primary School in terms of an appointment letter dated 29th May 2019 is null and void, and that it be declared that there was no valid contract between the applicants and first respondent. The applicants avers that during the preparation of the appointment letter, Mr Mashiane erroneously addressed the appointment letter to the first respondent. It is the applicants' contention that the appointment of the first respondent as an educator was a material mistake, and that the district director had lacked the intention to contract with the first respondent.

[6] According to the applicants, it was discovered that the first respondent was dismissed at her previous employment as an educator on 1st November 2007, and that it was the reason why her details could not be fed into the persal system. It is the applicant's contention that the employment of the first respondent as recommended by the second respondent would have been in contravention of circular 125 of 2018.

[7] The first respondent is opposing the applicant's application and has raised five points in limine. The first point in limine is that of lack of jurisdiction; second non compliance with regulations governing administration of oath or affirmation; third non-signature and/or initial on pages; fourth no cause of action for a declaratory relief; and fifth misjoinder-lack of supporting affidavit.

[8] On the first point in limine it is the first respondent's contention that the termination and/or cancellation of employment contract falls squarely within the jurisdiction of the dispute resolution mechanism provided for in the LRA, namely the Education Labour Relations Council (Bargaining Council in education sector) and/or Labour Court. The first respondent further submitted that the remedy sought by the applicants is to terminate or dismiss the first respondent

which dispute lies within the specific and exclusive jurisdiction of the Labour Court in terms of section 186(2) read with section 188 of the LRA and the Basic Conditions of Employment Act.

[9] On the second point in limine the first respondent has stated that it is not clear as to what is the gender of the deponent of the founding affidavit and that she is having a reasonable suspicion that the deponent never appeared before the alleged commissioner of oaths. On the third point in limine, the first respondent had submitted that the confirmatory affidavits by both MM Mashiane and T Nkuzana are not signed on all pages more especially the first pages by both the deponents and commissioner of oaths. On the fourth point in limine the first respondent has stated that the applicant had failed to meet the legal requirements of a declarator. On the fifth point in limine, the first respondent has submitted that there are two applicants in this application and by implication of law and practice, if a party is an applicant and/or respondent in a matter, his/her supporting affidavit and/or statement must be filled and deposed to in such proceedings. It is the first respondent's contention that the second applicant did not depose a supporting affidavit that she/he support the application.

[10] On the merits of the application the first respondent submitted the applicants had her information at their disposal before the interview and that with that information, they should have disqualified her from been shortlisted. It is the first respondent's contention that it has been the intention of the interviewing panel to appoint and to recommend her for the position of the teacher and that same was confirmed by the score sheet and the recommendation memo to the employer. The first respondent submit that she had received her appointment

letter on 29th May 2019 and resumed duties the same date and had been performing her duties since that date up to the date of signing of her answering affidavit. It is the first respondent's contention that she had a legitimate expectation that she will be remunerated for the services that she had rendered.

- [11] Regarding the first point in limine of lack of jurisdiction, it is trite that labour disputes must be resolved within the dispute resolution mechanisms provided for in the *Labour Relations Act*¹ (*LRA*). In *Fedlife Assurance LTD v Wolfaardt*² Froneman AJA said:

“...s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between the employer and employee. Some of the implications were recently discussed by Zondo JP in *Langevelt v Vryburg Transitional Local Council and Others* (2001) 5 ILJ 116 (LAC) ([2001] 5 BLLR 501). Its exclusive jurisdiction arises only in respect of ‘matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court’. Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after the attempts at conciliation have failed (see for example ss 9,24(7),26,59,63(4),66(3),68(1),69 etc). In my view, those are the ‘matters’ that are contemplated by s 157(1) and to which the Labour Court’s exclusive jurisdiction is confined.”

- [12] It is the first respondent's contention that the applicants' action of trying to declare the appointment letter of the first respondent null and void, amount to a dismissal. Unfair dismissal disputes are regulated by section 191 of the LRA. Job seekers are also protected by the LRA. The issue which has been brought for determination is whether a valid employment contract has been concluded between the applicants and the first respondent. The dispute is not about the

¹ 66 of 1995

² 2002 (1) SA 49 (SCA) at para 25

fairness of the termination of the first respondent's employment contract, but whether that contract ever validly existed. This dispute does not fall within the ambit of section 191 of the LRA, and therefore does not fall within the exclusive jurisdiction of the Labour Court. The first respondent's point in limine stand to be dismissed.

- [13] The second and third point in limine will be dealt with at the same time. *Justice of Peace and Commissioners of Oaths Act*³ (JPCA) and the Regulations regarding the administering of oaths, affirmations and/or declarations. In *S v Msibi*⁴ the court said:

"In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or give effect to it. The question should in each case be whether there has been substantial compliance with the requirements."

- [14] The founding affidavit has been duly signed, each page initialled by the deponent and the commissioner of oaths has also initialled each page and thereafter signed and commissioned it. However, the commissioner of oaths has omitted to scratch whether the deponent was a male or female. There are two confirmatory affidavits attached to the founding affidavit. The two confirmatory affidavits consists of two pages. Both the deponents and commissioner of oaths did not initial the first page of both confirmatory affidavits. However, the last pages of both confirmatory affidavits have been duly signed by both deponents and commissioned by the commissioner of oaths. In my view, there has been substantial compliance with the requirements of JPCA and Regulations, and

³ 16 of 1963

⁴ 1974 (4) 821 (T)

therefore the omissions by the deponents and commissioner of oaths are not that fatal. Therefore, the two points in limine stand to be dismissed.

[15] The first respondent's fourth point in limine is not a point in limine as it goes to the merits of the application. With regard to the fifth point in limine, a confirmatory affidavit will be necessary where the deponent of the founding affidavit refers to crucial evidence which originate from a certain person which are relevant to the matter in which the founding affidavit has been deposed. In that case, it will be vital for the source of that evidence to depose a confirmatory affidavit confirming that version, failing which that piece of evidence will be treated as hearsay without any probative value. (See *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*⁵).

[16] In the case at hand there is nowhere in the founding affidavit deposed by the first applicant where he/she refers to any evidence which originates from the second applicant. The second applicant has been joined to the proceedings as a party with substantial interest in the matter as the first applicant is accountable to the second applicant on all issues affecting educators. Despite been cited as a party to the proceedings, it not always necessary for him/her to depose a confirmatory affidavit, unless there is an issue which is within her/his knowledge which had been referred to in the founding affidavit. The first respondent's point in limine is misplaced and it therefore stand to be dismissed.

[17] Turning to the merits of the application, it is the applicants' contention that the appointment of the first respondent as an educator was a material mistake and that when the district director signed her appointment letter, she (district

⁵ [2017] ZASCA 118 (22 September 2017) at para 31

director) lacked the necessary intention to contract with the first respondent. The applicants' case is basically based on *justus error*.

[18] In *George v Fairmead*⁶ Fagan CJ said:

"When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other, as a reasonable man, to believe that he was binding himself?... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[19] In the case at hand there is no allegation of any misrepresentation associated to the first respondent which led to the district director signing the appointment letter addressed to the first respondent. The mistake which allegedly occurred was between the district director and Mr Mashiane. Even though the applicants in the founding affidavit have stated that the first respondent was barred from being reappointed as an educator as she was previously appointed as an educator and had resigned, it is not the applicants contention that the appointment of the first respondent was as a result of the first respondent's failure to disclose during the interviews that she had initially resigned as an educator. The fact that she had initially resigned was picked up at an early stage, hence they disqualified her and approved the appointment of Mmathi RW.

⁶ 1958 (2) SA 465 (A) at 471A-D

[20] In determining whether the applicants have succeeded in proving that the error which occurred amounted to *justus error*, the court had to consider the circumstances under which the appointment letter was signed. In *National and Overseas Distributors v Potato Board*⁷ Schreiner JA said:

“Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exist at all. At least the mistake (error) would have to be reasonable (*justus*) and it would have to be pleaded.”

[21] In the case at hand the applicants have stated in their founding affidavit that Mr Mashiane had erroneously addressed the appointment letter to the first respondent which led to the district director signing it. There are no details given in the founding affidavit as to what led to Mr Mashiane committing this alleged error. The district director had approved the appointment of Mmathi RW on 28th May 2018 and signed the appointment letter on 29th May 2018 appointing the first respondent. The appointment letter was signed a day after the approval, and the signature on the appointment letter was by same person who had approved a day before. The time period that had lapsed after the approval and appending of the signature was not that long. The applicants have failed to state in the founding affidavit the circumstances that led to the district director not noticing that she was signing an appointment letter not addressed to the person she had approved for appointment a day before, in order to enable this court to determine whether the alleged mistake was reasonable and justifiable. In my view, with the time period that had lapsed between the date of approval and

⁷ 1958 (2) SA 473 (A) at 479G-H

date of signature, a reasonable person in her position who was acting diligently and carefully, would have noticed the discrepancy as the facts were still fresh in her mind.

- [22] In my view, the district director has took it that Mr Mashiane had generated an appointment letter addressed to the correct person and carelessly signed without reading and verifying its correctness. In *Ex Parte Rosenstein*⁸ Nesser J said:

“The question is, however, whether his mistake was reasonable and justifiable. It may be that his conduct in not paying attention to the conditions of sale being read was reasonable and justifiable, more particularly in that there was apparently no announcement that the sale of erf 527 had been withdrawn. His conduct, however, in signing the conditions of sale without reading the document which he was signing cannot be held to be either reasonable or justifiable. See *Patel v Le Clus (Pty) Ltd.*, 1946 T.P.D. 30.

According to that decision even if applicant was mistaken when he signed the conditions of sale, he is bound by the contract because the mistake was due to his own carelessness and inattention.”

- [23] In the case at hand the mistake that led to the appointment letter been signed even though it was not for the intended person was as a result of the carelessness of the district director failure to read that appointment letter to verify whether information on that letter were correctly captured as per her previous approval a day before. The applicants are therefore bound by that mistake as they have failed to show that the mistake was reasonable and justifiable. The applicants’ application therefore stand to fail.

⁸ 1952 (2) SA 324 (T) at 326H-327A

[24] With regard to costs, both parties were partially successful. All the first respondent's points in limine were not upheld, whilst the first respondent was successful with her defence on the merits. It will therefore be appropriate if each party pays its/her own costs.

[25] In the result I make the following order

25.1 All the first respondent's points in limine are dismissed

25.2 The applicants' application is dismissed.

25.3 Each party to pay its/her own costs.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicants	: Adv Nkwana
Instructed by	: Office of State Attorney Polokwane
Counsel for the first respondent	: Mr Buthane
Instructed by	: Buthane Rasemana Attorneys
Date heard	: 4th August 2021
Electronically delivered on	: 19th August 2021