



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

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email. The date for hand-down is deemed to be 31 March 2026.

LEAVE TO APPEAL JUDGMENT

MOSIKILI, AJ

Introduction

- [1] The applicant, Public Servants Association of South Africa – **PSA** seeks leave to appeal against my judgment and order in the above matter whereby I dismissed their application to review, correct and/or set aside the award of the Commission for Conciliation, Mediation & Arbitration “**CCMA**” dated 19 December 2022 under case number GATW9753-22.
- [2] It has been at times difficult to discern the basis on which leave to appeal has been sought. This is so primary because the grounds of appeal and counsel’s heads of argument on behalf of PSA appear to be directed at the dissatisfaction with the outcome of the review application without pointing out the errors of law and/ or errors of facts committed. If anything, the facts of the case remain mainly uncontested, and my understanding of those admitted facts is not seriously attacked by PSA.
- [3] I have nevertheless done my best to distil what I believe are the three principal submissions made on PSA’s behalf, and I shall deal with each of them in turn.

Merits

- [4] The first contention by PSA is that I committed an error of law by relying on *Steenkamp and Others v Edcon Ltd*¹ in deciding this matter, as this judgment is distinguishable. The contention is that because PSA failed to adhere to its own internal recruitment policies and constitution in the appointment of Mr Maxwell Thekiso Sebati (Mr Sebati), such appointment was *ultra vires* and *void ab initio*, and as a result, PSA was entitled to summarily rescind Mr Sebati’s appointment without following any process.

¹ 2016 (3) SA 251 (CC)

- [5] I disagree with the above proposition, because the *Steenkamp judgment* remains good authority on the principle that 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 Labour Relations Act 66 of 1995 (“**LRA**”) and other relevant legislation.
- [6] PSA conflates the issue by formulating its ground of appeal as an obligation to set aside the irregular appointment of Mr Sebati. The simple question is this: on the uncontested facts, was PSA entitled to rescind Mr Sebati’s appointment without following due process because PSA held a view that the said appointment was peppered with irregularities, *inter alia*, its constitution and recruitment policies were not strictly adhered to.
- [7] PSA places reliance on *Baloyi v Tshifhesi* at paragraph 15 of the applicant’s heads of argument that “*Where a trade union performs any act that deviates from, or is contrary to its constitution, that act is ultra vires (beyond its powers) and null and void*”. Inexplicably, PSA comes to a conclusion that the above passage is a justification for it to summarily terminate Mr Sebati’s contract of employment as it did.
- [8] The above proposition by PSA, is unsustainable in law. It is at variance with the spirit of the Constitution in particular Section 1(c) of the Constitution read with section 23, relating to the right to fair labour practice and section 185 of the LRA.
- [9] In fact, the proposition advanced by PSA only serves to underscore its poor understanding of my judgment and, most importantly, what the law requires in situations PSA found itself. PSA cannot mark its own homework. The legal position is axiomatic, PSA, regardless of the circumstances, cannot summarily terminate the employment contract because its constitution, read with its

relevant policies, was not complied with. At least not on the admitted facts of this case.

- [10] I am not persuaded that a Court of Appeal would adopt a different approach and grant PSA a license to summarily terminate/dismiss Mr Sebati simply because PSA held a view that the appointment was “*void ab initio*”. What makes matters worse is that no fault can be attributed to Mr Sebati for this alleged “*ultra vires*” appointment. Adv Millard has failed to point me to any authority in support of his suggestion that the PSA’s constitution reigns supreme over the South African Constitution, read together with the relevant labour law tenets articulated above and in the *Steenkamp judgment*. No such authority exists. *Steenkamp* remains the binding authority and finds relevance in this matter. The rule of law reigns supreme. Accordingly, this ground of appeal is unsustainable.
- [11] Secondly, PSA contends that the application of the dominant impression test is not an appropriate standard on the facts of this case. PSA seems to contend that the dominant impression test is confined to disputes on whether someone is an employee or an independent contractor. In doing so, Adv. Millard refers to me paragraph 29 of the *Hydraulic Repair Services v Ntshona* (2007 ZALCJHB 22 (17 August 2009) penned by Molahlehi AJ as he then was. I have considered said paragraph and the judgment in *totalo*. The principles enunciated in the said judgment do not support the contention proposed by PSA. Again, PSA has not pointed me to any authority suggesting that the dominant impression test is an incorrect tool in determining the true relationship between PSA and Mr Sebati, as I did in this matter. Similarly, I am disinclined to agree that there are prospects that a Court of Appeal would adopt a different approach in resolving this dispute.
- [12] Lastly, PSA contends that I failed to interpret clause 8.14 of the PSA recruitment correctly; this ground is most difficult to discern. PSA seems to suggest that, because clause 8.14 requires an employee from the human resources section to be (or would be) involved in the interviews for all executive

positions, failure to adhere to this clause renders the appointment *void ab initio*. Consequently, PSA can and is authorised in those circumstances to summarily terminate a contract of employment if this clause is not adhered to.

[13] I disagree with PSA on this proposition. My comprehensive reasons for reaching this conclusion appear at paragraphs 33 – 38 of my main judgment. I have nothing to add to them save to say this: clause 8.14 does not grant PSA the authority to summarily rescind Mr Sebati's appointment without any due process that affords and protects Mr Sebati's constitutional rights.

[14] In any event, it is not suggested that I misunderstood the following undisputed facts, which I found to be revealing of the true and real position /relation of the parties, i.e.:

14.1 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*:

14.1.1 office space and was introduced to his personal assistant;

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

14.1.3 he was provided with an access card to the workplace.

[15] It escapes PSA that the very facts they conceded denote that an employment relationship was conceived *inter partes*. This concession can be gleaned on PSA's alleged "Rescission Letter" – it goes without saying that one can only terminate/rescind what existed, in this case, the employment relationship, and

our law demands that any termination of employment relationship must be done in compliance *inter alia* section 1(c) of the Constitution read with section 23, relating to the right to fair labour practice and section 185 of the LRA dealing with the right not to be unfairly dismissed. These rights are sacrosanct and cannot succumb to any employer's constitution nor policy.

- [16] It would appear to me that issues arising in this case are far from novel. They are, in fact, distressingly familiar. An employer cannot be the law unto itself - irrespective of the alleged irregularities surrounding the alleged appointment ; an employer is not entitled to simply rescind its offer of employment and thereby terminate employment without affording an employee a fair hearing or some due process. The judgment **Denel (Pty) Ltd v Gerber (2005) 26 ILH 1256 (LAC)** remains good authority on this issue.

Conclusion

- [17] The test for leave to appeal is whether “the appeal would have reasonable prospects of success” or whether “there is some compelling reason why the appeal should be heard...” It is clear that PSA offered Mr Sebati an employment contract and followed through with it by providing him with tools of trade, thereby affirming an employment relationship. The only legitimate way to terminate such an employment relationship is by following due process; it matters not on the facts of this case if the appointment was peppered with irregularities which had nothing to do with Mr. Sebati. The admitted facts are dispositive of the matter. As a result, I am of the view that the appeal would have no prospects of success. I am of the view further that there was no misdirection on either facts or law in granting the December 2025 order based on evidence before the court. The appeal would have no prospects of success in that respect too.

For all these reasons, I make the following order:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of this application.

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