



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: PA 14/24

In the matter between

MEC FOR SOCIAL DEVELOPMENT

Appellant

and

ZIMISELE ARNOT SAM

First Respondent

MNYAMEZELI BOMENI

Second Respondent

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORIAL BARGAINING COUNCIL**

Third Respondent

DUMISANI SONAMZI N.O.

Fourth Respondent

CHANTEL WILLIAMS

Fifth Respondent

Heard: 22 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Labour Appeal Court website and released to SAFLII. The time and date for hand-down is deemed to be 26 June 2025.

Coram Nkutha-Nkontwana JA, Mahalelo et Tokota AJJA

JUDGMENT

TOKOTA, AJA

Introduction

[1] The first respondent is an employee of the appellant (the Department), and the second respondent is an employee of the Department of Health. Both the first and second respondents applied for the position of Director: Employee Relationship, Wellness and Health Programmes within the Department. After the respondents were interviewed, they were subsequently disqualified from appointment to the position. They then declared a dispute of unfair labour practice relating to promotion. The dispute was referred to the Public Health and Social Development Bargaining Council (the Bargaining Council).

[2] After the dispute of unfair labour practice was referred to the Bargaining Council, the arbitrator found that the Department had committed no unfair labour practice. The arbitration award was challenged in the Labour Court, which found that the Department had committed an unfair labour practice in respect of the first respondent. With leave of the Labour Court, the Department now appeals against the whole of the judgment and order thereof.

Factual Background

[3] On 17 September 2017, the post of Director: Employee Relationship, Health and Wellness Programmes was advertised by the Department. Both respondents applied for the position.

[4] Both respondents were shortlisted in the recruitment process. On 2 March 2018, they were interviewed. The first respondent scored the best results and the

second respondent came second. In terms of the personnel suitability checks, they were required to undergo a process in terms of which the Department was obliged to verify the following areas, namely, their respective criminal records, finance records, citizenship, qualifications, reference checks, licence and directorships.

[5] The verification tests were done by an independent company called MIE. On 12 April 2018, a report was submitted to the Department in which it was stated that the first respondent was an active director of the following institutions: (i) Ijelo Labafazi, which was compliant and in business as per the CIPC; (ii) Izigodlo Khanyisa Agricultural and Multi-Purpose Primary Co-Operative Limited, which was also compliant and in business; and (iii) Zmish Trading Enterprise, which was at the final stages of deregistration. It was also discovered that when the second respondent completed his Z83 application form, he had indicated that he had no previous criminal convictions. The first respondent did not disclose his financial interests as required by the prescripts.

[6] The abovementioned revelations resulted in them being disqualified from consideration for the appointments. It was then decided to proceed by way of headhunting for the post. The headhunting process culminated in the appointment of the fifth respondent to the position.

[7] The respondents referred a dispute of unfair labour practice relating to promotion to the Bargaining Council for conciliation, mediation and arbitration. The conciliation failed and the matter was then referred to arbitration. On 14 May 2019, the arbitrator issued an award in favour of the Department, having found that the Department had committed no unfair labour practice. Consequently, so the arbitrator found, the respondents were correctly disqualified for appointment to the position.

[8] Both respondents instituted proceedings in the Labour Court seeking an order reviewing and setting aside the award. The Labour Court reviewed and set aside the award.

[9] There was a faint challenge that the presence of one Mr Collins on the headhunting panel was improper in that he was at the time at the level of middle

management and not on the level of a Director. Since we are not here dealing with the appointment of the fifth respondent, I need not deal with this challenge in that, even if it was improper, though this is denied, the respondents lacked locus standi to challenge that. This process was conducted after they had been disqualified. In any event, Mr Collins was already promoted to the rank of Director at the stage when the recommendations for the appointment of the fifth respondent were signed.

Review proceedings in the Labour Court

[10] The respondents instituted review proceedings challenging the reasonableness of the arbitration award and sought an order reviewing and setting aside the award. The Labour Court found that, in respect of the first respondent, the Department had committed an unfair labour practice and ordered that he be instated to the position of Director: Employee Relationship, Health and Wellness Programmes. The Labour Court further ordered that the Department pay the first respondent all of the remuneration to which he was entitled in terms of the instatement order, together with costs of the application. With regard to the second respondent, the Labour Court held that he had produced no reason justifying the review and impliedly dismissed his application.

[11] The Labour Court found that the Department was not entitled to disqualify the first respondent because he had made the disclosure of his interests to a subordinate of one Mr Zenzile, a Director in the Department. It held that even if the first respondent did not make a disclosure, he had established that failure to disclose such interests did not justify his disqualification

[12] The Labour Court held further that the legislation on which the arbitrator based his decision was irrelevant. It held that the relevant policies did not require the first respondent to make any disclosure of financial interests. It held further that if the Department was of the view that financial disclosure should have been made, its remedy was to institute a disciplinary process against the first respondent. It held that in the absence of a statutory or cogent reason for the non-appointment, the arbitrator's award was not reasonable and had to be reviewed and set aside.

Parties' submissions

[13] Counsel for the appellant submitted that the findings of the Labour Court, on which it based its conclusion, were erroneous and not supported by the evidence of the first respondent. I agree. The appellant contended that the first respondent testified that he had no financial interest to disclose. He testified that in any event, he had no obligation to disclose anything because according to him *'the disclosure is not a requirement for recruitment'*. Counsel submitted that the decision of the Labour Court was not supported either by the evidence led at the arbitration or by legislation. Consequently, so the argument went, the appeal ought to succeed.

[14] Mr *Mama Java*, for the first respondent, contended that the appeal should fail. He submitted that the Labour Court was correct in its decision. He supported the view of the first respondent that he had nothing to disclose. He contended that there were no companies in which he (the first respondent) had a financial interest. If there were such companies, the first respondent did in fact disclose his interest. This latter part of the argument cannot be found in the evidence that was led at the arbitration.

[15] Mr Java blew hot and cold in that, at some stage, he submitted that there was nothing to disclose. He contended that the first respondent was not a Director of any company. He could not explain the results of the CIPC reports, which revealed that there were three companies, of which the first respondent was a Director. He conceded, however, that the first respondent was a Director of *Ijelo Labafazi*, which was a non-profit organisation. He conceded further that there may be a financial interest in the organisation because the directors are entitled to monthly stipends. He persisted, however, that there was no obligation on the first respondent to disclose anything to the Department because he was not deriving any financial benefit from *Ijelo labafazi*.

Discussion

[16] The main issue for determination is whether the first respondent was a Director of any company and, if so, whether he had an obligation to disclose his financial interests therein. I find that the first respondent was a Director of three

companies, one of which was on the verge of being deregistered. It is common cause or not seriously disputed, that he failed to disclose his financial interests therein during the financial year 2017/2018. This Court must then decide whether there were any prescripts in terms of which he was obliged to disclose his financial interests. The Court must also make a finding as to whether, in the light of his failure to disclose his financial interests, the Department was entitled to disqualify him from being appointed to the position.

[17] It is trite that the appellate court will not interfere with findings of fact by a lower court, as they are presumed to be correct. It follows that it is not open to this Court to depart from findings of fact by the Court a quo merely on the grounds that this Court considers the findings to be wrong or that the Court a quo has misdirected itself in a material way or that it has based its findings on a misconception. It is only when there is no evidence, as in this case, which could reasonably support a finding of fact or where the evidence is such that a proper evaluation thereof leads inexorably to the conclusion that no reasonable Court could have made such a finding.¹ In that event, then this Court will be entitled to interfere.

[18] Where it has been demonstrated, through the recorded evidence, that the findings of fact by the court a quo constitute material misdirection and are wrong, the appellate court is entitled to make its own findings based on the recorded evidence.² I find that the court a quo erred in finding that the first respondent disclosed his financial interests during the year in which he was supposed to do so. I hold further that the Labour Court erred in finding that there was no legislation requiring a disclosure of financial interests. This Court is therefore at large to make its own findings based on the recorded evidence and prescripts of the Department.

Legal prescripts relating to financial disclosure

Senior Management Service Handbook

¹ *Betha and Others v BTR Sarmcol (A Division of BTR Dunlop Ltd)* (1998) 19 ILJ 459 (SCA) at 473F - G.

² *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645E - F. See: *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 et seq; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666B--D.

[19] In terms of paragraph 8.2 of the Senior Management Service Handbook (SMS Handbook) applicable to senior members of the service: *'[m]embers of the SMS are also required to disclose their financial interests'*.

[20] Regulation 11 provides: *'An employee shall abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct and official duties'*.

[21] Regulation 18 provides that *'SMS members, except for a head of department shall, not later than 30 April of each year, disclose to the relevant head of department, in a form prescribed for this purpose by the Minister, particulars of all his or her interests in respect of the period 1 April of the previous year to 31 March of the year in question'*.

[22] Regulation 19 provides:

'The following details of interests shall be disclosed;

(a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law

(i) The number, nature and nominal value of shares of any type in any public or private company and its name; and

(ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.

(b) Income generating assets

(i) A description of the income generating asset;

(ii) the nature of the income;, and

(iii) the amount or value of income received.

...

(d) Directorships and partnerships

(i) The name, type and nature of business activity of the corporate entity or partnership; and

(ii) if applicable, the amount of any remuneration received for such directorship or partnership.'

[23] It is common cause that the first respondent falls within the category of employees required to disclose their financial interests in terms of the SMS Handbook.

Determination and Directive by the Minister in terms of s 41(3) of the Public Service Act, Proclamation 103 of 1993, read with Regulations 16(c) and 18(3)

[24] In terms of s 41(3) of the Public Service Act³ (the Act) '*the Minister may issue directives which are not inconsistent with this Act to elucidate or supplement any regulation*'. By means of a directive dated 16 March 2017 as envisaged in s 41(3) of the Act read with Regulation 16(c) and 18(3) of the Public Service Regulations, 2016⁴, the Minister, by directive dated 16 March 2017, directed that designated employees, who included the respondents, must disclose their financial interests using the financial disclosure form for each financial year for the period 1 April of the previous financial year to 31 March of the financial year in question.

[25] In light of these prescripts, the Labour Court erred in holding that '*[t]he legislation [which] the arbitrator based his decision on is irrelevant*'.

[26] Failure to make proper disclosure, as required by the prescripts, strikes at the very core of employment and/or the promotion of employees into senior positions. The objectives of the financial disclosure framework, as introduced in 2001, were to assist the Executive Authorities in identifying and managing conflicts of interest amongst employees in Senior Management positions. It is a tool through which the Executive Authority can promote open and accountable government as espoused in s 195(1) of the Constitution. The scourge of corruption bedevilling this country can be minimised only if proper monitoring of managerial employees is enhanced.

[27] Accordingly, failure to disclose financial interests in circumstances where the employee knew or ought to have known that such information was material and the employer would rely on such disclosure or non-disclosure in appointing him/her to a higher position, then such deliberate act of non-disclosure must amount to a

³ Proclamation No.103 of 1994.

⁴ GN 877 of 2016: Public Service Regulations, 2016.

fraudulent misrepresentation. It was indeed a condition attached to the advertisement of the post that '*suitable candidates will be subjected to a personnel suitability check (including criminal record checks and financial/asset record checks)*'. It becomes worse where an employee persists, as the first respondent did, that there is no need to disclose, notwithstanding clear instructions in terms of directives and regulations.

[28] It has also been held that failure to disclose the complete truth in circumstances where there can be no doubt that silence may amount to a misrepresentation, such an omission will invariably give a misleading impression.⁵

[29] In terms of Chapter 2 of the Public Service Regulations, any designated employee who fails to disclose an interest or wilfully provides incorrect or misleading details is guilty of misconduct.

[30] The power to appoint and promote employees of the State is located in the heartland of the Executive Authority.⁶ The Executive Authority is therefore entitled to set norms and standards by which it will measure the appointment criteria. In terms of Regulation 18, all SMS members 'shall' disclose their interests to the Head of the Department in respect of the previous year from 1 April to 31 March of the year in question. It does not lie in the courts' hands to simply ignore the norms and standards set by the Minister and regard them as irrelevant. In my view, the test is whether the failure to disclose was material, and as such, would have inevitably influenced the decision to appoint the first respondent to the advertised position.

[31] In my view, the first respondent's non-disclosure was material to a decision whether or not he was fit to be appointed in a managerial position as advertised, which demands absolute integrity and impartiality. It follows, therefore, that a senior employee, like the first respondent, had a fiduciary duty to disclose his financial interests in the companies aforementioned.

⁵ *Marais v Edlman* 1934 CPD 212.

⁶ Section 9 of the Act.

[32] As alluded to above, the first respondent was inclined to approbate and reprobate in that at some stage he said he disclosed his interests and at some other stage he argued that he was not aware that he had a duty to disclose his financial interests. Regulation 11 makes it plain, as a code of conduct, that an employee must abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct and official duties. Regulation 14 makes it obligatory that an employee must promote sound, efficient, effective, transparent and accountable administration. Failure to adhere to the code of conduct constitutes a misconduct. Therefore, the first respondent cannot be taken seriously when he argued that he was not aware that he had a duty to disclose.

[33] The duty of disclosure is rooted in the duty of impartiality, but was also an implied (if not express) term of the first respondent's appointment to the advertised post. To that end, an essential corollary of the implied requirement of the first respondent to act fairly should include the legal duty to make disclosure.

[34] In the context of an ex parte application for a search warrant, with reference to full disclosure of material information, the Constitutional Court in *Thint (Pty) Ltd v National Director of Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*⁷ stated thus:

'A similar view was expressed in *Powell*⁸ in the context of search and seizure under the NPA Act under section 29(5). In this case, the Supreme Court of Appeal had to consider, among other things, a challenge to the validity of a search and seizure warrant based on a failure to disclose material facts. In the course of dealing with this challenge, the court held:

"In invoking a procedure without notice to the party sought to be subjected to it, Ferreira engaged the processes of justice in an inevitably one-sided process. She was consequently under a duty to be ultra-scrupulous in disclosing any material facts that might influence the Court in coming to its decision."⁹

⁷ 2008 (2) SACR 421 (CC) at para 299.

⁸ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) (*Powell*).

⁹ *Id* at para 42.

[35] In view of the above, it is clear that the Labour Court misdirected itself both on the findings of fact and law. Accordingly, the appeal must succeed.

[36] Before conclusion, there is one procedural aspect relating to the record of appeal which requires some comments. In terms of Rule 6(11) (h) and (i) of the Rules of this Court¹⁰, the record of appeal must not contain the record of oral argument and heads of argument. Further, the Rules provide that a document must not be included in the record more than once.¹¹ Volume 8 of the record consisted of heads of argument before the Labour Court by both parties. The judgment of the Labour Court appears twice in volume 9. By including unnecessary documents, the appellant may attract an order of costs. Care should be taken when preparing records of appeal not to include unnecessary material, as this goes to costs. Legal practitioners often charge for perusal of the whole record, which may not be fair to clients where it is not necessary to do so.

Costs

[37] What remains is a question of costs. In terms of section 162 of the Labour Relations Act¹², an order of payment of costs may be made in accordance with the rules of law and fairness. Unlike civil matters, costs in labour disputes do not necessarily follow the result.¹³ This remains a discretion of the court, taking into account the conduct of the parties during the proceedings and the relationship that exists between the employee and employer. I do not consider an order of costs as appropriate in this matter.

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

Order

1. The appeal is upheld.

¹⁰ GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court.

¹¹ Rule 6(10).

¹² Act 66 of 1995, as amended.

¹³ *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and Others* (2021) 42 ILJ 2371 (CC) at para 24; *Zungu v Premier of the Province of KwaZulu-Natal and others* (2018) 39 ILJ 523 (CC) at para 24.

2. The order of the Labour Court is set aside and substituted with an order in the following terms:

‘The application for review is dismissed with no order as to costs.’

3. There is no order as to costs.

B R Tokota

Nkutha-Nkontwana JA and Mahalelo AJA concur.

APPEARANCES:

FOR THE APPELLANT:

F T Pretorius and Z Zito

Instructed by the State Attorney

FOR THE FIRST RESPONDENT:

Mr M Java of Java attorneys