



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J448/2024

In the matter between:

MASWANGANYE MKHACANI VICTOR

Applicant

and

DEPARTMENT OF BASIC EDUCATION

First Respondent

DEAPRTMENT OF EDUCATION LIMPOPO

Second Respondent

MEC: DEPARTMENT OF EDUCATION LIMPOPO

Third Respondent

**HEAD OF DEPARTMENT OF EDUCATION
LIMPOPO PROVINCE**

Fourth Respondent

MOPANI EAST DISTRICT OFFICE

Fifth Respondent

Heard: 23 April 2025

Delivered: 15 May 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 15th of May 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

PHAKEDI, AJ

Introduction

[1] This is an unopposed application wherein the applicant seeks an order in the following terms:

- '1. Declaring that the Applicant was translated from Senior Administration Clerk Grade III to Assistant Administration Officer without the necessary adjustment in the salary scale.
2. Ordering the first and second respondents to pay the Applicant the remuneration or salary, which he would have been entitled to for the period 1 November 2001 to date together with interest thereon at the prescribed rate calculated from November 2001 to date of final payment.
3. The costs of this Application against any of the Respondent (s) opposing this application.
4. Further and /or alternative relief.'

[2] The State Attorney filed a notice of intention to oppose on behalf of the first, second, third and fourth respondents on 13 June 2024 but did not file opposing papers.

Background facts

[3] The applicant is employed as a Senior Admin Clerk Grade III by the fifth respondent, which is an entity controlled by other respondents. He has been in this position since 2001 and is aggrieved that although he was promoted into this position, he has not been remunerated accordingly.

[4] Attempts on his side to engage with the respondents in order to deal with the adjustment of his salary and benefits were met with technical and structural problems. On or about 3 May 2006, the second respondent addressed a letter to the fifth respondent confirming that he was translated into an existing post and he is regarded as an employee of the fifth respondent.

[5] The fifth respondent also confirmed that the applicant was absorbed into a position of Provisioning Admin Officer, which is no longer in existence. In its letter dated 20 June 2006, the fifth respondent stated that the applicant is occupying a non-existent post as the College does not have suitable posts which befit his qualifications and job requirements on its organogram.

[6] The applicant then referred his matter to his trade union, the Public Servants Association of South Africa (PSA). On 30 August 2010, the PSA wrote a letter to the fifth respondent confirming that the position of Senior Admin Clerk Grade III, which was on level 6, does not exist in the Department, however, the applicant was still receiving a salary of an Admin Clerk Grade III, which is on level 5. The PSA demanded that his salary be adjusted to level 7 in line with the position of Provisioning Admin Officer.

[7] The applicant then approached this Court in terms of section 77 (3) of the Basic Conditions of Employment Act¹ (BCEA), seeking a declaratory order that he was translated into a senior position and an order directing the respondents to pay him remuneration or salary which he would have been entitled to from 1 November 2001, including interest thereon.

Jurisdiction of the Labour Court

[8] Section 77(3) of BCEA provides that:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of

¹ Act 75 of 1997 as amended.

whether any basic condition of employment constitutes a term of that contract.'

[9] In terms of this section, any claim that has to do with a dispute over a contract of employment, that could be brought in a civil court, falls within the jurisdiction of the Labour Court. It is trite that jurisdiction is decided on the pleadings filed by an applicant/plaintiff. In an application, the pleadings are constituted by the notice of motion and the supporting affidavits.²

[10] The Supreme Court of Appeal in *Makhanya v University of Zululand*³ stated that the pleadings of a case were definitive:

'...the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly...'

[11] The Constitutional Court in *Amalungelo Workers Union and Others v Philip Morris SA (Pty) Ltd and Another*⁴ held that section 77(3) expands the Labour Court's jurisdiction to cover disputes arising from contracts of employment even if they are not regulated by the Act. But in that event, the jurisdiction is not exclusive. It is shared with the civil courts. In order for the applicant to succeed with his contractual claim, his right must be found in the written contract, either express or implied.

[12] The applicant in this matter is relying on correspondence exchanged between his employer/s and trade union as a basis for seeking a declaratory order. He is not relying on any term of his contract of employment in order for this Court to satisfy itself that it has the necessary jurisdiction to grant the declaratory order against the respondents for payment of remuneration or salary from the period 1 November 2001. The applicant's payslip does not take the matter anywhere as it merely confirms that he received his salary on 15 September 2020. In the absence of a copy

² See: *SA Municipal Workers Union on behalf of Morwe v Tswaing Local Municipality and Others* (2022) 43 ILJ 2754 (LAC) at para 5.

³ [2009] 8 BLLR 721 (SCA) at para 71.

⁴ (2020) 41 ILJ 863 (CC) at para 23.

of a contract and a specific plea on which term of the said contract the applicant claims breach, this Court is unable to come to his aid.

Entitlement to a declaratory order

[13] The basic principle in litigation is that in order to be entitled to relief, the applicant must make out his case in his founding papers. A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others*⁵, Corbett CJ laid the following principle with regard to declaratory reliefs:

‘An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case ... But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding ...’

[14] The Constitutional Court in *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another*⁶ confirmed that in considering whether or not to grant declaratory relief, a two-stage approach must be applied:

- (a) the court must be satisfied that the applicant for the relief has an interest in an existing, future or contingent right or obligation; and
- (b) the court may then exercise its discretion to either refuse or grant the order sought.

[15] The applicant in his papers states that ‘*it is not in the public interest that the issues of translation and promotion processes should be open to abuse by senior government officials as evident by this case*’. He further states that ‘*the balance of*

⁵ 1995 (4) SA 1 (A) at 14F-I.

⁶ 2019 (3) SA 1 (CC) at para 80.

convenience favours the granting of this application in that an adjustment to my salary was unfairly withheld from me since 2001...

[16] The aforementioned statements are indicative that the applicant is aware of his rights and understands that he also has remedies which can be pursued in terms of the mechanisms provided for in the Labour Relations Act⁷ relating to promotion. Pursuing a claim in terms of contract law has specific requirements which the applicant has to meet in order for the court to exercise its discretion and apply the legal principles applicable in contractual disputes.

[17] *The Labour Appeal Court in Passenger Rail Agency of South Africa and Others v Ngoye and Others*⁸ held that:

‘[28] While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims, in my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.

[29] The motive for litigants choosing to follow an alternate route to that which is set out in the LRA is seemingly to be awarded a quicker remedy than that which is available in terms of the LRA. However, it appears that litigants are not aware of the requirements that must be met to qualify for a contractual remedy such as specific performance or damages. This is potentially the reason for the proliferation in the use of contractual recourse. In this regard, I refer to what was said by this Court more than five years ago in *Toyota SA Motors (Pty) Limited v Nzuza and others*:

“....it appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and claim breach of contract

⁷ Act 66 of 1995, as amended.

⁸ (2024) 45 ILJ 1228 (LAC) at paras 28 – 29.

seeking either specific performance or damages. I do not know the reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this Court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief.”

[18] I am not satisfied that the applicant has made out a case for this court to grant the declaratory relief as pleaded in his founding papers. Section 77A deals with the powers of the Labour Court and provides that:

‘... the Labour Court may make any appropriate order, including an order –

...

(e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation...’

[19] On the face of the pleadings filed in this matter, I am not in a position to exercise my discretion in terms of the above-mentioned section and grant the orders sought in the notice of motion.

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

Order

1. The application is dismissed.
2. There is no order as to costs.

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv K Mokwena

Instructed by: GA Maluleke Attorneys

For the Respondents: No appearance

LABOUR COURT