



Not Reportable

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

Case no: **C302/2022**

In the matter between:

MAMONYANE SEFAI MATSASENG

Applicant

And

DEPARTMENT OF SOCIAL DEVELOPMENT

First Respondent

NOMVUYO MABUSELA

Second Respondent

Date of Hearing: 26 June 2024

Date of Judgment: 12 August 2025

JUDGMENT

CASSELLS AJ

Introduction

- [1] In this matter the Applicant seeks an order declaring the decision taken by the First Respondent to not interview her after she was invited to an interview for the post Community Development Manager: Sustainable Livelihoods in the Western Cape Government as irrational, resulting in the recruitment and selection process being defective and that the First Respondent be ordered to recall all applicants previously invited to the interview to a fresh interview, including her.
- [2] The Applicant initiated her dispute by means of motion proceedings in terms of rule 7 of the (old) rules of this Court. Ordinarily, such disputes are initiated by means of action proceedings. However, as the First Respondent did not object to the process adopted by the Applicant, this matter is adjudicated on the basis of the papers filed by the parties.
- [3] The Applicant's founding affidavit contains only a reference to section 11 (2) of the Employment Equity Act, 1998 as amended ("the EEA") as the basis for her application that First Respondent's conduct towards her was irrational. In a supplementary affidavit that the Applicant filed after the First Respondent had filed its answering affidavit, she records that the relief sought is in terms of section 6 (1) of the EEA, as read with section 11 (2) thereof, as she was unfairly discriminated against on an arbitrary ground. The Applicant did not seek leave to file the supplementary affidavit, despite its filing not being contemplated in terms of rule 7 of this Court's (old) rules. However, as the filing of the affidavit was not opposed by the First Respondent and as the content of the affidavit merely records the legislative framework on which the Applicant's claim is based, it is accepted.

The condonation applications

- [4] The Applicant's founding affidavit addresses condonation for the late referral of her dispute to this Court, which is opposed by the First Respondent.
- [5] The Applicant's dispute was conciliated on 7 October 2022¹ and her present application was filed on 09 November 2022. There is therefore no need for her to apply for condonation.
- [6] The First Respondent seeks condonation for the late filing of its answering affidavit, which the Applicant has not opposed. The explanation tendered for the delay, namely internal administrative issues in briefing counsel, is accepted as reasonable and the late filing of the answering affidavit is condoned.

Factual background

- [7] The factual background to this matter is that in July 2021 the Applicant applied to the First Respondent for an advertised post with job title Community Development Manager: Sustainable Livelihoods and was informed on 24 January 2022 that she was shortlisted. The selection process required that she undergo a competency assessment / proficiency test and attend an interview. The Applicant was also informed that she would be sent a practical assessment on 1 February 2022, which she was required to complete in thirty minutes and thereafter return it within five minutes of completion to Faiza Patton ("Patton"), the First Respondent's human resources official designated to administer the shortlisting and interview process.
- [8] The Applicant was sent the practical assessment at 09h00 on 1 February 2022 and she was required to complete and submit it to Patton by 09h30. The Applicant only submitted the practical assessment at 10h46 that morning. Patton advised the Applicant to submit the assessment, although its submission was late.
- [9] The Applicant was scheduled to be interviewed online on 3 February 2022 at

12h40. On that day, Patton advised the Applicant that her interview was delayed and thereafter informed her by email that the selection committee had decided not to interview her as she had submitted her practical assessment late and the practical assessment and the interview is a combined process. The Applicant responded thereto on the same date by addressing an email to the chairperson of the selection committee complaining that she was treated unfairly as she had experienced a challenge in submitting the practical assessment on time, had advised the First Respondent of her challenges and was then allowed to submit her assessment. The Applicant questioned why she was not told at that time that she was disqualified and why, on the day of the interview, she received a message that it was delayed, as she had continued to spend money and resources in preparing for the interview. Her email further recorded that she would have accepted if she had been told immediately on 1 February 2022 that she was disqualified but she had been allowed to submit her practical assessment, and it was only whilst waiting to be connected for the online interview two days later that she was advised that she would not be interviewed. She found this unfair and lodged an objection with the chairperson of the selection committee and the First Respondent's Labour Relations Unit and requested feedback. She reiterated that her complaint was that the First Respondent should not have given her the impression that she would be interviewed by advising her that the interview was delayed.

- [10] The chairperson of the selection committee did not specifically respond to the Applicant but rather addressed an email to Patton on 3 February 2022 explaining the reasons for not interviewing the Applicant, which Patton in turn forwarded to the Applicant. The explanation was that the selection committee could not give the Applicant more time for the practical assessment than they gave other candidates as it would not be fair and that the Applicant did not report her technical difficulties until Patton had called her.

- [11] In its answering affidavit, the First Respondent's explanation, which was not contested in reply, was that the selection committee met on 2 February 2022 to consider the portfolios of each candidate when they were preparing for the interviews in terms of the allocated times set out in the agenda. The Applicant was the last candidate on the schedule, and her oral interview was scheduled to take place on 3 February 2022 at 12h40. Patton was instructed to confirm the allocated time slot with all candidates, including the Applicant. The issue of non-compliance with the prescribed time periods for the completion of the practical assessment was only considered and decided upon before the commencement of the individual interviews. At the time allocated for the interview of the Applicant, the selection committee considered her failure to comply with the prescribed timeframe for the practical assessment and decided not to proceed with the oral interview as she had been disqualified, as in terms of the proviso contained in the advertisement, the candidates needed to submit the practical assessment within the required timeframe. This proviso was also recorded in two separate emails sent to the Applicant on 24 January 2022 and on 1 February 2022 respectively.
- [12] The issue whether the Applicant reported her technical difficulties to Patton or whether Patton had called her to find out whether she had submitted her practical assessment is the only relevant material issue in dispute. Applicant contends that she contacted Patton at 09h30 that morning to advise her that she was experiencing technical problems in sending the assessment and enquired whether she could still send her portfolio after the problem was rectified. The First Respondent denies the Applicant's version and records that when Patton was collating the submitted practical exercises from the short listed candidates, she realized that the Applicant's application was not amongst them, and she then contacted the Applicant to establish whether she had returned the completed assessment. The Applicant at that time informed Patton that she was experiencing technical difficulties and that she would submit her assessment once those difficulties were resolved. Although in reply the Applicant denies the First

Respondent's version, she does not materially contest its version on the facts.

- [13] The Appellate Division (as it then was) in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*² sets out the principles applicable to the evaluation of factual disputes arising from evidence presented by affidavit, namely that the relief sought should only be granted if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order. In the present matter, the First Respondent's version is that Patton contacted the Applicant after realizing that she had not received the Applicant's practical assessment and this version is accordingly accepted.

Evaluation

- [14] The Applicant contends that the First Respondent's refusal to interview her was irrational and amounted to unfair discrimination on an arbitrary ground.
- [15] Section 11 (2) (b) of the EEA requires that in claiming unfair discrimination on an arbitrary ground, the complainant must prove, on a balance of probabilities, that the conduct complained of is not rational, amounts to discrimination and that the discrimination is unfair.
- [16] In respect of the first requirement, the Constitutional Court decision in *Minister of Water Affairs and Sanitation v SembCorp Siza Water*³, granted in the context of a review application, confirms that the rationality standard is not about the cogency of reasons furnished for a particular decision but "*whether there was a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power*" and that "*(i)f there is such connection, the review challenge based on this ground must fail, regardless of the cogency of the reasons furnished for the decision in question. This is because rationality is the lowest threshold required for the exercise of public power.*" The judgment further records that a decision

taken or a procedure followed that is rationally connected with the purpose for which the decision making power is granted will not constitute discrimination.

- [17] The further requirements of section 11 (2) (a) of the EEA that if unfair discrimination on an arbitrary ground is alleged, the conduct complained of must be proven on a balance of probabilities to amount to discrimination and the discrimination must be unfair, are subject to the legal construction set out by the Labour Appeal Court in *Naidoo & others v Parliament of the Republic of South Africa*⁴, which rejected the notion that the phrase “any other arbitrary ground” contained in section 6 (1) of the EEA is unconnected to the listed grounds of discrimination set out therein, or a ground analogous thereto, as:

“It would make section 6 (1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch-all or a panacea. Indeed, the EEA is the instrument of s9 of the Constitution and therefore its mission is to give teeth to that constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the values of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, section 9 has a specific and concrete focus, intelligible within the context of the historical experience of South Africa’s legacy of oppression. The writers, Garbers and Le Roux rightly caution against being seduced by the idea that anti-discrimination law can be weaponized to solve all labour market ills. Other vicissitudes of life find remedies elsewhere, not least of in the panoply of protections in labour legislation.”⁵

- [18] And again further:

“The glue that holds the listed grounds together is the grundnorm of human dignity. The authors expressed this view, with which I agree:

‘Discrimination is about infringement of dignity (or comparably serious harm), about an identifiable and unacceptable ground and about the link (directly or indirectly) between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.’⁶

- [19] In assessing the rationality test on the facts of this matter, the explanation tendered by the chairperson of the selection committee in not interviewing the Applicant was that the selection committee could not give the Applicant more time than other candidates to complete the practical assessment as it would not be fair, and the Applicant did not report her technical difficulties until Patton enquired from her whether she had submitted her assessment. The reasoning is premised on the trite principle that employment candidates should be subject to the same criteria. The facts are that the Applicant did not submit her practical assessment within the prescribed period that was repeatedly communicated to all the candidates. Whilst it may be unfortunate that the Applicant experienced technical difficulties in submitting her practical assessment, the selection committee’s subsequent decision meets the rationality threshold required for exercising its powers, as the reasons tendered are a cornerstone of a fair process. In the circumstances, the explanation tendered by the chairperson of the selection committee for its decision to exclude the Applicant from the interview process cannot be regarded as irrational.
- [20] The basis for the Applicant’s claim of unfair discrimination on an arbitrary ground is that, notwithstanding that she submitted her practical assessment late, Patton advised her to submit it and did not inform her at that time that she was disqualified, and thereafter, on the day of the interview Patton advised her that her interview was delayed, thereby creating the impression that her interview would take place.

- [21] The immediate difficulty with the Applicant's claim is that it does not address the fundamental requirements for alleging unfair discrimination on an arbitrary ground as the Applicant does not set out the ground of discrimination on which she relies. Without linking the allegation of unfair discrimination to a listed ground or a ground analogous thereto, the fact that the selection committee did not interview the Applicant after she was shortlisted, and/or the fact that the First Respondent could have communicated its reasons for not interviewing the Applicant in a more professional manner,⁷ does not amount to an actionable affront to the Applicant's dignity. Absent a ground of discrimination, the Applicant cannot claim that the way she was treated failed to recognize her intrinsic worth as an individual.
- [22] For the abovementioned reasons, the merits of the Applicant's application do not support the granting of the relief she seeks.

Costs

- [23] The Constitutional Court has held that the ordinary rule that costs follow the result does not apply in labour matters.⁸ There are no reasons in this matter to justify a departure from that principle.
- [24] The following order is made:

Order:

1. The First Respondent's application for the condonation of the late filing of its answering affidavit is granted.
2. The Applicant's application is dismissed.
3. There is no order as to costs.



G Cassells

Acting Judge of the Labour Court of South Africa

For the Applicant: Adv Q Maxongo
 Instructed by: Steenkamp Abrahams Incorporated

For the First Respondent: Adv M Titus
 Instructed by: State Attorney

¹ The parties were requested to make further submissions in respect of the CCMA Form recording an agreement that the Applicant withdraws her dispute against the First Respondent, which also records that "*The matter will be referred to the Labour Court*". The Court has considered the supplementary representations made by the parties and accepts that the intention in completing the form was to record that the dispute would not proceed in the CCMA but would proceed in this Court

² 1984 (3) SA 623 (A) at p634E – 635C

³ 2023 (1) SA 1 (CC) at paras [57], [60], [67] and [68]

⁴ 2020 ILJ 1931 (LAC)

⁵ At paragraph [25]; Garbers & Le Roux 'Employment Discrimination into the Future' 2018 (2) Stell LR 237 – 269, at 249

⁶ At paragraph [27]; Garbers & Le Roux 'Employment Discrimination into the Future' 2018 (2) Stell LR 237 – 269, at 261

⁷ This was done by merely forwarding the internal email communication between the chairman of the selection committee and Patton to the Applicant

⁸ Zungu v Premier of the Province of KwaZulu-Natal & others (2018) 39 ILJ 523 (CC); Long v SA Breweries (Pty) Ltd & others (2019) 40 ILJ 965 (CC)