



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 38952/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 15 July 2024 Signature: _____

In the matter between:

SINDISWA CHARMAIN CHWARO

Applicant

And

MINISTER OF DEFENCE AND MILITARY VETERANS N.O.

1st Respondent

DEPARTMENT OF DEFENCE AND MILITARY VETERANS

2nd Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] This is an application to review and set aside the first respondent's decision to terminate the applicant's fixed term contract of employment (the "contract"), and/or a declaration that the contract is extant and linked to the First Respondent's tenure and only capable of termination for legally valid reasons.
- [2] Further, that pursuant to the relief above, the Applicant seeks an order directing the Second Respondent to pay the Applicant's unpaid remuneration for periods that may have passed from 1 October 2022.
- [3] The application is opposed by the respondents on the grounds that, firstly, the application is in the wrong forum as the application falls within the exclusive jurisdiction of the Labour Court; and secondly, that the Applicant had been appointed on 6 month-probation (which had been extended), and the Applicant had failed to provide proof of requisite qualifications.
- [4] The Respondents thus contend that the applicant's cause of action is that of unfair dismissal disguised as a review application.

B. JURISDICTION

- [5] The Respondents' case which is raised as a point *in limine*, is that this court lacks the requisite jurisdiction to hear this matter due to it being an unfair dismissal application which is in the remit of the Labour Court.
- [6] Annexure "DOD 1" is a letter from the Office of the First Respondent to one General Mkhize who is a Chief Director: Human Resource Management in the Second Respondent. This letter is headlined: "FILLING OF POSTS IN THE PRIVATE OFFICE". The subject matter of this letter is the envisaged appointment of 3 staff members in the Minister's office, first of whom is the applicant in the position of Chief of Staff at level 14. In the penultimate paragraph, the letter reads: "*The appointments must be done on a fixed term of contract basis that is linked to the term of office of the Minister.*" (Emphasis added).
- [7] The question of concurrence in jurisdiction between the Labour Court and the High Court in circumstances like this one was decided recently in *Baloyi v Public Protector & Others*.¹ The Constitutional Court held that the termination of a contract of employment has the potential to found a claim for relief for infringement of the Labour Relations Act ("LRA")² and a contractual claim for enforcement of a right that does not emanate from the LRA. It is for the litigant to decide which cause of action to pursue.

¹ (CCT03/20) [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); 2022 (3) SA 321 ...

² Act 66 of 1995.

[8] In *Baloyi v Public Protector*, the Constitutional Court's point of departure on the issue of concurrent jurisdiction of the High Court and the Labour Court was that:

*"The High Court did not consider the public law basis for the review relief: that is, the claim that Mr Mahlangu lacked the requisite statutory authority to terminate Ms Baloyi's contract of employment and the claim that the termination decision was made in bad faith for the ulterior purpose of furthering nefarious political objectives. The High Court also did not consider Ms Baloyi's request for declaratory relief for declaratory relief based on Ms Mkhwebane's alleged flouting, in her capacity as the Public Protector, of her constitutional duties..."*³

[9] In the fullness of the judgment in *Baloyi*, and the factual basis of this application, it becomes clear that this court would have concurrent jurisdiction to deal with this matter only if besides being an employment contract matter, there was a basis for reviewing the respondent's decision. The respondent's point *in limine* is well founded. I will traverse the merits of the application to afford the parties with more clarity for my findings and decision hereunder.

C. THE APPLICANT'S CASE

³ *Baloyi supra para 49.*

[10] The crux of the applicant's case is that:

10.1 the first respondent has unlawfully terminated her contract of employment. And secondly,

10.2 that the applicant's contract of employment with the respondents is extant and linked to the first respondent's tenure as minister of defence.

D. THE CASE FOR THE RESPONDENTS

[11] The applicant was appointed by way of an appointment letter dated 11 October 2021 which included a probationary period of 6 months.⁴ In terms of paragraph 2(d) thereof, the probationary period of 6 months was subject to the applicant submitting a qualification that meets the minimum requirement of a NQF level 7.

[12] The applicant was dismissed from employment by way of termination letter dated 12 May 2022.⁵ This letter makes reference to the appointment letter and its provisions on probation and the condition regarding the NQF 7 qualification.

⁴ Annexure "DOD4" to the respondents' answering affidavit.

⁵ Annexure "DOD9/FA1" read with annexure "DOD11/FA12" to the respondents' answering affidavit.

E. ANALYSIS

[13] On her own version, the applicant does not possess a NQF level 7 qualification.⁶ Hence in her lengthy letter to Admiral Kubu⁷ she pleads with the latter to invoke some scheme whereby an individual's prior learning is recognized in lieu of actual qualifications. Unfortunately for the applicant, Admiral Kubu was not able to assist her. This he made clear in his response to her inquiry, annexure DOD 11/FA12.

[14] The applicant having failed to comply with all the conditions to which her appointment was subject, more specifically the failure to submit the qualification that meets the minimum requirements of NQF7, was dismissed. It is this dismissal that she seeks to have reviewed and set aside.

[15] It is not clear on what basis the applicant seeks to have her contract of employment reviewed and considered extant. This is because there was no breach of the provisions of the contract of employment by the respondents. The breach of the contract of employment is on the applicant's part due to non-fulfilment of her obligations in terms of the conditions accompanying the probationary requirements.

[16] The applicant has not even closely gone about proving an alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the

⁶ Founding affidavit para 45.

⁷ Annexure "DOD10/FA 11".

Constitution.⁸ The applicant's papers and heads of argument do not make a case near the provisions of section 157 of the LRA where concurrent jurisdiction of the High Court would properly be engaged.

[17] The application is devoid of any cogent reasons anchoring it as a review, for instance any allegations of an exercise of public power or mala fides or ulterior motives. The reliance on the Baloyi decision is thus misplaced.⁹

[18] The applicant avers that probation was factually not a condition of the applicant's employment. This is devoid of any sense even from the documentation that applicant herself relies upon.

[19] On behalf of the applicant, reference to the matters of *Chirwa v Transnet*¹⁰ and *Baloyi v Public Protector*¹¹ is made without any linkage to the facts in this application.

[20] In the *Baloyi* matter, the Constitutional Court found that Ms Baloyi had advanced a claim for contractual breach and expressly disavowed reliance on the provisions of the LRA. The Court held, further, that while Ms Baloyi may also have a claim for unfair dismissal in terms of the LRA, nothing in the LRA

⁸ Section 157(2) of the LRA

⁹ *Baloyi v Public Protector* 2022 (3) SA 321 (CC).

¹⁰ 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC);

¹¹ 2022 (3) SA 321 (CC)

required her to advance that claim in the Labour Court. As for the public law basis for the review relief and the declaratory relief based on section 182(1) of the Constitution, the Constitutional Court held that neither of those claims fell within the exclusive jurisdiction of the Labour Court, in terms of section 157(1) of the LRA.

[21] The Apex Court concluded that the High Court erred in dismissing Ms Baloyi's application on the basis that it was "essentially a labour dispute" and that its jurisdiction was not engaged. Accordingly, it upheld Ms Baloyi's appeal against the High Court's finding on jurisdiction and remitted the matter to the High Court, Gauteng Division, Pretoria for a hearing *de novo*.

F. CONCLUSION

[22] Based on the above, I am not persuaded that applicant's application has any foundation in law, accordingly it must fail.

[23] As regards costs, the law is settled in that the successful party is entitled to its costs unless Constitutional imperatives are established in the application.

G. ORDER

The following order is made:

The application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 24/01/2024

Date of Judgment: 15/07/2024

On behalf of the Applicant: Adv. T. Manchu

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 15 July 2024.