

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

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

.....  
.....

**Case no: 2022/033096**

In the application between:

**MAMPEULE, MOLATE EDWARD  
ID NO. [...]**

Applicant

and

**CHIEF DIRECTOR, JOHANNESBURG  
METRO DISTRICT HEALTH SERVICES**

First Respondent

**MEC FOR HEALTH, GAUTENG  
PROVINCIAL GOVERNMENT**

Second Respondent

---

**JUDGMENT**

---

**DELIVERED:** This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 February 2024.

**GOODMAN, AJ:**

### **FACTUAL BACKGROUND**

1. The applicant was employed, for a number of years, by the Gauteng Health Department as an Optometrist, Grade 2, at the Lenasia South Community Health Centre, Lenasia. The background he provides in that regard is as follows:
  - 1.1. The applicant first took up his position in January 2007, to fulfill his contractual obligations under a state bursary contract which, in exchange for financial assistance for his studies, required him to work at a state institution for a period of two years. Although he was contractually required to report for duty 5 days a week, due to equipment constraints, he was only able to offer optometric services at the hospital for 4 days a week initially – and later for only 2 days a week. He raised concerns in this regard with the Department, but no additional facilities were made available. He nevertheless continued to receive his full salary for a 5-day work week.
  - 1.2. In January 2010, shortly after his bursary service period ended, the applicant wrote to the Department proposing that he be employed on new contractual terms – namely, that he take on greater responsibilities (including conducting weekly visits to satellite clinics, and that he undertake training of junior optometrists) in exchange for a higher remuneration level. The Department acknowledged receipt of that proposal but never reverted to the applicant. Nor did it increase his salary as requested, or confer the proposed responsibilities on him.
  - 1.3. The applicant remained in the Department's employment, and continued to provide optometric services at the hospital, on the same basis as before until Tuesday 11 February 2020.

2. It is common cause between the parties that this was the applicant's last day at work, and that his employment with the Department was subsequently terminated, with effect from 31 March 2020.
3. The parties' accounts of the applicant's absence from work and his dismissal differ.
  - 3.1. The applicant states that he did not attend work from Wednesday 12 February 2020, primarily because his February 2020 salary had not been paid, prejudicing his ability to report for duty. When he and his union representative engaged with the respondents' representatives regarding the late salary payment and his return to work, he was instructed to resolve his registration with the Health Professions Council of South Africa ("HSPCA"). That had become an issue because, although optometrists are required to be registered with the HSPCA to practice as such, the applicant's registration had been suspended from 24 November 2011. The applicant applied for restoration of his name to the register on about 20 January 2020, and made payment to the HSPCA in respect thereof on about 25 February 2020 (when he also sent proof of payment to the Department). He made a further payment to the HSPCA in early July 2020. He was ultimately re-registered during 2020, although the exact date on which that occurred is not clear.<sup>1</sup> He subsequently learned, by way of a telephone call on 18 December 2020, that he had been dismissed from employment at the hospital in March 2020. He states that he did not receive notice of either his suspension or termination because the Department sent notice thereof to an outdated address. He submits that, as a consequence, he was not afforded an opportunity to be heard prior to being dismissed.
  - 3.2. The respondents' position is that the applicant was, by his own admission, absent from work without leave or permissible reason from 11 February 2020. They say that such absence could not have been

---

<sup>1</sup> The applicant submits that the effect of his February 2020 payment was that his suspension was automatically and immediately revoked by operation of law. The HSPCA appears to have taken a different view and to have taken a decision to restore him to the register sometime before 1 April 2020. This dispute is not determinative of any of the issues in the present proceedings, and I consequently do not weigh in on it.

attributable to non-payment of the applicant's salary since, on his own version, he ceased attending work before his salary was due to be paid (on 15 February 2020). But whatever the reason for the applicant's absence, it constituted serious misconduct. Warning letters were sent to the applicant's *domicilium* address on about 5 and 12 March 2020, but did not trigger a return to work or a response. Consequently, the first respondent's decision to terminate the applicant's employment in terms of section 17(3)(a) of the Public Service Act 103 of 1994 was lawful and justified.

4. During early 2021, the applicant referred an unfair dismissal complaint to the CCMA, which in turn referred the dispute to the General Public Service Sector Bargaining Council. None of those records is before the Court, and it is unclear what came of those processes.
5. It is clear, however, that they did not bear fruit for the applicant because on 21 May 2021, he (through an attorney) filed an internal appeal against the termination of his employment, to the second respondent, the MEC. The appeal set out the context and explanation recorded above, and submitted that the applicant's termination had been substantively and procedurally unfair, unjustified and unreasonable. It sought the immediate re-instatement or re-employment of the applicant to his previous post.
6. The MEC dismissed the appeal on about 4 March 2022. She found that the applicant had failed to provide reasons for his failure to report for duty, and consequently that the termination was justified in terms of section 17(3)(a) of the Public Service Act. She refused to re-instate or re-employ him.
7. That triggered the present application:
  - 7.1. During October 2022, the applicant instituted proceedings to review and set aside his termination, as well as the MEC's refusal of his appeal, and sought an order re-instating him to his previous post.

- 7.2. The respondents opposed the application and filed answering papers, out of time. The applicant opposed condonation for the late filing of the answering papers, but nevertheless filed a replying affidavit.
- 7.3. Some months after he had done so, the applicant filed a notice of intention to amend his notice of motion. No notice of objection was filed, and, in September 2023, the applicant filed an amended notice of motion, and an accompanying “supplementary founding affidavit”. The amended notice of motion seeks additional orders:
- 7.3.1. declaring the termination letter of 25 March 2020 to be fraudulent and setting it aside;
  - 7.3.2. declaring that his January 2010 proposal and the Department’s response to it constituted a contract; and
  - 7.3.3. for “*restorative justice*” to place the applicant in the position he would have been economically and otherwise, “*if the injustice had not taken place*”; and
  - 7.3.4. for just and equitable compensation, “*both delictual claim and breach of contract for the prejudice suffered*”.
- 7.4. The accompanying affidavit re-states many of the averments made in the founding affidavit, but also puts up new facts and legal argument in support of the relief sought. Among others, it seeks more than R9.6 million in just and equitable compensation – being the annual remuneration (with increases) that the applicant claims he would have received under the 2010 proposal, but for his dismissal.

## CONDONATION

8. The respondents’ application for condonation of their late filing is made in scant terms. The first respondent states:

*“I pray for condonation for the late filing of this Answering Affidavit. The State Attorney filed notice of opposition on 6 January 2022. After this date counsel had to be briefed and I am only now in a position to file my answering affidavit.”*

9. The affidavit does not record the length of the delay, nor give a fulsome explanation for it. A more detailed account should usually be given where condonation is sought.
10. I note, however, that the applicant has not himself always complied fully with the requirements of the Uniform Rules of Court (likely because he is not represented), and the respondents have not taken issue with his approach. Given their attitude, I am more inclined to grant them an indulgence. In addition, the applicant seeks, among others, to impute fraud and misconduct to them, and to be paid substantial monetary amounts under the rubric of just and equitable relief. The respondents will be seriously prejudiced if their opposition and/or their answering papers are not admitted. By contrast, other than delay, the applicant suffers no prejudice if condonation is granted.
11. In those circumstances, it is in the interests of justice that the respondents be granted condonation for the late filing of their notice of intention to oppose and their answering affidavit.

## **JURISDICTION**

12. The respondents' primary response to the application is that this Court lacks jurisdiction to determine it. That, they say, is because properly construed, it is a claim for unfair dismissal, which falls within the exclusive jurisdiction of the Labour Court under section 157 of the Labour Relations Act 66 of 1995 (“the LRA”).
13. The applicant, by contrast, claims that his cause of action is one grounded in the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), and that this Court's jurisdiction is consequently not ousted by the LRA.

14. The proper approach to jurisdictional disputes of this kind has been laid down by the Constitutional Court in *Baloyi*.<sup>2</sup> It clarified that:
- 14.1. Section 157(1) of the LRA confers exclusive jurisdiction on the Labour Court to determine all matters that, in terms of the LRA or any other law, are required to be determined by the Labour Court. Matters governed by or concerning the enforcement of a provision of the LRA, or for which the LRA creates specific remedies, are matters within its exclusive jurisdiction. These include unfair dismissal disputes.<sup>3</sup>
- 14.2. However, the LRA does not afford the Labour Court exclusive jurisdiction in employment matters generally. The High Court's jurisdiction is not ousted merely because a dispute arises within the overall sphere of labour relations.<sup>4</sup> A dispute concerning, for example, a contract of employment does not, without more, fall within the Labour Court's exclusive jurisdiction.<sup>5</sup>
- 14.3. Moreover, the same set of facts may give rise to different causes of action – some of which fall within the Labour Court's exclusive or its concurrent jurisdiction, others of which may be beyond the Labour Court's remit.<sup>6</sup> Court must look to the pleadings to determine what the cause of action pleaded and pursued is, and which court has jurisdiction over it.<sup>7</sup>
15. The overarching question, then, is what cause of action is pleaded by the applicant? If it is a claim for unfair dismissal, then it is a cause of action within the exclusive jurisdiction of the Labour Court, and is beyond this Court's purview. If it is in fact a PAJA review, then it falls to be determined by this Court.

---

<sup>2</sup> *Baloyi v Public Protector and Others* (CCT03/20) [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); 2022 (3) SA 321 (CC) (4 December 2020). See also *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) paras 70-75; *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) paras 47, 60.

<sup>3</sup> *Baloyi* paras 23-26.

<sup>4</sup> *Baloyi* para 24.

<sup>5</sup> *Baloyi* para 28.

<sup>6</sup> *Baloyi* para 38. See also *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at paras 11 and 18

<sup>7</sup> *Baloyi* paras 33, 39.

16. The following is noteworthy from the founding affidavit:
  - 16.1. The main complaint advanced in the founding papers was that the termination of the applicant's employment was substantively and procedurally unfair, and that the applicant was consequently arbitrarily and/or unfairly dismissed. He complained that the respondents had not properly considered the reasons for his non-attendance at work, his service history and his record, that they did not give him proper warnings or undertake a proper disciplinary process, that the respondents were biased against him, and that the evidence against him was not properly considered. He expressly stated that he brought the present application because "*I am not accepting the dismissal of my appeal and my dismissal from employment*". The claim is framed as one for unfair dismissal. The founding papers do not mention PAJA at all.
  - 16.2. Congruent with that, the original notice of motion sought only to set aside the termination of the applicant's employment and the refusal of his appeal, and to procure his reinstatement. These are quintessentially labour law remedies. The original notice of motion did not ask for the relief set out in section 8 of PAJA, either by seeking a declaration of invalidity or just and equitable relief.
17. The founding papers thus plead a cause of action for unfair dismissal – which is a claim within the Labour Court's exclusive jurisdiction. They do not properly advance a claim in terms of PAJA.
18. It is only in the "supplementary founding affidavit" that the applicant pleads a PAJA cause of action. For example, he changes early paragraphs of the affidavit to characterize his review as one brought "*in accordance with the Promotion of Administrative Justice Act 3 of 2000*". He also seeks just and equitable relief for the first time – including an order declaring a contract to be in force between the parties and for "*just and equitable compensation*". That is a material change to the claim originally pursued.
19. However, the "supplementary founding affidavit" was deposed to and filed after the answering affidavit had raised the jurisdictional complaint. In fact, it was



filed several months after the replying affidavit had been delivered. The applicant has neither sought nor procured leave for its admission and the respondents have not answered to it.

20. In those circumstances, it is not appropriate for the court to look to the “supplementary founding affidavit” to ascertain the applicant’s cause of action. An applicant in motion proceedings must plead the averments to establish his cause of action in his founding papers.<sup>8</sup> He cannot make out a new case in reply. By the same token, the applicant in this case cannot change his cause of action in a “supplementary founding affidavit” filed after pleadings would otherwise have closed, in order to overcome a jurisdiction complaint.
21. In the circumstances, I find that the claim brought falls outside this Court’s jurisdiction and must be dismissed on that basis.

## **COSTS**

22. The respondents did not make any submissions as to costs, and left the matter purely to my discretion. Given that the applicant is unrepresented, I am not inclined to award costs against him.

## **ORDER**

23. In the result, the following order is made:
  - 23.1. The respondents’ late filing of their notice of intention to oppose and their answering papers is condoned.
  - 23.2. The application is dismissed.

---

<sup>8</sup> See, for example, *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para 28; *NCSPCA v Openshaw* [2008] 4 All SA 225 (SCA) at para 29.

---

I GOODMAN, AJ  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 23 January 2024

DATE OF JUDGMENT : 15 February 2024

FOR THE APPLICANT : In person

RESPONDENT'S COUNSEL: Adv C R Minnaar

RESPONDENT'S ATTORNEYS : State Attorney, Pretoria