



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case number: 2072/2024

In the matter between:

**AFRICAN NATIONAL CONGRESS, OFFICE
OF THE CHIEF WHIP: FREE STATE**

APPLICANT

and

**KENALEMANG KELEBOHILE NOTSI
COMMISSION FOR CONCILIATION, MEDITATION
AND ARBITRATION
THEMBENI SKULLY NGXANGISA**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

Coram: Loubser J

Heard: 25 July 2024

Delivered: 21 October 2024

Summary: Appointment as personal assistant of the Chief Whip of the African National Congress: Free State without the required recruitment, selection and appointment process – status of the employment contract

ORDER

1. The employment contract between the 1st Respondent and the Applicant is declared unlawful and is hereby set aside.

2. The 1st Respondent is ordered to pay the costs of the application on the party and party scale, including the fees of counsel on scale B.

JUDGMENT

LOUBSER J

[1] This is an application instituted by the present Chief Whip of the African National Congress: Free State, for the following relief: Firstly, that the employment contract between the 1st Respondent and the Applicant be declared unlawful and set aside. Secondly, that the proceedings of the 2nd Respondent be stayed pending the finalization of this application, and lastly an order for costs of suit, but only if the application is opposed. No orders are sought against the 2nd and 3rd Respondents. The application is consequently only directed against the 1st Respondent and the contract of employment she entered into with the Applicant.

[2] The application was initially opposed by the 1st Respondent, but it is common cause that she filed her answering affidavit seven work days late, with the result that she launched a condonation application for such late filing. The condonation application was heard simultaneously with the main application by this court. Counsel appearing for the 1st Respondent immediately submitted at the hearing that there was no merit in the condonation application. I have no doubt that this submitted was correctly made, mainly because the 1st Respondent had failed to provide any reasonable and acceptable explanation for the late filing. In addition, the 1st Respondent failed to provide persuasive grounds upon which it can be said that she enjoyed prospects of success in the main application. In the premises, her counsel agreed that the condonation application should be dismissed, and it was so ordered by the Court.

[3] It followed that there was no answering affidavit before the Court when the main application was heard. The Court had to rely on only the founding affidavit of the Applicant and the annexures thereto in order to decide whether the relief sought should be granted.

[4] It appears from the founding affidavit that the 3rd Respondent was the predecessor of the present Chief Whip. It was him who had appointed the 1st Respondent as his personal assistant during his tenure as the Chief Whip, and who had signed the fixed term of employment contract with the 1st Respondent on 25 April 2023. In this contract, the fixed

period of employment is indicated as 15 April 2023 to 15 August 2024.

[5] At this juncture I pause to refer to the 2019/2024 ANC Free State Caucus policy document attached by the Applicant to her founding affidavit. Section 5.2 thereof deals with staff matters, and section 5.2(i) specifically with the employment of staff. It reads as follows: "A primary condition of employment of staff is that all appointments, without exception, are linked to the term of office of the Legislature, unless an appointment is specified to be linked to the term of office of a specific political office bearer. All contracts are therefore contractual appointments." In section 5.2(j) it is stipulated that a copy of each employment contract, duly signed by both designated responsible Whip and the staff member appointed, must be forwarded to the Secretary to the Legislature for safe-keeping.

[6] In her founding affidavit, the Applicant explains that all appointments must be linked to the term of office of the Legislature. Such appointments take place after the employee has undergone a recruitment, selection and appointment process. This process would involve a number of stages, for instance a structured interview and reference checks to verify factual information. However, employees who are exempt from such recruitment and selection process, are those employed by a constituent member on condition that their employment is linked to the constituent member's term of office. This usually happens when a constituent member elects to appoint his own personal assistant. The Applicant further indicates that the Chief Whip is a constituent member.

[7] The Applicant points out that if an employee had successfully undergone the proper appointment process, the consequent contract of employment must be kept by the Secretary to the Legislature, and the steps followed in the appointment process will be stored in the Human Resources data base of the Legislature. Despite a diligent search, she could not find the contract of employment nor any indication in the said database that a proper appointment process had been followed for the appointment of the 1st Respondent. The 3rd Respondent failed to provide her with any information relating to the appointment in issue.

[8] In her answering affidavit, which was not allowed by the Court in the condonation application, the 1st Respondent alleged that she indeed went through the recruitment, selection and appointment process. She annexed her curriculum vitae to the answering affidavit, and alleged that it was one of the documents she had submitted in the appointment process. There is no indication at all on this document that it was used in the appointment process. As pointed out by the Applicant, there is also no indication in the

data base that the process was followed prior to the 1st Respondent's appointment. The result hereof is that, even if the answering affidavit was before the Court, it would not have assisted the 1st Respondent. Her version of the events would have been rejected as untenable in view of the lack of any documentary or electronic confirmation.

[9] The Applicant says if the 1st Respondent was appointed by the 3rd Respondent himself, her employment would be linked to the term of office of the 3rd Respondent. He had already terminated his position long ago. At the hearing of the application, it was revealed by counsel for the Applicant that the 3rd Respondent had vacated his post during July 2023. The Applicant says that if the 1st Respondent's employment was linked to the term of office of the Legislature, then that term had come to an end on 29 May 2024 in any event, when a new administration became elected. When the employment of the 1st Respondent was terminated in the circumstances, the 1st Respondent approached the 2nd Respondent claiming an unfair dismissal. The Applicant says that the proceedings before the 2nd Respondent is presently stayed pending the outcome of the present application in the High Court. The 1st Respondent's contract of employment became revealed for the first time in the proceedings before the 2nd Respondent, the Applicant says. She annexed a copy of the employment contract to her founding affidavit.

[10] In the contract of employment, the term of employment is stipulated to be the period from 15 April 2023 to 15 August 2024, as mentioned earlier. Clause 1.4 of the contract, however, reads as follows: "Employee expressly agrees that their (sic) term of employment is linked to that of the 6th Administration." As already indicated, the term of the Legislature, or then the Administration, came to an end on 29 May 2024. The 1st Respondent's appointment until 15 August 2024 therefore makes no sense.

[11] At least it is clear from the terms of the contract that the employment was linked to the term of office of the Legislature. This is expressly so stated in the contract, which the 1st Respondent has duly signed. As we have seen, such an appointment could only have been made if the 1st Respondent had undergone the required recruitment, selection and appointment process, including a structured interview and a verification process. As we have further seen, there is no trace or indication that the 1st Respondent has indeed been successfully subjected to such a process. It follows that the employment contract is unlawful and that it should be set aside.

[12] As for costs, I find no reason to deviate from the general rule that costs should follow the result.

[13] The following order is made:

1. The employment contract between the 1st Respondent and the Applicant is declared unlawful and is hereby set aside.
2. The 1st Respondent is ordered to pay the costs of the application on the party and party scale, including the fees of counsel on scale B.



P.J. LOUBSER, J

For the Applicant:

Adv. Z. Nyezi

Instructed by:

Rampai Attorneys, Bloemfontein

For the First Respondent:

Adv. C. J. Hendriks

Instructed by:

MB Mogotsi Attorneys, Welkom

c/o Kruger Venter Attorneys, Bloemfontein