



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA14/2022

In the matter between:

ACTING NATIONAL COMMISSIONER FOR THE DEPARTMENT OF CORRECTIONAL SERVICES	First Appellant
DEPUTY MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Appellant
DEPARTMENT OF CORRECTIONAL SERVICES	Third Appellant
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Appellant
DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Appellant
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Sixth Appellant
DIRECTOR-GENERAL OF THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Appellant
MINISTER OF PUBLIC SERVICE AND	

ADMINISTRATION

Eighth Appellant

And

MZUKISI LUBABALO NDARA

Respondent

Heard: 9 May 2023

Delivered: 21 June 2023

Coram: Molahlehi ADJP, Musi JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court (per Rabkin-Naicker J) in which the termination of the employment of the respondent, Mr Mzukisi Lubabalo Ndara, was found to be unlawful and of no force and effect; and the status *quo ante* restored for “*due consultation [to] take place as to the early termination of the five-year employment contract between the parties*”. In addition, the first and second appellants, the Acting National Commissioner of the Department of Correctional Services and the Deputy Minister of Justice and Correctional Services respectively, were ordered to reimburse the respondent R254 468,44 unlawfully deducted from his salary within ten days of receipt of the order, with the appellants held jointly and severally liable for the respondent’s costs. The respondent cross-appeals against the Labour Court’s decision to dismiss his application to amend his pleadings.

[2] At the outset of the hearing of this appeal, the appellants sought its reinstatement since, due to the late filing of the appeal record, the appeal was deemed to have been withdrawn, with no extension having been granted by the

Judge President.¹ Having had regard to the limited delay, the reasons for it, as well as the absence of prejudice and the prospects of success in the matter, I am satisfied that the appeal should be reinstated and the late filing of the record condoned.

Background

[3] On 11 March 2022, the first appellant, the Acting National Commissioner for the Department of Correctional Services, informed the respondent in writing that:

‘1. You have been employed as Director Technical Specialist (level 13) in the office of the Deputy Minister of Justice and Correctional Services linked to the term of the contract of the Deputy Minister signed on 24 June 2019.

2. Following your request for a transfer, I informed you in writing on 8 January 2022 that I am willing to accommodate you within the Department of Correctional Services as a Director (level 13) linked to the term of office of the Deputy Minister and invited you to apply for such transfer on your own time and cost in writing. You never applied and such transfer is therefore no longer an option.

3. You further indicated your desire to leave your employment with the Deputy Minister. The Deputy Minister has similarly indicated that the working relationship between yourself and the Deputy Minister has broken down irretrievably.

4. The Deputy Minister has therefore in terms of clause 3 of your employment contract decided to terminate your employment with one months’ notice. Your last day of service will therefore be on 30 April 2022.

¹ Rule 5(8) of the Rules for the conduct of proceedings in the Labour Appeal Court GN 1666 of 14 October 1996 states:

The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9).’

Rule 5(19) states:

‘If the respondent delivers a notice of intention to prosecute a cross-appeal, the respondent is for the purposes of subrule (8) deemed to be the appellant, and the period prescribed in subrule (8) must be calculated as from the date on which the appellant withdrew the appeal or on which the appeal was deemed to have been withdrawn.’

5. You are required to liaise with the DCS human resource office (head office) to finalise your termination...'

[4] Following receipt of this letter, on or about 5 April 2022, the respondent instituted urgent proceedings in the Labour Court against the appellants. In an inelegantly drafted notice of motion and founding papers, which referenced the incorrect contract of employment, the respondent sought that an interim order be granted in respect of the relief sought in Parts A, B and C of the notice pending an unspecified return date.

[5] In Part A, an interim order was sought "*pending the final determination of these proceedings*" *inter alia* that:

5.1 the Acting National Commissioner and the Deputy Minister be interdicted and restrained from putting into operation their purported decision to terminate the respondent's employment with the Department of Correctional Services (the Department); and

5.2 directed to reinstate the respondent's contract of employment immediately and allow him to continue performing his duties as if his contract of employment had never terminated.

[6] In Part B, the respondent sought *inter alia* a declaration that:

6.1 the decision of the Acting Commissioner and Deputy Minister purportedly to terminate the respondent's contract with effect from 30 April 2022 was unlawful, null and void ab initio with no force and effect for want of compliance with clause 3.3 of the contract of employment entered into on 25 June 2019 between the parties, read together with sections 14 and 17 of the Public Service Act, 1994 and section 23(1) of the Constitution, 1996, with an order setting aside such decision;

6.2 the respondent was employed as Director: Head of Office to the Deputy Minister at level 13 (Head of Office) with effect from 1 June 2019 until

2 October 2019 when he was appointed and/or transferred to the position of Special Advisor to the Deputy Minister at level 14 (Special Advisor) with effect from 1 July 2019 to date; alternatively that the appointment of the late Mr Khaya Somgqeza to the Head of Office position legally occupied by the respondent was invalid and unlawful with no force and effect “*unless it is declared that on 2 October 2019 the Deputy Minister legally appointed the [respondent] as Special Advisor with effect from 1 July 2019 to date and appointed Mr Somgqeza into his position as Head of Office with effect from 1 July 2019 until his death on 24 September 2021*”;

6.3 alternatively that the respondent remained legally appointed as Head of Office with effect from 1 July 2019 to date.

[7] In Part C, the respondent sought an order declaring that the conduct of the Government and the Department in deducting R254 468.44 from his gross salary as Head of Office was unlawful and in contravention of section 34 of the Basic Conditions of Employment Act² (BCEA); alternatively that the deduction of R922 364,44 from the respondent's gross salary as Special Advisor was unlawful and in contravention of section 34. An order was sought directing the Government and the Department to repay such amounts, with costs sought against the appellants.

[8] The respondent case, as set out in his founding affidavit, was that he had been employed as Head of Office with effect from 1 June 2019 until 2 October 2019 when he was appointed as Special Advisor with effect from 1 July 2019 to date. The Head of Office contract was signed on 25 June 2019, operative from 1 June 2019, for a five-year term linked to the term of the Deputy Minister.

[9] In the appellants' answering affidavit, it was denied that the respondent was employed as Head of Office since that contract had been cancelled by mutual agreement. Instead, it was stated that the respondent was employed as Technical Specialist, having signed a contract to this effect on or about 5 August 2021, which

² Act 75 of 1997.

contract was backdated to 24 June 2019. In his replying affidavit, the respondent admitted as much. There was no dispute between the parties that at a meeting attended by the respondent on 28 June 2019, the restructuring of the Deputy Minister's office was discussed. At this meeting, the respondent agreed that he would be appointed as Special Advisor, with a new employee, Mr Somgqeza, to be appointed into his position as Head of Office. On 1 July 2019, the respondent confirmed in writing the oral agreement that he would be appointed to the Special Advisor post.

[10] However, on 22 July 2019, the respondent was informed that the sixth appellant, the Department of Public Service and Administration (DPSA), had not supported the deviation requested by the Deputy Minister, which would have permitted the appointment of the respondent as Special Advisor, on the basis that such a deviation could only be sought by a Minister with more than one portfolio and not by a Deputy Minister in terms of the applicable Ministerial Handbook. In spite of this, on 24 July 2019, Mr Somgqeza was appointed to the Head of Office post. During August 2019, the respondent's job title on the payroll system was amended to reflect his appointment as Technical Specialist.

[11] On 6 January 2020, the Chief of Staff of the fourth appellant, the Minister of Justice and Correctional Services (Minister), confirmed the DPSA's view in relation to the deviation sought. On 5 May 2020, the respondent was informed that since the request to appoint him to the Special Advisor post had been declined, he was required to sign a contract of employment as Technical Specialist, which it was contended he had previously refused to do. On 8 August 2020, the Minister confirmed in writing that the appointment of the respondent to the Special Advisor post was not approved. In spite of this written indication, on 13 August 2020, the respondent stated that he was informed that the Minister had agreed telephonically to the creation of a level 14 post additional on the establishment to which the respondent should be appointed and then seconded to the Deputy Minister's office. This was never actioned.

[12] A contract in respect of the position of Director: Technical Specialist in the Deputy Minister's office at level 13 (Technical Specialist) was thereafter provided to

the respondent. In his founding affidavit, the respondent denied that he had signed such a contract and that in any event, Mr Emanuel Khoza, the Department's signatory to the contract, was not authorised to sign on behalf of the Department as he was no longer employed as Deputy Commissioner: Human Resource Management but as Area Commissioner at Kgosi Mampuru Correctional Centre. In the appellants' answering affidavit, it was stated that on or about 5 August 2021, the respondent signed the Technical Specialist contract, backdated to 24 June 2019, which provided for a five-year contract linked to the term of the Deputy Minister. In reply, the respondent admitted for the first time that he had signed the Technical Specialist contract on or about 5 August 2021 but reiterated that Dr Khoza, who had signed on behalf of the Department was not authorised to do so.

Judgment of the Labour Court

[13] Before the Labour Court, the respondent sought leave to amend his pleadings *inter alia* to reflect his employment in the position of Technical Specialist. The Labour Court refused the amendment on the basis that, to grant it would cause prejudice to the appellants, which could not be compensated by a costs order. The Court nevertheless rejected the appellants' submission that the urgent application must fail on the basis that the relief sought by the respondent was founded on his claim that he was employed in the Head of Office position, alternatively that of Special Advisor. The Court found that a clear right to relief had been shown to exist since the Head of Office and Technical Specialist contracts were "*identical in essentialia*".

[14] The termination of the respondent's employment was found unlawful in that it did not accord with the terms of the contract and had not been imposed for any of the reasons contemplated in section 186 of the Labour Relations Act³ (LRA). There was found to be no reason why the respondent was not given the right to be heard, and "*difficult to fathom why, short of exasperation on the part of the first [appellant], the termination was issued, without regard to the necessary process being undertaken*". The Court took note of the fact that the respondent had sought to negotiate a mutually acceptable termination following the appellants' refusal to

³ Act 66 of 1995, as amended.

appoint him as Special Advisor, as well as resolve the issue of the deductions made from his remuneration, but that his efforts in this regard had not been reciprocated by the appellants. This appeared to lead the Court to order the restoration of the status *quo* in order for the parties to consult about the early termination of the respondent's five-year contract.

[15] The deductions from the respondent's gross salary were found to be unlawful, invalid and in contravention of section 34 of the BCEA. The first and second appellants were consequently directed to ensure that the respondent was paid R 254 468,44 within ten days of receipt of the order of the Court, with the appellants to pay the costs of the application jointly and severally.

Grounds of appeal

[16] The appellants contended on appeal that the respondent had failed to make out his case in his founding papers, with a material dispute of fact existing between the parties as to the contract in terms of which he was employed, which dispute could only have been determined in the appellants' favour. The Court had therefore erred in finding that the respondent had established a clear right to the relief sought when it was sought on a pleaded contract which the respondent conceded was incorrect.

[17] In addition, the finding that the *essentialia* of the two contracts were "identical", despite knowing that the appellant would be prejudiced by not being able to deal with the *essentialia* of the correct contract had it been pleaded, was not sustainable. The result was that the Court reinstated the respondent into a position which did not exist at the time, and when he had not sought reinstatement into the position of Technical Specialist. As to the issue of deductions, the appellants disputed that the respondent had proved such claims. For these reasons, the appellants sought that the appeal be upheld with the costs of two counsel.

[18] The respondent opposed the appeal on a number of grounds. The first was that the appellants should be perempted from pursuing the appeal⁴ on the basis that they had implemented the Court order by taking steps to restore the status *quo ante*, including sending the respondent a notice of reappointment effective from 1 May 2022, requiring completion of a declaration of his financial interests, advising the medical scheme of the respondent's reappointment and restoring the respondent's salary on 31 May 2022. This conduct, it was submitted, was wholly inconsistent with an intention to contest the Labour Court's order.

[19] It was argued further that the respondent's reference to the incorrect contract did not preclude the Labour Court from ordering a restoration of the status *quo ante*. This was so since section 77(3) of the BCEA empowers the Labour Court to determine any matter concerning a contract of employment. The Head of Office and Technical Specialist contracts are identical in their terms and both afforded the right of *audi alteram partem* to the respondent, with the respondent entitled to be consulted before any decision to terminate his contract of employment. The appellants' approach to the pleadings was "overly technical" and inimical to the objects of the LRA, including the promotion of the effective and speedy resolution of labour disputes, more so when substance must prevail over form in employment matters. Pleadings, it was submitted, are to be "*properly construed to ascertain what the legal basis of the applicant's claim is*".⁵ The Court restored the status *quo ante* after the patently unlawful termination of the respondent's contract of employment. Furthermore, there was no basis advanced by the appellants to justify why an appeal should succeed in relation to the repayment of deductions made from the respondent's gross salary. Consequently, for these reasons, the respondent contended that the appeal falls to be dismissed with costs.

Evaluation

⁴ With reference to cases including *Booi v Amathole District Municipality and others* [2021] ZACC 36; [2021] JOL 51358 (CC); (2023) 44 ILJ 109 (LAC) at para 29; *Dabner v South Africa Railways and Harbours* 1920 AD 583 (*Dabner*); *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2016] ZACC 38; (2017) 38 ILJ 97 (CC); [2017] 1 BLLR 8 (CC) (SARS) at para 26; *National Union of Metalworkers of SA and others v Fast Freeze* (1992) 13 ILJ 963 (LAC) at 969I-970A.

⁵ See: *MEC of the Executive Committee of the Western Cape Provincial Government Health Department v Coetzee and others* [2015] ZALAC 35; (2015) 36 ILJ 3010 (LAC) [2015] 11 BLLR 1108 (LAC) at para 89.

[20] The first issue that arises in this appeal is whether the appellants “*deliberately and undoubtedly abandoned or perempted their right of appeal*”.⁶ The onus to establish peremption is discharged only when the conduct or communication relied on points “*indubitably and necessarily to the conclusion*” that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.⁷

[21] There was no dispute that steps were taken by the Department to implement the orders of the Labour Court prior to the appeal being pursued in this matter. Little explanation was advanced by counsel for the appellants as to why this occurred if the appellants intended to appeal the matter, although some blame was placed on the conduct of junior employees within the Department who were apparently unaware of the consequences of their actions. However, distinguishable from the decision in *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and others*⁸, the facts do not indicate that the relevant officials within the Department had taken a deliberate and indubitable decision not to appeal against the order of the Labour Court. There was no express indication that an appeal would not be pursued and no indication that the appellants’ lawyers, or other employees or officials who were familiar with the matter, had deliberately and expressly stated as much. Having regard to the facts advanced, the respondent was therefore unable to show that the appellants had, through their conduct, perempted their right of appeal.

[22] In any event, even if it were to have been found that there had been a deliberate and undoubted abandonment or peremption by the appellants, the application of the doctrine is not absolute.⁹ It remains open to a court to overlook acquiescence where the broader interests of justice would otherwise not be served,¹⁰ with overriding policy considerations capable of militating against the enforcement of peremption against an appellant’s right of appeal.¹¹ On the facts of

⁶ *Dabner supra*.

⁷ *SARS supra* at para 26.

⁸ *SARS supra* at para 25.

⁹ *Minister of Defence v South African National Defence Force Union* [2012] ZASCA 110 (*SANDU*) at para 23.

¹⁰ *Ibid*.

¹¹ *SARS supra*.

this case, the interests of justice, in any event, would weigh strongly against a finding of peremption.

[23] Turning to the merits of the appeal, the ordinary rule in motion proceedings is that an applicant must stand or fall by its notice of motion and the averments made in its founding affidavit,¹² with it impermissible for a case to be made out in reply for the first time.¹³ As was made clear in *National Director of Public Prosecutions v Zuma*:¹⁴

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.¹⁵ The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.¹⁶

[24] The respondent sought relief on the erroneous basis that he was employed as Head of Office, alternatively as Special Advisor to the Deputy Minister. In reply, he accepted the appellants' averment set out in their answering affidavit that he was, in

¹² *President of the Republic of South Africa and Others v South African Rugby Football Union and others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (SARFU) at para 150; *Betlane v Shelly Court CC* [2010] ZACC 23; 2011 (1) SA 388 (CC); 2011 (3) BCLR 264 (CC) (*Betlane*) at para 29 with reference to *Van der Merwe and another v Taylor NO and others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) (*Van der Merwe*) at para 122; *SARFU supra* at para 150.

¹³ *Betlane* at para 29 with reference to *Van der Merwe* at para 122; *SARFU* at para 150; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A-B; and *Bayat and others v Hansa and another* 1955 (3) SA 547 (N) at 553D.

¹⁴ [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (*Zuma*) at para 26.

¹⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (*Plascon-Evans*) 634-5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (*Fakie NO*) at para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2008 (2) SACR 421(CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (*Thint*) at paras 8 - 10.

¹⁶ *Sewmungal NNO and another v Regent Cinema* 1977 (1) SA 814 (N); *Trust Bank van Afrika Bpk v Western Bank Bpk NNO en andere* 1978 (4) SA 281 (A).

fact, employed in the position of Technical Specialist, a contract which was signed on 5 August 2021 but backdated to 24 June 2019. Following this admission there was no dispute of fact between the parties as to the position in which the respondent was employed. The respondent sought to take issue with the authority of Mr Khoza to sign the contract on behalf of the Department, but since he only admitted having concluded the contract belatedly in reply, the issue of authority was not inadequately pleaded nor was any particular relief sought in this regard in relation to the backdated contract concluded. The result was that, by the time the matter came before the Labour Court, the parties had agreed that the respondent was employed in the post of Technical Specialist and, on the express terms of the termination letter, that it was his employment in this position that the Acting Commissioner sought to terminate.

[25] Having belatedly accepted that he had been appointed into such position, the respondent sought leave to amend his pleadings. The Labour Court refused such application on the basis that potential prejudice may result and instead proceeded to determine the merits of the main application. Given that there was no dispute that the respondent was employed as Technical Specialist, it is difficult to conceive of any prejudice which the appellants may have suffered were the amendment granted. Nevertheless, since the purpose of pleadings is to define the issues for adjudication,¹⁷ following the filing of the replying affidavit the issues had been clarified to the extent that there remained no dispute between the parties that the respondent had signed the Technical Specialist contract of employment on or about 5 August 2021. With this common cause, the appellants were aware that the dispute before the court for adjudication concerned whether the termination of the respondent's employment as such, and the deductions allegedly made from his remuneration, were lawful.¹⁸ This was so despite the respondent's incorrect recordal of his post both in the notice of motion and in his founding affidavit. For these reasons, no purpose would be served by granting the cross-appeal in this matter.

¹⁷ See *Media 24 (Pty) Ltd v Nhleko and another* [2023] ZASCA 77 at para 16 with reference to *Moolman v Estate Moolman and another* 1927 CPD 27 at 29 and *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 9.

¹⁸ *Zuma supra* at paras 15 and 17; *Fischer and another v Ramahlele and others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) at para 13.

[26] Since the Technical Specialist contract was entered into between the parties on or about 5 August 2021, by which time the Head of Office contract had by agreement been cancelled and was of no force and effect, there can be no suggestion that the Technical Specialist contract, backdated to 24 June 2019, had been novated by the conclusion of the Head of Office contract on 25 June 2019.¹⁹

[27] Clause 3.3 of the Technical Specialist employment contract (as was also recorded in the Head of Office contract) states that:

'3.3 Subject to the provisions of the Act, and the Labour Relations Act, 1995, either party may, after consultation and agreement, terminate the Contract before the expiry of an original term of office or an extended term of office, by giving to the other party one month's notice of termination, which notice shall –

3.3.1 Be given in writing...'

[28] Notice of termination of the respondent's employment from the post of Technical Specialist was unlawful given that no proper process preceded it. The termination notice was issued without any consultation and was not founded on any of the other reasons contemplated in the LRA. Since the right to be consulted was expressly provided for by the contract, it followed that the contract could not have been lawfully terminated on notice by the Acting Commissioner in the absence of such consultation.²⁰ In giving notice of termination on 11 March 2022, the Acting Commissioner, therefore, acted unlawfully and in breach of the contract's express terms. In finding as much the Labour Court cannot be faulted.

[29] Having found the termination of the respondent's contract to be unlawful, the Court exercised its discretion to order the restoration of the status *quo ante*. In doing so it correctly distinguished the matter from the decision in *Old Mutual Ltd and others v Moyo and another*²¹ in which specific performance was not granted for expressed reasons of both misconduct and intolerability. Specific performance is a primary and

¹⁹ *Tauber v Von Abo* 1984 (4) SA 482 (ECD) at 485C.

²⁰ *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA); (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA) paras 32 - 33 and 55 - 58.

²¹ [2020] ZAGPJHC 1; [2020] 4 BLLR 401 (GJ); [2020] 2 All SA 261 (GJ); (2020) 41 ILJ 1085 (GJ).

not a supplementary remedy for breach of contract.²² A court will, as far as possible, give effect to the choice exercised by a litigant to claim specific performance while retaining the discretion to refuse such a claim and allow damages. Each case must be judged in the light of its own circumstances.²³

[30] No reason was advanced by the appellants why the Labour Court, having found his termination unlawful, should exercise its discretion against the respondent to refuse his claim for reinstatement. Furthermore, on appeal, the appellants do not contend for any grounds that would warrant interference by this Court with the exercise of that discretion.²⁴ However, despite the Labour Court's order that the status *quo ante* be restored, interference with such order by this Court is nevertheless warranted in that an unqualified order was not made but rather one "*in order that due consultation can take place as to the early termination of the five-year contract between the parties*". In ordering as much, the Labour Court failed to direct itself to the relevant facts and principles, including that the respondent was entitled to unqualified reinstatement as the primary remedy. In finding differently the Labour Court reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.²⁵

[31] Turning to the claim for repayment of deductions allegedly unlawfully made from the respondent's gross salary, the Labour Court found that the appellants had failed to make out a case on the papers regarding why such deductions had been made. However, clear disputes of fact existed between the parties on the issue, a final order could only have been made if the facts averred by the applicant (the respondent in this appeal) had been admitted by the respondents (the appellants in this appeal) and, together with the facts alleged by the latter, such an order was justified. The appellants' denial was not bald or uncreditworthy, nor did it raise

²² *Santos Professional Football Club (Pty) Ltd v Igesund and another* 2003 (5) SA 73 (C) [2002] 10 BLLR 1017 (C).

²³ See: *Haynes v King Williams Town Municipality* 1951 (2) SA 371 (A) at 378 - 379; *Masetlha v President of the Republic of South Africa and another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC), *Moyane v Ramaphosa* [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP) and *Gama v Transnet SOC Limited* [2018] ZALCJHB 348.

²⁴ See for example, *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11.

²⁵ *National Coalition supra* at para 11.

fictitious disputes of fact, or was palpably implausible, far-fetched or clearly untenable.²⁶ The Labour Court could not properly have resolved the dispute of fact between the parties on the papers and its orders made concerning the repayment of the deductions claimed cannot be sustained and must be set aside. With a clear dispute of fact in existence between the parties, the issue should properly have been referred for the hearing of oral evidence. On appeal, such an order is consequently warranted.

[32] The appellants took no issue with the costs order made by the Labour Court and there is no reason why this Court should interfere with such order, particularly given that the respondent, on the primary issue of the lawfulness of his termination, succeeded before that Court. For all of the reasons advanced, the appeal must succeed in part. There is no reason, having regard to considerations of law and fairness, that an order of costs should follow in this appeal.

[33] In the result, the following order is made:

Order

1. The appeal is reinstated and the late filing of the appeal record is condoned.
2. The appeal is upheld in part, with paragraphs 2, 3 and 4 of the order of the Labour Court set aside and replaced with the following orders:
 2. The status quo ante is restored, with the applicant to be reinstated retrospectively with immediate effect into the position of Director: Technical Specialist (level 13) in the office of the Deputy Minister of Justice and Correctional Services, on the terms and conditions as set out in the contract dated 24 June 2019, linked to the term of office of the Deputy Minister.

²⁶ *Plascon-Evans supra* at 634-5; *Fakie NO supra* at para 55; *Thint supra* at paras 8-10.

3. The dispute relating to deductions allegedly made from the applicant's gross salary is referred to oral evidence at a date and time to be arranged with the Registrar on the following basis:

3.1 the affidavits filed in this matter are to serve as pleadings in the determination of that issue;

3.2 the parties are entitled to call any witness who deposed to any affidavit in these application proceedings;

3.3 the parties are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings:

3.3.1 provided that such party has at least thirty court days before the date of the hearing of the oral evidence served on the other party an affidavit or statement of the evidence-in-chief to be given by such person;

3.3.2 but subject to the court, at the hearing of the matter, permitting any further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;

3.4 the parties may subpoena any witness to give evidence at the hearing or to furnish documents whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;

3.5 the rules pertaining to the discovery of documents shall apply.'

4. The cross-appeal is dismissed.

5. There is no order of costs.

SAVAGE AJA

Molahlehi ADJP and Musi JA agree.

APPEARANCES:

FOR THE APPELLANTS: J van der Schyff and C-A Daniels
Instructed by the State Attorney

FOR RESPONDENT: F Sangoni
Instructed by Ximbi Ncolo Inc. Attorneys

LABOUR APPEAL COURT