



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR08/23

In the matter between:

PUBLIC SERVANTS' ASSOCIATION

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

COMMISSIONER TSHEPO MASHIGO N.O

Second Respondent

MAXWELL TSHEKISO SEBATI

Third Respondent

Heard: 24 June 2025

Delivered: 04 December 2025

Summary: *The employer alleges no employment contract/relationship existed. Employer claims that the appointment was irregular because it failed to follow its own Recruitment Policies in appointing the third respondent. Therefore, the employer self-rescinded the alleged irregular appointment after the employee reported for duty. The commissioner found dismissal was substantially and procedurally unfair– reinstatement with five months backpay. Review test restated – commissioner made a reasonable decision - review application dismissed.*

JUDGMENT

MOSIKILI, AJ

Introduction

- [1] The applicant seeks, in terms of section 145 of the Labour Relations Act¹ (“the LRA”) to review, correct and/set aside the award of the Commission for Conciliation, Mediation & Arbitration “**CCMA**” (per Second Respondent) dated 19 December 2022 under case number GATW9753-22.
- [2] The applicant, Public Servants’ Association of South Africa – **PSA**, strongly contends that the second respondent:
- 2.1 rendered an unreasonable arbitration award;
 - 2.2 misapplied his mind to the relevant law and facts;

Background Facts

- [3] The material facts appear from the award and do not warrant repetition in this judgment. Suffice to record that:
- [4] In April 2022, PSA advertised a post of Deputy General Manager: Members Affairs (“**DGM**”). The person responsible for the appointment of this position, in accordance with the PSA Recruitment and Selection Policy and the Procurement Policy, was the General Manager (then Mr Marcus Ramakgale). The third respondent, “**Mr Sebati**” applied for the aforementioned post of DGM.
- [5] On 19 May 2022, during a PSA Board meeting, the Board decided to call in the General Manager to attend the same meeting “to apprise” them on the recruitment process he was embarking on to fill the position of the DGM. The

¹ No. 66 of 1995, as amended

General Manager attended the said Board meeting and duly apprised the Board on the recruitment process of the DGM.

- [6] Mr Sebati, as part of the PSA Board, was present at the said meeting. However, because he had applied/ intended to apply for the post of DGM - he together with other Board members with a similar interest in applying/ who applied for the post of DGM, recused themselves from the said meeting. Whether Mr Sebati's recusal at the meeting was timeous or not is of no moment for the purpose of this judgment.
- [7] Notably, at the said Board meeting, after hearing from the General Manager, the Board did not take any resolution regarding the post. I pause to state that, had the Board held some reservations with regard to the process followed by the General Manager in the recruitment process of the DGM post, this was an opportune moment to intervene(to an extent that they had powers to do so).
- [8] Furthermore, on 20 May 2022, through a round robin resolution, the Board decided to suspend the post of DGMA. This resolution, in the form of a letter, was directed to the General Manager to implement².
- [9] In response to the said Board "*resolution*", the General Manager responded in an email as follows:

"This mail is to inform you that the panel and service providers had on 18 May 2022 met and resolved to schedule the interview for the position of the Deputy General Manager as follows:

Date: 31 May 2022.

Hope you find the above in order

..."

- [10] In essence, notwithstanding the Board resolution, the General Manager decided to continue with the recruitment process. Subsequently, Mr Sebati attended the interview as scheduled and was ultimately informed to be a

²Record, "Annexure LM 8", record, page 93

successful candidate. On 01 June 2022, Mr Sebati was presented with an Appointment Letter: DGM, to which Mr Sebati accepted.

[11] On 08 June 2022, Mr Sebati presented himself for work at PSA as the newly appointed DGM. On the same day, he was provided with tools of trade, which included, *inter alia*:

11.1 an office space and was introduced to his personal assistant;

11.2 he signed various documents, including; personal information form, a written acceptance and consent utilisation, an acknowledgement of receipt of job description and the PSA Private Policy and Confidentiality; and

11.3 he was provided with an access card to the workplace;

[12] In a rather strange turn of events, on 08 June 2022, while Mr Sebati was still in an induction process as the newly appointed DGM, the Vice President of the PSA Board attended to the PSA offices and instructed Mr Sebati to leave the premises, as he was not an employee of PSA.

[13] On 09 June 2022, PSA issued a letter to Mr Sebati titled “**DGM:MA APPOINTMENT RESCINDED**”³; but the letter was received by Mr Sebati on 17 June 2022 whereby PSA ultimately stated that his appointment, *albeit*, for different reasons, was “...irregular and has to be put aside with immediate effect...”.

[14] From the above facts, it can be gleaned that no other process nor procedure was followed by PSA in rescinding Mr Sebati’s appointment. PSA acted in this manner because it held a view that Mr Sebati’s appointment was irregular for failure to comply with the PSA Statute and Policies, or so the argument went.

The Award

[15] Having considered, *inter alia*, the facts enlisted above and the parties’ argument, the second respondent approached the dispute as a matter of

³ Record, annexure LM 17, page 106

interpretation on whether, on all facts considered, Mr Sebati was an employee of PSA – DGM. In doing so, he considered whether a valid contract of employment /relationship existed between the parties. Even having accepted, for a moment at least, at paragraph 46 of the award that:

[46] *“Assuming that the process was wrong, which in my view was not, there is nowhere the applicant was involved. He did all he was required of him, and he was given an offer of employment, an offer which he accepted. At that time the employment relationship between the parties existed. A contract is said to be perfected (completed) when the employer has made an offer and the employee has accepted the offer. In Wyeth SA (PTY) Ltd v Maqhele and others [2005] 26 ILJ 749 (LAC), it was held that the definition of Employee in section 213 of the LRA can be read to include a person or persons who has /have concluded a contract of employment of which the commencement of employment is deferred to a future date. In the current case, there is no denying the fact that the applicant and the respondent had concluded a contract of employment and the applicant was to commence with his duties on 08 June 2022”.*

[16] That being the case, the second respondent determined that Mr Sebati had been an employee of PSA: DGM. Having done so, the next logical conclusion was that the so-called “Rescission Letter” constituted a dismissal as contemplated in section 186 of the LRA.

[17] From the admitted facts, the conclusion by the second respondent was that since termination of the contract of employment was without notice, the dismissal was both procedurally and substantially unfair.

Applicant's Case

[18] I consider it apt to briefly set out the employer's case before this court. PSA bravely contends that Mr Sebati was not an employee of PSA because the appointment was inconsistent with the procedures of the PSA Statute and the Recruitment and Selection Policy, rendering the said appointment of Mr

Sebati as DGM irregular⁴. In particular, the appointment was inconsistent with clause 8.14 of the Recruitment and Selection Policy in that an employee from human resources section was not involved in the recruitment process. Accordingly, Mr Sebati did not hold a valid contract of employment.

[19] Furthermore, PSA contends that the second respondent unreasonably upheld the referral in favour of Mr Sebati and ordered reinstatement and backpay.

[20] In addition, PSA asserts that the decision by the second respondent to reinstate Mr Sebati was unreasonable because he disregarded relevant information and placed undue reliance on irrelevant consideration because the appointment was made in total disregard of the Board's "resolution" to suspend the post. For all its trouble, the arbitration award handed down by the second respondent stands to be reviewed and set aside.

Respondent's Case.

[21] Mr Sebati contends that, regardless of the alleged non-compliance, which had nothing to do with him, including the alleged Board resolution, he received a letter of appointment, which he accepted, he reported for duty and was offered tools of trade, wherefore he was employed as the DGM of PSA.

[22] Mr. Sebati also adds that PSA's Mariet Lange assisted him in completing employment-related documents to set him up in the position of DGM. He also points to a communicate between himself and the Acting Human Resource Manager, who facilitated his appointment.

The Law

[23] Our courts have consistently applied the "dominant impression" test to determine whether an individual is an employee, moving away from rigid or single-factor approaches such as the control test. This test involves evaluating the totality of the relationship between the parties, considering factors like the degree of control, integration into the organisation, economic dependence, the intention of the parties, and so forth.

⁴ Record Founding Affidavit , para 19, page 11

[24] The Code of Good Practice⁵: Who is the Employee is particularly influential in guiding the courts and tribunals on this aspect. The Code also clarifies that while all factors are relevant, they need not be given equal weight, and the overall assessment should focus on the dominant impression formed from the evidence presented.

[25] In **Denel (Pty) Ltd v Gerber (2005) 26 ILH 1256 (LAC)**, the Court held as follows:

[19] "When a court or other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.

[20] If a court or other tribunal were to be precluded from looking at matters outside of the parties' agreement, there would be a serious danger that it could be precluded from determining the true position or the true relationship between the parties and end up making a finding that the parties wish it to make as to the position when in fact the true position is different⁶".

[26] The contract will obviously be accorded weight depending on the extent to which its provisions describe in concrete terms rights and obligations of the parties, which are more or less characteristic of the true relationship between the parties.

[27] **Mamabolo v South African National Blood Service**⁷ addressed the situation where a contract of employment was concluded, but performance has not yet commenced. The Court, relying on *Wyeth SA (Pty) Ltd v Manqele*

⁵ Code of Good Practice: Who is an Employee, GenN 1774 of 2006

⁶ See also *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para [27]

⁷ 2020 JDR 0082 (LP)

and Others, found that an individual may be considered an employee upon acceptance of an offer and resignation from previous employment, even before starting work, thus enjoying protection under the LRA.

- [28] It is accepted that in our law, the validity of an employment relationship does not automatically depend on strict compliance with an employer's internal recruitment policies, as the statutory framework governing employment relationships is broader than the contractual or procedural aspects alone. However, where legislation expressly requires compliance with specific recruitment procedures for certain positions, such as municipal managers under the Local Government: Municipal Systems Act, non-compliance can invalidate the appointment. The jurisprudence below buttresses this view.
- [29] The Apex Court in **Steenkamp and Others v Edcon Ltd**,⁸ emphasised that the statutory concept of an employment relationship is broader than the contractual notion of employment. The Court noted that statutory definitions and protections apply to employment relationships, even where the strict requirements of contract law or internal employer policies have not been met.
- [30] The upshot of the **Steenkamp judgment** is that generally, even if an employer fails to adhere to its own recruitment policies, an employment relationship may still be recognised as valid under the law, provided that the statutory requirements for such a relationship are met. The statutory framework, including the LRA and other relevant legislation.
- [31] The reasoning in **Steenkamp** further supports a view that employment relationships are governed by statutory law, which may recognise the existence of such relationships even where contractual or procedural requirements have not been strictly observed. The Court also said that the statutory concept of dismissal, for example, is broader than the contractual notion of lawful cancellation of an employment contract. This indicates that statutory law is the primary source for determining the validity and existence of employment relationships.

⁸ 2016 (3) SA 251 (CC)

- [32] The LRA's definition of dismissal provides, amongst others that an employer has terminated employment with or without notice. In **Steenkamp**⁹, the Court reasoned that *"the word terminated must be given its ordinary meaning. This is "bring to an end" – regardless of whether the action is lawful, fair or otherwise. A termination by an employer without giving proper or valid notice still constitutes a "dismissal" under the LRA. The statute provides remedies to address any wrongfulness or unfairness. But this does not alter the factual consequence of the termination. The employee is dismissed, fairly or unfairly, lawfully or unlawfully"*.

Evaluation and analysis

- [33] In terms of section 78(6) of the PSA Statute, the General Manager, (then Mr Marcus Ramakgale)'s duties included the appointment and dismissal of officials of the PSA in terms of the applicable Codes and Policies. Meaning that the General Manager would have been responsible for the appointment of the DGM in *casu*.
- [34] In terms of the Clause 8:14 of the Recruitment Policy, the selection panel will be no less than two persons who interview and select the applicants for a position. An employee from the human resources section will be involved in all executed positions.
- [35] Much of the PSA's case is mounted on a contention that clause 8:14 above was not complied with because while Mr Sebati was interviewed by more than two people, however, none of them was from the human resource section (*"the HR person"*). Instead the General manger invited an external consultant to assist with the recruitment process for "confidentiality" purposes - Lesele Consulting. Put differently, according to PSA, absence of the human resource person from the interview panel vitiates the contract of employment that might have emanated from such an interview. This argument by PSA, I must say, is difficult to discern. This is so because:

⁹ at paragraphs 11 - 13,

- [36] The language of clause 8:14 suggests interview attendance by more than two people. Then the clause says an employee from the HR section will be “involved” in all executive positions. Nowhere is there a suggestion from clause 8:14 that involvement is strictly confined to the “HR person” being part of the interview panel. An overview of the evidence tendered by Mr Thabo Mpeila Mathibe of Lesele Consulting, it is apparent that the HR person (one Ms Vermaak – then head of HR) was involved in the recruitment process, *albeit* not part of the interview panel, until the letter of appointment was issued. Mr Sebati also produced evidence of his interaction with the acting HR person who facilitated his appointment.
- [37] Apropos, I cannot agree with PSA that on purpose reading of clause 8.14, is mandatory that the HR person must be part of the interview panel per se. For this reason, I must reject PSA’s invitation to find that the absence of an *HR person* in the interview of Mr Sebati invalidated the employment contract, or that no valid employment relationship could have emanated from such circumstances. But even if I am wrong, this case does not turn on that.
- [38] Steenkamp *supra* is authoritative, I find that even if I accept for a moment that there was non-compliance with the PSA Statute and Recruitment and Selection Policy and the Procurement Policy as alleged by PSA - the law is explicit, judging from the common facts, i.e. Mr Sebati responded to a job advertisement, attended an interview, was subsequently offered employment, which he accepted, he reported for duty and was provided with tools of trade – the dominant impression is that indeed he was employed by PSA as DGM.
- [39] The Constitutional Court in **Khumalo & other v MEC For Education**¹⁰: **KwaZulu Natal**, with reference to *Njongi* endorsed the principle “...(that while it is always open to a government official to admit, without qualification, that an administrative decision was wrongly taken) must apply to unlawful acts committed deliberately, negligently or even in good faith. The Labour Appeal Court agreed that the MEC was not only entitled but also duty-bound to

¹⁰ [2013] ZACC 49 at paragraph 33

approach a court to set aside her irregular administrative act” [Emphasis Added].

- [40] While the **Khumalo judgment** dealt with public-sector employees, I find that the principle echoed there applies with equal vigour in this matter. To argue otherwise would be lax (more so that PSA itself operates in the same public-sector environment). In case of a suspected irregular appointment, the employer is duty-bound to follow due legal process to “rescind” the impugned appointment.
- [41] Evidently, even if the recruitment process was somehow botched (including non-compliance with PSA Statute) and/ or non-compliance with the Board’s resolution, PSA was duty-bound to follow due process in dealing/correcting the alleged irregularities; it was never open for PSA to unilaterally “rescind” the appointment as it attempted to do.
- [42] To reiterate the uncontroversial fact: no notice nor process was followed when Mr Sebati’s appointment was apparently rescinded on the strength of the letter titled: DGM: MA APPOINTMENT RESCINDED received on 17 June 2022.
- [43] The inescapable conclusion under any construction of the facts above, the dominant impression is that Mr Sebati was an employee of PSA as DGM who was dismissed without due process.

The Test on Review

- [44] The threshold in a review application is deliberately stringent for an applicant to surmount; this is consistent with the limited scope of judicial intervention. This is so because a review is not an appeal in disguise.
- [45] In **Zono v Minister of Justice and Correctional Services: In re: Minister of Justice and Correctional Services v Zono and Others**¹¹, it was held that:

¹¹ [2020] 11BLLR (LC)

“This court is empowered to intervene if and only if the decision to which the arbitrator came is so unreasonable that no reasonable decision-maker could come to that decision on available evidence. As the Labour Appeal Court has often observed, given the threshold that applies, it is not often that applicants will succeed in a review. In the present instance, the primary attack on the award is one that goes to the assessment of evidence. Where review is sought on these grounds, the court must particularly cautious not to blur the line between a review and an appeal. Arbitrators are allowed to be wrong, and a fragmented, piecemeal analysis of the award should be awarded”.

- [46] Appositely, the question ultimately to be answered is whether the second respondent's award is so disconnected from the evidence that it can be said that the award falls outside a band of decisions to which a reasonable decision-maker could reach.
- [47] In my view, the second respondent's decision is not an unreasonable one. *Au contraire* to what is contended by PSA, the second respondent, as adequately demonstrated above, did not misapply his mind to the evidence and question of law, nor did he reach an illogical conclusion. His conclusion, based on the evidence before him, on the dominant impression test, was that indeed Mr Sebati was PSA's employee (as DGM). On that conclusion, it became a foregone conclusion that the dismissal was both procedurally and substantially unfair.
- [48] For these reasons, I find that the second respondent's award squarely falls within a band of decisions that a reasonable decision-maker could reach, and I see no basis for me to interfere with same.
- [49] Would it be feasible to reinstate Mr Sebati as per award? Perhaps its prudent for me to pause at this juncture as Mr Sebati had not asked me to make the award an order of Court, that question lives to be answered by another court.

[50] In the circumstances, the following order is made:

Order

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



T Mosikili

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv K Millard

Instructed by: Cheadle Thompson & Haysom Inc

For the Third Respondent: Adv K Nondwangu

Instructed by: Ngada Attorneys