IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2305/16

In the matter between:

NATIONAL REGULATOR FOR COMPULSORY SPECIFICATIONS **Applicant**

and

PORTIA SINDISWA MAZIBUKO **Respondent**

Heard: 17 October 2018

Delivered: 20 February 2019

Summary: *Locus standi* –Duty on the State to act expeditiously.

JUDGMENT

MABASO, AJ

Introduction:

[1] The applicant, acting in the public interest, exercising public powers as an entity established in terms of the National Regulations for Compulsory Specifications Act[1], sought an order, in terms of 158 (1) (h) of the Labour

[1] Act 5 of 2008(the Act)

Relations Act[2] (LRA), reviewing and setting aside both its decision and the subsequent appointment of the respondent as its Head of Human Capital Management. This decision was taken on 25 June 2015 and implemented on 01 July 2015. The applicant further seeks condonation for the late filing of this application. The respondent is opposing this application, and she premised her argument on two points, namely that the applicant has no *locus standi* to bring this application and that the application was delivered too late, therefore, there is an unreasonable delay. I deal with these two points below.

Does the applicant have locus standi?

[2] The respondent contends that this application should have been brought by the Chief Executive Officer (the CEO) of the applicant. The respondent in supporting this point argued that as this application relates to the alleged unlawfulness of her appointment, the only entity entitled to approach this Court to seek such rectification is the responsible functionary which according to her, is only the CEO and not the applicant as the latter is not the functionary who is responsible for rectifying any irregularities in public administration. Furthermore, she argues that the functionary which is compelled by the Constitution[3] and other statutory provisions to avoid and eliminate illegalities is the CEO.

[3] The applicant in challenging this *point in limine* submitted that it is an employer, therefore, the appointing authority, it has sufficient legal interest in ensuring that its employees are not appointed irregularly and that the policies in appointing the respondent were adhered to.

[4] The applicant is a juristic person[4], which is established as a public entity.[5] Its powers include *inter alia,* that,

> *"[It] may do all that is necessary or **expedient** to perform its functions, including-*

[2] Act 66 of 1995 as amended.
[3]108 of 1996.
[4] S 3(2)of the Act
[5] S 3(1) of the Act.

(a) acquiring or disposing of property or any right in respect thereof, but ownership in immovable property may be acquired or disposed of only with the consent of the Minister in concurrence with the Minister of Finance;

(b) opening and operating banking accounts in the name of the National Regulator;

(c) investing any of the money of the National Regulator;

(d) insuring the National Regulator—

(i) against any loss, damage or risk; or

(ii) against any liability it may incur in the application of this Act;

*(e) **performing legal acts, including acts in association with or on behalf of any other person or organ of state**;*

(f) subject to subsection (2), concluding agreements with organs of state and other persons; or

*(g) **instituting or defending any legal action**."*[6]

[5] The Labour Appeal Court (LAC), in *Merafong City Local Municipality v South African Municipality Workers Union (SAMWU) and Another*[7] discussing the issue of *locus standi* under section 158 (1) (h) of the LRA summarised this principle thus:

> "[49].. In *Ferreira v Levine NO and Others: Vryenhoek v Powell and Others (Ferreira)*,Chaskalson P preferred a broader approach as opposed to the more technical approach. Chaskalson P held that it was for the court to decide what a sufficient interest was in light of the circumstances of the matter. O'Regan J in that same matter mentions some factors and circumstances that would have to be considered in determining whether an applicant was genuinely acting in the public interest in bringing a constitutional challenge. Amongst such factors are "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application, and the range of persons or groups who may be directly or indirectly affected by an order made by the court

[6] S 4 of the Act. Own emphasis.

[7] [2016] 8 BLLR 758 (LAC); (2016) 37 (ILJ) 1857 (LAC).

and the opportunity that those persons or groups have had to present evidence and argument to the court"

[50] In *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape and Others,* the court held that a broad flexible approach should be assumed in establishing whether an applicant who challenges administrative action (alleging it is unlawful), has sufficient interest. The court, in determining whether the applicant had *locus standi*, also took into account (*inter alia*) the provisions of the statutes and directives at issue and the question whether they create any rights and duties for the applicant, the applicant's source of prejudice, the importance of the issue to be decided, and the nature of the relief applied for.

[51] The "narrow, formalistic approach" is inappropriate in matters with a public interest element or in matters of a constitutional (including administrative law) nature.

[52] …The approach to standing therefore should not be too technical or formalistic. The question whether the respondents had sufficient interest in the matter should be left to the discretion of the court taking into account all relevant factors and circumstances."

[6] The Minister responsible for trade and industry appoints the CEO of the applicant, his responsibilities include the general administration of the applicant and to carry out any function assigned to the applicant by the Act.[8] The CEO with the concurrence of the Minister is vested with powers to appoint a deputy CEO of the applicant. The latter performs the functions of the CEO whenever he is unable to perform those functions, or when its office is vacant. The supporting affidavit to this application is signed by the deputy CEO and states that the CEO has resigned and left the applicant with effect from 10 October 2016. It states that the deputy CEO is authorised to bring this application. As I have already mentioned, the deputy CEO executes the duties assigned to the CEO in the absence of the latter.

[8] S 6

[7] *Locus standi* means a right to prosecute. Under common law, this doctrine requires that a party must have a personal and direct interest in the matter before the court.[9] In terms of the Constitution[10] "(a) anyone acting in their own interest" and/or "(d) anyone acting in the public interest", may approach a competent court asking for an order, if it is under the belief that its rights have been violated or threatened.

[8] It is important to mention that the powers that are vested on the applicant as a juristic person are not taken away by the CEO's 's role as his is to "carry out"[11] and perform the functions of the applicant. It is my view that it was not the intention of the legislature that applicant has no powers because the same Act provides that the applicant is the public entity and a juristic person.[12] The Act vests the applicant with powers to institute any legal action which includes correcting its own decisions. Therefore, the applicant in approaching this Court is seeking relief of correcting and setting aside one of its decisions in appointing the respondent. Based on those mentioned above, I conclude that the applicant has *locus standi* to bring this application, therefore, the submission that the applicant as an employer has no *locus standi* is misplaced under the circumstances.

Is there an unreasonable delay?

[9] During argument, parties agreed that this application is brought in terms of section 158(1)(h) of the LRA, despite the initial uncertainty that was raised by the applicant that the application was both in terms of this section together with the provisions of Promotion of Administrative Justice Act[13] (PAJA). It is commonly referred to as judicial review under the principle of legality, and there is no time limit as to when this application should be brought, however, as it is a labour dispute it has to be expeditiously resolved. I agree with the decisions of this Court where a reasonable time to bring a review application

[9] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* 2013(10 BCLR 1180 (CC) at para 27
[10] S 33 of the Constitution of the Republic of South Africa, 108 of 1996.
[11] S 6
[12] S 3(1) and (2) of the Act.
[13] Act 3 of 2000.

under section 158 (1)(h) has been held to be about six (6) weeks, and the reasons for this conclusion is that this interpretation serves the purpose of the LRA.

[10] In proceeding to decide the issue of delay "in matters of this nature" the SCA in *Gqwetha v Transkei Development Corporations Ltd and Others*[14] said,

> "The attitude of our courts when faced with the issue of delay in matters of this nature is neatly captured by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 SCA at 321 as follows:
>
> …
>
> *… application of the rule requires consideration of two questions:*
>
> *(a) Was there an unreasonable delay?*
>
> *(b) If so, should the delay in all the circumstances be condoned?*

[11] The latter question requires this Court to apply its judicial discretion being informed by "the values of the Constitution" which are the foundation of the LRA. The relief sought consists of the consequential relief as the applicant seeks for the appointment of the respondent to be set aside. The Constitutional Court, in *Khumalo and Another v Member of the Executive Council for Education: Kwazulu-Natal,*[15] re-emphasised the principle that a presiding officer has to take into account the prejudice that will be suffered as a result of the relief sought. It was held that the following factors have to be considered, taking into account that courts have to make orders which are just and equitable: (a) there is a heavy weigh on the State to perform its duties diligently and without delay,[16] (b) Is there any complaint against the employee's performance,[17] (c) the merits of the case,[18] the values of security

[14] [2006] 3 All SA 245 (SCA).
[15] 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).
[16] *Khumalo* at paras 46 and 51.
[17] *Khumalo* at para 54 to 56.
[18] *Khumalo* at para 57.

of employment, (d) and the role played by the employee on the decision taken by the employer.[19]

[12] This application was delivered in November 2016, asking that the decision that was made on 25 June 2015 and effected on 1 July 2015 be set aside and corrected. The applicant in its papers avers that it became aware of the irregularities after an internal audit report dated 10 May 2016. Therefore, this application was delivered six months after the applicant became aware of the alleged irregularities. The respondent argued that the delay is unreasonable because the decision was taken on 25 June 2015, therefore, according to her, the delay is more than 12 months.

[13] The first question is from what date such a reasonable period falls to be calculated. I conclude that, in deciding as to when the review should have been brought one has to take into account that according to the papers, before the report could be made available to the applicant it was not aware that there was this alleged irregularity, therefore to say the delay starts from June 2015 it cannot stand as one has to look at when did it become aware of this alleged irregularity.[20] Therefore in calculating the delay one has to start from 10 May 2016.

[14] The next question to be answered is: is the delay unreasonable? This question depends on the facts and the circumstances of this case. The six-week period ended on about 23 June 2016, and this review was delivered 19 weeks (4 months) thereafter.

[15] The applicant confirms that the internal audit report was received on 10 May 2016, then it proceeded to consider "the outcome of the investigation in the months of May, June and July 2016 taking this action against implicated employees", it only sought legal advice as to what steps to be taken in August 2016 (about three months later). The attorneys of record were appointed and they proceeded to seek legal opinion from counsel. The applicant avers that

[19] *Khumalo* at para 65.
[20] *Khumalo* at para 39.

due to prior commitments, counsel finalised the opinion on 21 September 2016. After a consideration of the opinion, it gave instructions for this review to be instituted. It submits that counsel was instructed on 3 October 2016 and indicated that he had prior commitments and would therefore not be able to prepare the application urgently. It transpired that this is the same counsel who had been briefed to provide legal opinion, as the same counsel had been instructed, a decision was taken that he should prepare the application as soon as possible. This application was finalised in the week of 24 October 2016. There is no indication in the papers that Maenatje *SC,* who appeared for the applicant in this matter*,* is the same counsel that was briefed to provide legal opinion and prepare the papers.

[16] I am unable to understand why the applicant upon becoming aware of the alleged irregularity did not take action at that time by bringing this application but opted to first institute disciplinary action against those who took a decision in appointing the respondent. There is no reason before this Court which indicates that the outcome of the dismissal hearing necessitated the institution of this application, therefore, in my view, this is an application that should have been instituted immediately upon the applicant becoming aware of the alleged irregularity. The applicant appointed the attorneys of record, presumably as attorneys with skill in prosecuting matters of this nature, the attorneys opted to instruct counsel who was not available and they chose to wait for such counsel to be available. Counsel provided the legal opinion, yet they still expected for the same counsel to prepare the papers for them, and there is no explanation as to why the attorneys could not prepare the papers themselves. I have looked at the papers, and to my mind, this is not a complicated, but a straightforward matter.

[17] In the papers, there are no allegations that the respondent was aware or ought to have known that the appointment was irregular, in this matter the irregularities are based on the scoring which it is alleged that Mr Mpfariseni Mudau made in favour of the respondent. There is no allegation that the respondent is a poor performer following the appointment, being guided among other things by what the Constitutional Court stated in *Khumalo*, as

summarised above, Furthermore, the applicant being the State which is *"obliged to act expeditiously in fulfilling [its] constitutional obligations"* this Court cannot overlook the aspect of the unreasonable delay.

[18] In respect of costs, am of the view that each party should pay its costs.

[19] Wherefore, the following order is made:

Order

1. The application is dismissed.
2. Each party to pay own costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Adv Maenatje SC
Instructed by*:* *Roy Ramdaw and Associates Inc.*

For the Respondent: Adv H Gerber
Instructed by : *Welman and Bloem Inc.*