

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 1205/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Signature]</i>	
Date <i>13/12/2019</i>	

In the matter between:

MATOME JOHANNES MPHASHA

APPLICANT

and

MEC OF PROVINCIAL TREASURY

FIRST RESPONDENT

MEC OF CO-OPERATIVE GOVERNANCE,

SECOND RESPONDENT

HUMAN SETTLEMENT & TRADITIONAL AFFAIRS

 JUDGMENT

MAKGOBA JP

- [1] In this application the Applicant has launched a review application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") read with Rule 53 of the Uniform Rules of Court, wherein he seeks relief in the following terms:
- 1.1. Reviewing and setting aside the decision taken by the First Respondent on 17 March 2017 not to approve the counter offer made to the Applicant by the Second Respondent.
 - 1.2. Substituting the decision of the First Respondent not to approve the counter offer, with the following –
"The counter offer made to the Applicant is approved with retrospective effect from 01 March 2017".
- [2] Essentially the Applicant approaches this Court to review and set aside a decision made by the First Respondent. The Applicant relies on PAJA as his basis to review and set aside the decision made by the First Respondent on 17 March 2017. There is however no reference to which part of PAJA the Applicant relies on in bringing this application.
- The decision which the Applicant seeks to be reviewed and set aside is that of the First Respondent not to approve a counter offer request made by the Second Respondent.

The said counter offer is borne out of an employment offer made by a third party to the Applicant. The application is opposed by the First Respondent. The Second Respondent abides the decision of the Court.

Factual Background

- [3] The Applicant is the employee of the Second Respondent. At some stage he applied for a position of Deputy Director: Performance Management Development System in the Eastern Cape Provincial Government. He was successful in such application and was advised accordingly on the 23 January 2017. The Applicant then tendered his resignation to the Second Respondent. The Second Respondent made a counter offer to the Applicant in order to retain him. By reason of the said counter offer the Applicant declined to take the position offered to him by the Eastern Cape Provincial Government.
- [4] On the 3 March 2017 the Second Respondent made a request to the Head of Department ("HOD") of the First Respondent ("Provincial Treasury") to approve the counter offer made to the Applicant.
- On 17 March 2017 the HOD of the First Respondent responded as follows:
- "COUNTER OFFER ON THE POST OF DIRECTOR: HUMAN RESOURCE PLANNING PROVISIONING: 2016/17 FINANCIAL YEAR*
- The above matter refers.*

In terms of provincial Personnel Management Framework (PPMF) issued in 2016 section 5.3 which indicates that "A successful application for a same level or higher level post will be viewed as a career choice rather than an opportunity to negotiate a counter offer, therefore PSR V.C.3 should not be applied to retain a person who has made a career choice"

It is on the above mentioned basis that the department is disapproved to implement the counter offer. The department should continue with recruitment process to fill the advertised post as planned."

The effect of the aforesaid correspondence is that the Second Respondent's counter offer to the Applicant was disapproved by the First Respondent. This correspondence is Annexure MJM8 to the Applicant's founding affidavit.

- [5] It is clear from the reading of the aforementioned Provincial Personnel Management Framework document (Annexure GP02 to the First Respondent's answering affidavit) that section 5.3 thereof was not correctly quoted in the correspondence of the First Respondent HOD. Section 5.3 of the document provides for something else, namely **"Approval of Departmental Human Resource Management Annual Plans"** and not counter offers. The correct section relevant to the matter at issue herein is section 5.13.

For the sake of convenience I set out the contents of section 5.13 which read as follows:

"5.13. Awarding of higher salary notches in terms of PSR V.C.3

A successful application for a same level or higher level post will be viewed as a career choice rather than opportunity to negotiate a counter offer, therefore Public Service Regulation, Part V.C.3 should not be applied to retain a person who made a career choice"

The error is noted but same will not have any effect on the issues to be adjudicated in this application.

- [6] On 24 March 2017 the Second Respondent wrote to the Applicant and advised that the First Respondent had disapproved the counter offer. A letter to this effect is annexure MJM7 to the Applicant's founding affidavit. The letter contains the reasons given by the HOD of the First Respondent for disapproving the counter offer. The Applicant was therefore provided with the reasons for disapproval of the counter offer as contained in Annexure MJM8, that is the correspondence from the HOD of First Respondent to the Second Respondent.

- [7] It can be accepted that the Applicant was advised of the disapproval of the counter offer and the reasons thereof on 24 March 2017 as per Annexures MJM7 and MJM8 to the founding affidavit. The Applicant instituted the present application proceedings on 22 February 2018.

Grounds of Review

- [8] The grounds of review relied upon by the Applicant in terms of PAJA are the following:

8.1. That the HOD of First Respondent took into account irrelevant considerations in not approving the counter offer sought by the Second Respondent.

Further, that the decision taken is not rationally connected to the information that was before the HOD and the reasons for the decision given by him.

8.2. That the decision taken by the HOD not to approve the counter offer was so unreasonable that no reasonable person would have taken it.

Points in *Limine*

- [9] The First Respondent has raised the following two points in *limine* and submits that same should dispose of the dispute without considering the merits of the case:

- 9.1. That there was undue delay in bringing the application and the Applicant failed to bring an application for condonation as required by PAJA upon which the Applicant relies for the application.
- 9.2. The Second leg deals with whether the matter should be before the High Court and not the CCMA, Bargaining Council or Labour Court as directed by the Labour Relations Act 66 of 1995.

- [10] The Applicant concedes that he became aware of the First Respondent's decision on 24 March 2017. It is common cause that the present review proceedings were instituted on 22 February 2018, almost eleven months after the Applicant became aware of the decision and reasons thereof as contained in Annexures MJM7 and MJM8 to the founding affidavit.
- [11] Section 7(1) of PAJA provides that 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 on which the person concerned was informed of the administrative action, and or became aware of the action and the reasons for it, or might have been expected to have become aware of the action and the reasons.
- [12] In terms of section 9 of PAJA the period may be extended for a fixed period by agreement between the parties or, failing such agreement, by a Court on

application by the person or administrator concerned. Such an application may be granted where the interests of justice so require.

It is common cause that in this matter the Applicant has not brought an application for an extension of the period in terms of section 9 or at the very least a request for an opportunity to make one.

[13] It is trite that the Court is only empowered to entertain review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the Court has no authority to entertain the review application¹.

In the case of **Mostert NO v The Registrar of Pension Funds**² at paragraph 35-37 the following observation was made:

"[35] It follows in my view that where it appears to the Court on the papers that there has been a manifest delay and that the proceedings might not have been instituted within the period of 180 days, it will be entitled to raise the point itself as such a delay will be unreasonable per se and the Court will not have the power to review. As was said in Camps Bay Rate Payers and Residence Association the applicant should be given an opportunity to deliver a further affidavit to explain the apparent delay, or apply for an extension in terms of section 9. It will, of course be entitled not to do so and to argue the matter on the papers as they stand.

¹ Opposition to Urban Tolling Alliance & Others v The South African National Roads Agency Ltd & Others [2013] 4 All SA 639 (SCA)

² 986 [2017] ZASCA 108 (15 September 2017)

[36] This brings me to the question whether the Court a quo erred in allowing the Minister to raise the point when he had not done so in his papers. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is in my view entitled to raise the point in argument that the Court has no power to hear the review. This is not raising a defence – it is a submission that, on the applicant's own papers, the Court has no power to entertain the review. If the Court is entitled to raise the point *mero motu* then there can be no reason why the respondent should not be allowed to raise it. It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit.

[37] I do not agree with the submission that the time bar in s 7(1) is the same as a special defence of prescription. Section 17(1) of the Prescription Act 68 of 1969 provides that a Court shall not of its own motion take notice of prescription. Sub-section (2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record. There is no similar provision in PAJA. Where the proceedings were not instituted within the periods specified in s 7(1) a Court has no power to hear the review."

- [14] In the present application it is common cause that the Applicant has failed to bring the application within 180 days provided for in terms of section 7(1) of PAJA. Accordingly this Court has no power to hear the review application.
- [15] The First Respondent contends that this Court has no jurisdiction to entertain the dispute in this application. It contends that the Applicant's case is essentially a request for promotion to a higher position in terms of the counter offer which was made but on account of the First Respondent's disapproval, not implemented. The Applicant is of the view that the failure to implement the counter offer was unfair and that the Court should find such conduct unfair and unreasonable and grant him relief by promoting him.
- [16] The Applicant in its founding affidavit relies on PAJA and the Constitution of South Africa to obtain the relief he seeks. The relevant section the Applicant can rely upon in the Constitution would be section 23(1) which deals with the right to fair labour practices. Disputes concerning alleged unfair labour practices relating to failure to appoint, and / or promote an employee must be referred to the CCMA and / or Bargaining Council for conciliation and arbitration in accordance with the provisions of the Labour Relations Act ("the LRA"). The Applicant in the present case seeks a declaratory order from this Court in terms of which he will be promoted by the Second Respondent.

[17] I agree with the submission made by Counsel for the First Respondent that the problem the Applicant has is if he wants to rely on PAJA (as he does) he must first consider the provisions of section 7(2)(a) and (b) of PAJA. In terms of these sections the right to seek judicial review may be deferred until the aggrieved person has exhausted remedies available to it in terms of governing legislation. Since the Applicant in the present case effectively seeks a promotion the governing legislation which the Applicant ought to rely on is the LRA, which directly regulates the right to fair labour practices.

In **SANU v Minister of Defence and Others**³ it was said that:

"Where legislation is enacted to give effect to a Constitutional right, a litigant may not bypass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the Constitutional standard."

[18] I am of the view that the Applicant, as a matter of principle, cannot approach this Court to have his promotional issue determined and can only approach the CCMA or the appropriate Bargaining Council in terms of the dispute resolution provision provided for in the LRA. The Supreme Court of Appeal in **South African Maritime Safety Authority v McKenzie**⁴ reiterated that the LRA was enacted to give effect to the labour rights guaranteed in terms of section 24 of the Constitution. It also confirmed that section 185 of the LRA is

³ [2007] 28 ILJ 1909 (CC) at para 51

⁴ [2010] 5 BLR 488 (SCA)

one of the most important rights flowing from the Constitutional guarantee of fair labour practices.

- [19] The two points in *limine* raised by the First Respondent are upheld. On these grounds the application is dismissed with costs.

Merits

- [20] For the sake of completeness I proceed to deal with the merits of the case. Even on the merits the Applicant has failed to make out a case for the relief sought.
- [21] The issue is whether the disapproval of the counter offer made to the Applicant by the Second Respondent is irrational and / or unreasonable as alleged by the Applicant. From the onset it should be noted that in his founding papers the Applicant did not fully set out the grounds on which it is alleged that the conduct of the First Respondent in disapproving the counter offer was irrational and / or unreasonable.
- [22] The First Respondent in its answering affidavit has explicitly set out the reasons why the counter offer was disapproved. According to the First Respondent it has a duty to approve all new positions within the Province due to excessive salary expenditures. The Limpopo Province has for the past few

years incurred a much higher salary bill than the rest of the provinces in South Africa. One of the major causes of this was as a result of various departments in the Province making illogical counter offers to employees that do not make any financial sense and / or where such offers are without merit.

Effectively there is excessive expenditure with little to no value. The First Respondent has effectively had to assume the role of watchdog on counter offers and new appointments to prevent the system from being abused.

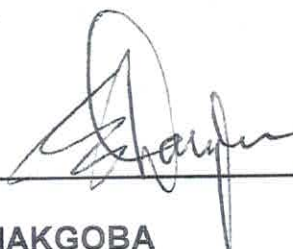
[23] The Limpopo Provincial Government accordingly developed the Provincial Personnel Management Framework (Annexure GP02 to the answering affidavit) with the Provincial Treasury as the custodian, the purpose of which was to guide Provincial departments and Public Entities in the reduction of personnel costs across the Province.

[24] In the present case the Second Respondent has taken steps to appoint the Applicant in a higher position based on the counter offer. The position which the Second Respondent seeks to offer the Applicant is level 11 position whereas the Applicant is currently on level 9. According to the First Respondent the Applicant does not currently possess the requisite skills to move to a level 11 position. Even by virtue of the existence of a vacancy (as alleged by the Applicant in his affidavit) the Applicant cannot expect to be automatically appointed in such a position.

[25] In the light of the aforesaid reasons furnished by the First Respondent, I am of the view that the First Respondent applied its mind to the request for a counter offer to be made and a proper decision was taken not to authorize it. The decision was purely based on paragraph or section 5.13 of the Provincial Personnel Management Framework which state that a successful application for a same level or higher level post will be viewed as a career choice rather than an opportunity to negotiate a counter offer, therefore Public Service Regulation, Part V.C.3 should not be applied to retain a person who has made a career choice.

In my view, the First Respondent's conduct was rational and reasonable in the circumstances of this case.

[26] The application is dismissed with costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on : 11 December 2019

Judgment delivered on : 13 December 2019

For the Applicant : Adv. L Nkwana

Instructed : Maboku Mangena Attorneys

For the First Respondent : Adv. P Verveen

Instructed : State Attorney