



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Reportable/Of interest to other judges

Case no: C 666/2023

In the matter between:

THEMBALETHU VICO

Applicant

and

**DEPARTMENT OF FERESTRY, FISHERIES
AND ENVIRONMENT**

First Respondent

**DIRECTOR GENERAL OF THE
DEPARTMENT OF FORESTRY, FISHERIES
AND ENVIRONMENT**

Second Respondent

ADV NAZEER CASSIM SC (N.O.)

Third Respondent

Heard: 17 April 2025

Delivered: 23 April 2025

Summary: (Application – Declaratory relief relating to incomplete disciplinary proceedings – Most of the relief sought outside the court's jurisdiction – Applicant already having exercised right to obtain some relief in other fora – Main relief abandoned at the hearing – Application vexatious in character – costs awarded)

JUDGMENT¹

LAGRANGE, JNature of the application

- [1] This is an opposed application for declaratory relief. At the time the application was brought in January 2024 the applicant, Mr T Vico ('Vico'), was still employed as a Director for the Department of Fisheries, Forestry and the Environment DFFE ('the department').
- [2] The department has also applied for condonation for the late filing of its answering affidavit, but as the applicant did not object to the late filing it is not necessary under Rule 36(1) of the Labour Court Rules for the court to consider a condonation application. Accordingly, the answering affidavit forms part of the record.
- [3] By the time the application was heard he had already been dismissed on 14 June 2024. He seeks the following relief.

"1. Declaring that the first and second respondents, in their respective capacities as the employer, (hereafter "the employer"), have unjustly and unfairly terminated the briefing contract of the third respondent as chairperson of the disciplinary hearing.

2. Declaring that the first and second respondents' termination of the briefing contract of the third respondent has caused unreasonable delay of the disciplinary hearing that the employer had initiated against the applicant.

3. Declaring that the respondents have contravened the applicant's right to fair labour practice by prolonging the disciplinary inquiry disciplinary hearing against him, thus causing harm, inter alia, to his prospects of career progression.

4. Declaring that the costs spent on the recusal applications that were initiated by the second respondent against the third respondent as fruitless and wasteful expenditure.

¹ As varied on 24/04/25 in terms of S 165(b) of the LRA to amend a grammatical error.

5. *Make the ruling of Advocate Mojapelo an order of the court.*

6. *Directing any respondent who opposes this application to pay the costs thereof.*

7. *Further end or alternative relief."*

(superfluous capitalisation omitted)

- [4] The applicant has been involved in protracted litigation with the Department relating to the disciplinary inquiry instituted against him, which concerns the removal of abalone confiscated by the department valued at R 7.5 million. A very brief outline of the sequence of events is set out below.
- [5] He was charged with numerous acts of misconduct, including fraud, unauthorized possession of goods, breaches of the Prevention and Combating of Corrupt Activities Act 2 of 2004 and of the Public Finance Management Act of 999, amongst other things. On 10 January 2020, the first chairperson of the inquiry found him not guilty of all 4 charges he was facing.
- [6] The Department took the Chairperson's decision on review. The matter was heard by Van Voore, AJ under case number C23/2020. The court set aside the award of the first chairperson and remitted the matter back to the Department to *"proceed de novo before another Chairperson, who shall be permitted to rely on the record of evidence before the second respondent, together with any additional evidence adduced by the parties."*
- [7] The department appointed an advocate, Mr S.M. Shaba SC, as the second chairperson of the inquiry, which was due to convene on 6 and 7, June 2023. The new chairperson was provided with transcripts of the original hearing. The parties agreed they would make representations to the Chairperson who would make a ruling whether the transcripts were adequate enough for him to determine the matter on the pre-existing record. On 3rd August 2023, he advised that given gaps in the transcripts, he was unable to make a fair and just finding and directed that both documentary and oral evidence should be led before him, proposing six dates for the hearing. There is some dispute about whether the parties

had agreed to rely on the record, but in any event the Chairperson was not willing to do so.

- [8] The applicant then applied to lead the evidence of two witnesses and the matter was scheduled for hearing on 9 and 10 December 2023. Following the applicant's request to summon a witness, the department submitted a recusal application to the chairperson on the basis that he was biased. The applicant opposed the recusal application and in reply the employer appeared to have added an additional ground for his recusal relating to the chairperson allegedly delaying the finalization of the matter. On 5 December 2023 and before the chairperson handed down a decision on the recusal application, the department terminated his mandate as a chairperson of the inquiry without providing reasons. The applicant's union attempted, unsuccessfully, to get the decision reversed. The applicant complains that the pending disciplinary inquiry adversely affected his prospects of promotion in the department or elsewhere in the public service.
- [9] He filed his application for a declarator on 3 January 2024. After that, the department appointed the third respondent, Mr N Cassim SC, as the third chairperson to chair the enquiry. The inquiry was due to resume on 27 May 2024, but prior to that the applicant requested the withdrawal of the charges, failing which he would bring an urgent application to interdicted. When the department rejected his demand, the applicant launched the application which came before Gandidze AJ on 24 May 2024 who dismissed his application. The Chairperson subsequently found the applicant guilty of a number of the charges against him and recommended his dismissal. The applicant then brought another application on an urgent basis in early June 2024, seeking, amongst other things to prevent, the Department from giving effect to the chairperson's recommendation.
- [10] That application was also dismissed on 28 June 2024. Thereafter, the applicant lodged an unfair dismissal claim with the General Public Service Sectoral Bargaining Council ('the GPSSBC'). In his referral he disputed both the substantive and procedural fairness of his termination. His argument in respect of substantive fairness was that there was clear

evidence he had not committed the misconduct he'd been found guilty of. In relation to his procedural complaints, he went into some detail in his request for arbitration, stating that:

“The employee was found not giving guilty in the first hearing which was chaired by Advocate Mojapelo. The employer went to court to review the outcome of the first hearing, praying that the court must order that the employee is guilty or alternatively that the court must order that there employer must start the hearing de novo. The court refused to order that the employee guilty but instead granted the employer the alternative prayer to hold hearing de novo in front of a different chairperson. the Chairperson. The employer appointed a new chairperson (Advocate Shaba SC) who ruled that the parties must call witnesses to start the hearing de novo. The employer disagreed with him stating that there is no need to call witnesses and consequently the employer filed recusal applications. On 5th December 2023, the employer fired the Advocate Shaba SC for ruling against the employer. The employer then took six months before appointing another Chairperson. These these incidents deprived violated the employee’s right to a speedy resolution of the dispute. The third Chairperson issued a ruling without hearing the dispute afresh (de novo) as directed by the Review Court as the third chairperson made a decision without hearing witnesses and without properly considering the evidence that is already on Record. The third chairperson recommended that the employee be dismissed with one month notice without giving the employee opportunity to provide mitigating circumstances. The employer dismissed the employee with immediate effect.”

(sic)

[11] The applicant had applied for leave to appeal against the judgment of Van Voore AJ, which was refused. Likewise, his petition for leave to appeal to the Labor Appeal Court was also refused in August 2023. Similarly, he was later refused leave to appeal to the Constitutional Court. Gandidze AJ noted that when the applicant brought the urgent application on 24 May 2024, he did not take the court into his confidence about his unsuccessful attempts to appeal the judgment of Van Voore AJ, nor that his application for leave to appeal to the Constitutional Court was pending at the time.

Evaluation

[12] The applicant claims he is entitled to a declaratory order by virtue of the Labour Court's power to make a declaratory order under section 158(1)(a)(iv) of the Labour Relations Act 66 of 1995 ('the LRA'). Two caveats must be mentioned. Although widely framed, it must be understood that the power to grant such relief, only applies to disputes which the Labour Court has jurisdiction to decide in terms of s 157 of the LRA. Secondly, one of the factors a court must take account of when deciding if it should exercise its discretion to grant declaratory relief is whether the applicant has alternative remedies². It is not an alternative avenue to utilising the tailored remedies for resolving disputes, which are provided for in the LRA.

[13] Further, the principles governing the exercise of a court's discretion to grant declaratory relief are the same as those governing the grant of such relief in the High Court³. Two questions have to be answered when considering an application for declaratory relief. In *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* (325/2022) [2023] ZASCA 87, the Supreme Court of Appeal confirmed its dictum in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*; 2005 (6) SA 205 (SCA), with reference to the powers of the High

² *Member of the Executive Council for Education, North West Provincial Government v Gradwell* [2012] 8 BLLR 747 (LAC) at paragraphs 46-47.

³ *Mantzaris v University of Durban-Westville & others* [2000] 10 BLLR 1203 (LC) at paragraph 6.2.

Courts to grant declaratory relief under Section 21(1)(c) of the Superior Courts Act 10 of 2013, namely that:

“[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an ‘existing, future or contingent right or obligation’ and nothing more is required (Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam 1995 (4) SA 1 (A) at 14F). In Durban City Council v Association of Building Societies 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”

(Emphasis added)

- [14] The applicant initially argued that the declaratory relief he sought would not have any practical consequences but corrected himself later by arguing that he had a clear interest in the outcome of the application.
- [15] In respect of the first prayer, the applicant could not identify any provision of the LRA which entitles the labour court to determine the fairness or lawfulness of the termination of a chairperson's mandate to conclude a disciplinary enquiry.
- [16] In relation to the second and third prayers, that the disciplinary enquiry had been unreasonably delayed contravening his right to fair labour

practices and prejudicing his career progression prospects, most of that complaint is encompassed in the applicant's dispute about the procedural unfairness of his dismissal which he has referred to arbitration and accordingly is an issue set down for determination in those proceedings. Any complaint about the procedural unfairness of a dismissal falls squarely within the jurisdiction of the presiding arbitrator in terms of s 188(1)(b) of the LRA and is not a matter for determination by this court unless exceptional circumstances exist⁴. The applicant did not set out any exceptional grounds for the court. The applicant also did not provide any support for his contention that this court has the authority to determining the harm his career advancement might have suffered as a consequence of any delays in his disciplinary enquiry.

[17] In regard to the fourth prayer concerning a declaration that fruitless and wasteful expenditure was incurred by the department in applying for the recusal of the second chairperson of the disciplinary enquiry, the applicant could not provide any support for the court being able to assume the power to make such a finding. Section 40 of the Public Finance Management Act, 1 of 1999, ('the PFMA'), provides for the determination of fruitless and wasteful expenditure by accounting officers and the auditor-general. Accordingly, such a declaration falls outside the purview of this court.

[18] The prayer with the greatest potential impact is the fifth one, which asks the court to make the ruling of the first chairperson of the disciplinary enquiry an order of court. That ruling acquitted the applicant of all disciplinary charges. As mentioned earlier, the ruling was set aside on review by Van Voore AJ and the applicant's attempts to set aside that judgment have been unsuccessful. Not only was there a judgment already setting aside the chairperson's decision, but when he launched this application he already knew that he had been refused leave to appeal against the judgment by both the Labour Court and the Labour Appeal Court. It beggars belief that the applicant could have seriously believed that he could simply avoid the unequivocal effect of the judgment, by

⁴ *Booyesen v Minister of Safety & Security & others* (2011) 32 ILJ 112 (LAC) at paragraph 44.

approaching his court under the guise of an application for declaratory relief that would have effectively reversed that judgment by reviving the ruling it set aside.

[19] Moreover, on 30 July 2024 the Constitutional Court had dismissed his application for leave to appeal to that court. If he had any slender hope that the highest court might yet reverse the judgment setting aside his acquittal by the first chairperson, that hope was extinguished the Constitutional Court's judgment. Even then the applicant continued to pursue this application. It was only during the course of argument in court that he abandoned his prayer to make the first chairperson's findings a court order.

[20] For all the reasons set out above, the application must fail.

Costs

[21] Both parties asked for costs in the event they were successful. It is unclear what the applicant's costs were as he represented himself and appeared to be the author of all his pleadings and submissions, though he might have obtained legal advice. The respondent was forced to oppose an application in which the primary relief sought was already *res judicata* when the application was launched, and which was then only abandoned when argument was underway. It must also have been obvious to the applicant that his claim for a declaration of procedural unfairness relating to the enquiry delays substantially duplicates part of the dispute he has referred to the bargaining council, and is pending determination there. It is clear from his papers and argument that the applicant is no stranger to legal principles and reasoning. This is not a case of an unsophisticated litigant blundering recklessly ahead in legal ignorance. I am satisfied that the applicant's conduct in launching and persisting in pursuing this application is vexatious in nature, and it would be remiss of the court to compel the respondent to simply shoulder the costs of having to oppose such a speculative application.

[22] The department, very generously in my view, decided not to ask for a punitive cost order on the basis that the applicant is not a legal

practitioner. Had the department asked for costs to be ordered on a punitive scale, I would have been inclined to consider that request favourably. The scale of fees was not specified by the department and accordingly the default scale, Scale A under High Court Uniform Rule 67A will apply.

Order

1. The application is dismissed.
2. The Applicant must pay the Respondents' costs on Scale A in terms of High Court Rule 67A.


R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: In Person

For the Respondent: Adv J Mnisi instructed by State Attorney Pretoria