IN THE HIGH COURT OF SOUTH AFRICA
TRANSKEI

In the matters between:

CASE NO: 185/05

TENJISWA TOTO Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

MEC FOR PROVINCIAL TREASURY
(EASTERN CAPE PROVINCE) 4th Respondent

THE PERMANENT SECRETARY,
DEPARTMENT OF HEALTH 5th Respondent
(EASTERN CAPE PROVINCE)

CASE NO: 248/05

EMMA NOMAMA MFENE Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

MEC FOR PROVINCIAL TREASURY (EASTERN CAPE PROVINCE) 4th Respondent

THE PERMANENT SECRETARY, DEPARTMENT OF HEALTH (EASTERN CAPE PROVINCE) 5th Respondent

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CASE NO: 249/05

CORDELIA MAFUNGWASHE NDALASI Applicant

and

THE MEC FOR HEALTH (EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

MEC FOR PROVINCIAL TREASURY (EASTERN CAPE PROVINCE) 4th Respondent

THE PERMANENT SECRETARY, DEPARTMENT OF HEALTH (EASTERN CAPE PROVINCE) 5th Respondent

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CASE NO: 250/05

TOBEKA LETITIA MADAKA Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

MEC FOR PROVINCIAL TREASURY
(EASTERN CAPE PROVINCE) 4th Respondent

THE PERMANENT SECRETARY,
DEPARTMENT OF HEALTH 5th Respondent
(EASTERN CAPE PROVINCE)

CASE NO: 805/05

NTOMBOSINDISO MURIEL NCUKANA Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

CASE NO: 806/05

TOKOZILE NTSULUMBANA Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

CASE NO: 815/05

LUMKA MLUNGUZA Applicant

and

THE MEC FOR HEALTH
(EASTERN CAPE PROVINCE) 1st Respondent

THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION 2nd Respondent

THE PUBLIC SERVICE COMMISSION 3rd Respondent

JUDGMENT

EBRAHIM J:

Introduction

[1] Each of the applicants seeks leave to appeal to the Full Court against the whole of the judgment of this Court, delivered on 16 August 2007, dismissing their applications with costs. The respondents oppose the application.

[2] The applicants also seek condonation for the late delivery of this application. In respect of the application for condonation the respondents' attitude is that the granting or refusal thereof is dependent on whether or not there is a reasonable prospect of success on appeal.

[3] I shall, for the sake of convenience, confine myself to the papers of the applicant T Toto but it should be self-evident that the decision I arrive at will apply equally to all the applicants seeking leave to appeal.

Grounds of appeal

[4] Apart from specifying the principal grounds of appeal, the applicants have expanded thereon with supplementary comments. I have therefore abbreviated these and consider the following to be an adequate summary of the grounds of appeal, which are that:

1. The Court erred in finding that the Promotion of Administrative Justice Act[1] (PAJA) and the common rule against unreasonable delay in launching review proceedings were applicable when the applicants were

[1] Act No. 3 of 2000

not seeking to review the refusal or delay by the Department of Health to consider them for promotion but seeking to vindicate contractual rights and to enforce the terms and conditions of their employment contracts by way of a declaration of rights, interdict and mandamus.

2. The Court erred in not finding that there had not been a delay as the decision that they would not be promoted was conveyed to the applicants, after lengthy negotiations, by letter dated 6 June 2004 whereupon the applicants issued a demand in September 2004 and launched proceedings in March 2005.

3. The Court erred in not finding that the applicants' cause of action accrued before the advent of the PAJA and that its provisions could not be applied retrospectively against the applicants.

4. The Court erred in not finding that implementation of the Human Resources Operational Project Task Team (HROPT) was underway at the time the applicants launched their applications and, in any event, that the undue delay rule was inapplicable in respect of the challenge to the validity of the HROPT's finding, which was a nullity and *ultra vires*.

5. The Court erred in finding that the applicants did not follow the grievance procedure set out in the public service regulations promulgated in 1999 and should, instead, have found that they followed the said procedure or a procedure substantially similar.

6. In the alternative, the Court erred in finding that as the regulations regulated procedure they were retrospective in operation and were binding on the applicants, instead of finding that they acquired the right to be considered for promotion prior to the new regulations coming into effect and should, therefore, have been considered for promotion.

Ad grounds 1 and 2

[5] The applicant Toto stated in her founding affidavit that 'I herein seek to vindicate the violation of the ..... conditions and terms of the ..... contract of employment between myself and the Department of Health, Eastern Cape', and '[t]he conduct of the first respondent I complain about ..... constitutes administrative action. It is unlawful and thus unconstitutional thereby entitling me to vindicate my right against it from this Honourable Court by means of a declaratory order.' Further, 'I vindicate the violation or breach of contract under common law ..... .'

[6] The relationship between the applicant and the first respondent is governed by statute[2] (including agreements concluded at the Public Service Bargaining Council) and not by the law of contract and 'to the extent that there is a contractual relationship between the parties, the terms and conditions thereof are governed by statute.'[3]

[7] The applicant's attack on the failure and/or refusal of the first respondent to consider her for promotion was premised on the conduct of the first respondent constituting administrative action. This was reinforced by the fact

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[2] Public Service Act, 1994

[3] See *Ceza v MEC for Agriculture and Land Affairs* (unreported judgment handed down on 9 June 2005, Transkei High Court (Case No. 1811/04)

that the declarator sought by the applicant was that the conduct be declared 'unlawful, invalid, in breach of the conditions of employment' and 'unconstitutional'.

[8] The applicant's failure to bring the application without undue delay and non-compliance with the provisions of the PAJA were specific defences raised by the respondents. Even if the application fell to be considered under common law the issue of an unreasonable delay in launching the application remained a crucial consideration.[4] Both circumstances were canvassed in the judgment and I do not deem further comment necessary. I am not persuaded that there is any reasonable prospect of success on either of these grounds.

Ad ground 3

[9] The fact of the PAJA not being retrospective in application would not assist the applicant in view of the Court's finding that even under common law there had been an unreasonable delay. The grounds on which the Court found the delay to be unreasonable are adequately set out in the judgment and I do not deem it necessary to add anything further. I am accordingly of the view that there is no reasonable prospect of success on this ground.

Ad ground 4

[10] Since the Court upheld the specific defences of undue delay and the failure to comply with the prescribed grievance procedure the Court refrained from entering into the merits of the application and of expressing any view on

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[4] Baxter, Administrative Law at p715 - a declaratory order, interdict and *mandamus* are discretionary remedies in which undue delay is relevant; See also *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit* van Kaapstad 1978 (1) SA 13 (A)

the finding of the HROPT. However, since the applicant(s) have raised this as a ground of appeal I am constrained to deal therewith.

[11] On the version proffered by the applicant Toto herself it is clear that the Office of the Premier of the Province of the Eastern Cape notified the Union of Public Servants (of which she was a member) by letter dated 14 November 2002 (Annexure 'TT9') that 'it has been approved that all officers whose cases were subjected to reviewal (*sic*) should retain the salary notches which they held as at 01 May 1994 and this has resulted in the alleged overpayments falling away (*sic*)'.

[12] There is no doubt, therefore, that the applicant would not have to repay the amount of R39 209,93 which had been overpaid to her. It is evident from this that when the applicant launched the instant application no grounds existed for the issue of an order 'declaring the finding by the first respondent made through its task team known as HROPT at (*sic*) the applicant had, during the implementation of the provisions of circular 10/8/84, been overpaid, unlawful and unconstitutional'.

[13] It is pertinent to note that the respondents denied that the findings of the HROPT had been implemented. Moreover, the first respondent had not yet taken a decision on what were merely recommendations from this body. In the absence of such a decision the application for the aforesaid and an interdict to restrain implementation of the HROPT finding was thus premature. I find there is no reasonable prospect of success on this ground.

Ad grounds 5 and 6

[13] The issue of the failure to exhaust internal remedies has been addressed in the judgment and I have nothing further to add. I find that there is no reasonable prospect of success on this ground.

[14] In addition to the aforementioned grounds the applicant has also contended that this matter is of great importance to all the parties. However, in the absence of any reasonable prospects of success the granting of leave to appeal on this ground is not justified.

Conclusion

[15] In the circumstances, I am not persuaded that there is a reasonable prospect that another Court may come to a different conclusion on any of the grounds of appeal. The application for leave to appeal to the Full Court must therefore be refused.

Costs

[16] In regard to costs, it is trite that costs should follow the result in the absence of cogent reasons why this should not be so. In the present case I am not persuaded that there are any and the respondents are thus entitled to an order for costs in their favour.

Order

[17] In the result, there is an order in the following terms:

(a) The application for condonation for late delivery of this application is refused with costs; and

(b) The application for leave to appeal is refused with costs.

Y EBRAHIM
JUDGE OF THE HIGH COURT **11 MARCH 2008**

Attorney for the Applicants:	M Tshiki
Attorneys for the Applicants:	Tshiki & Sons Inc MTHATHA
Counsel for the Defendant:	S Mbenenge SC
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