

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT DURBAN**

**Case: D692/2021**

In the matter between:

**SEBENZILE PRECIOUS MYEZA**

**First Applicant**

and

**DEPARTMENT OF EDUCATION  
FOR THE PROVINCE OF  
KWAZULU-NATAL**

**First Respondent**

**MEC: DEPARTMENT OF  
EDUCATION FOR THE PROVINCE**

**Second Respondent**

**HOD: DEPARTMENT OF  
EDUCATION FOR THE PROVINCE  
OF KWAZULU-NATAL**

**Third Respondent**

**S W KHESWA**

**Fourth Respondent**

**Date of Hearing:** 16 November 2023

**Date of Judgment:** 29 November 2023

**Summary:** (Application to compel signature of document finalising appointment – Counter application to set aside decision to offer appointment to post – Applicant recommended for post in the event of the preferred candidate declining - Preferred candidate accepting and taking up appointment and passing away shortly afterwards – Applicant offered post without her

appointment being approved by head of department and in the absence of a prior decision this could be done in the circumstances which transpired – Absence of authority to offer appointment making appointment invalid - Counter application launched belatedly - Costs)

---

## JUDGMENT

---

LAGRANGE J

### Background

- [1] In 2020, the applicant, Ms S Myeza, had applied for a permanent post of Chief Education Specialist Governance and Management in the UMzinyathi District, advertised by the respondent ('the department'). After the conclusion of the short-listing and interview process, the selection panel identified her as the second most suitable candidate for the post. The selection committee recommended, in the event that the preferred candidate, Mr Mahaye, did not take up the post, then it should be offered to her.
- [2] The head of department accepted the selection committee's recommendation and the post was offered to Mr Mahaye. He duly accepted the post and took up his appointment, but almost immediately fell ill and unfortunately passed away within the space of about a month after taking up the post.
- [3] The applicant then assumed, based on the selection committee's recommendation, which the head of department had endorsed, that she was next in line for appointment to the now vacant post. After making enquiries about when she could take up the position, she was made a formal offer of employment by the director of HR services on 6 April 2021. Ms Myeza duly accepted the appointment and various procedural steps were then taken by department to finalise the appointment process. However, when it came to the final step the appointment process ground to a halt.
- [4] On commencing duty at a new post, a Notice of Assumption of Duty form has to be completed on the first day the appointee reports for work and

must be signed by the District Director. This is to complete the appointment process and is a prerequisite for issuing the official letter of appointment. The official in question, Mr S Kheswa (the third respondent), refused to sign the form.

- [5] The department defended his refusal to do so, contending that the applicant should never have been made an offer of employment by the HR director, as he had no authority to do so. Accordingly, Mr Kheswa correctly declined to conclude the appointment process.
- [6] In May 2022, Ms Myeza brought this application (the main application) to compel Mr Kheswa to countersign the form so her appointment could be completed. The department opposed the application on the basis that the offer of employment was not authorised. It did concede that, in exceptional circumstances, the Selection and Recruitment Policy permitted the appointment of a second ranked candidate without re-advertising the post, subject to a submission being made to the head of department. The department argued that no exceptional circumstances were present in Ms Myeza's case.
- [7] The department addressed three apparent exceptions raised by Ms Myeza in which second choice candidates were appointed without re-advertising the posts. It stated that in all three cases the factual circumstances were distinguishable from Ms Myeza's case. Thus, in two instances, the preferred candidates had passed away before they could take up their appointments. In the third case, the preferred candidate had a choice of two posts and accordingly did not take up one of them. The common factor is that the successful candidates did not take up the appointments, whereas in Mr Mahaye's case he did take up the appointment but passed away shortly afterwards.
- [8] The main application was enrolled for hearing on 23 February 2023, but the matter was adjourned by the court to allow the department to belatedly launch a counter-application. The counter-application essentially is a so-called 'self review' to set aside the original decision of the human resources director on 20 April 2021 to offer Ms Myeza the position.

### Analysis and Evaluation

- [9] In the case of a private employer, common business sense would probably have led to Ms Myeza's appointment in Mr Mahaye's stead, given the relatively short interval between him taking up the job and his passing and the fact that it was a short interval since she had been recommended as a suitable alternative appointee for the post.
- [10] As mentioned, the department conceded that under exceptional circumstances it had appointed second choice candidates. However, the department argues that the appointment policies it operates under do not automatically give it such flexibility, without further authorisation by the head of department being required.
- [11] It referred to the Policy on the Recruitment and Selection of Public Service Employees embodied in a Human Resource Management Circular 21 of 2018 ('the policy'). As its title suggests the circular is a policy document. In a covering letter from the Provincial Head of Department the purpose of the document is described as a policy which "provides strategic measures and procedures for the recruitment and selection of personnel in the filling of posts created in terms of the Public Service Act". It sets out in detail the processes to be followed in making appointments.
- [12] In particular, clause 7 of the circular stipulates the following: the responsible HR component must obtain approval in terms of delegated authority for the appointment of the recommended candidate (clause 7(a)); the recommendations of the selection committee may only be varied if the person having authority to make the appointment is of the opinion the policy has not been correctly applied, or there is evidence of bias or some irregularity (Clause 15(c)).
- [13] Clause 8 of the policy stipulates that no applicant has a right to appointment in a vacant post until advised in writing that the appointment has been approved by the Executive Authority or their delegate and they have physically assumed their duties. Section 9 of the Public Service Act, Proclamation 103 of 1994, clearly assigns the power to make

appointments to the relevant executive authority<sup>1</sup>, in this case the provincial head of the department. Clause 15(a) of the policy stipulates, amongst other things, that the HR component must obtain approval of the delegated authority for the appointment.

[14] The department concedes that the selection committee had recommended Ms Myeza should be appointed if Mr Mahaye did not accept the appointment. However, that was not the situation which occurred: Mr Mahaye did not decline the post but accepted it and was appointed. It was only after his appointment that his passing occurred. Consequently, his appointment terminated with his death. In terms of the policy, the head of department had to abide by the selection committee's recommendation, which only provided for one situation in which Ms Myeza could have been appointed without further authorisation. The recommendation adopted by the head of department simply did not cover the situation which arose. I am satisfied that the recommendation of the committee and the decision of the head of department confirming and authorizing the appointment did not make provision for a situation where the chosen candidate actually accepted and was appointed, as opposed to declining the offer. Strictly speaking then, a vacancy arose on his death and the original authorization for appointment did not cover that situation. Whether or not it was unreasonable of the head of department to refuse to appoint the applicant in the circumstances, and to insist that the post had to be re-advertised, is not what the court is called upon to decide. However, in the absence of specific authorisation to appoint Ms Myeza, despite the terms of the adopted recommendation, authority to offer her the post was lacking.

[15] It is unfortunate that the selection committee's recommendation was so narrow and unfortunate for Ms Myeza, that the selection committee recommendation did not make provision for her to replace Mr Mahaye, if he also vacated the post within a short period of time, for whatever reason. However, the applicant cannot contend that her appointment had been

---

<sup>1</sup> Viz:

9 Appointments in public service

An executive authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.

authorised in the absence of the head of department acceding to it. Accordingly, whether it could have been handled better from a personnel management and HR perspective, Mr Kheswa had no authority to regularise and finalise Ms Myeza's appointment by signing the Notice of Assumption of duty form, and cannot be compelled to do so.

- [16] Similarly, in the absence of such authority being properly delegated to the HR director, it is clear he had no authority to offer the appointment to Ms Myeza and the decision to make the offer should be set aside for that reason.
- [17] I am aware of the delay of the respondent in bringing the application to set aside the conduct of the HR director and had the Respondent acted timeously this application would have been heard together with the first one. Nonetheless, I do not think the department should be non-suited by the delay and prejudice to the applicant can be partly assuaged by an appropriate costs order.
- [18] In that regard, I consider that the late filing of the application caused the applicant to incur the additional costs of another hearing and that considerations of law and fairness require the respondent to pay the costs of attendance and representation of the second occasion.

### Order

- [1] The application to compel the Fourth Respondent to countersign the Notice of Assumption of Duty form attached as Annexure "SM9" to the Applicant's founding affidavit is dismissed.
- [2] The offer of employment dated 6 April 2021, issued by the former Director: Human Resources Services and delivered to the Applicant on 20 April 2021 was irregular and unlawful and is set aside.
- [3] The First Respondent must pay the Applicant's costs of preparation and representation for the hearing on 16 November 2023.

---

**Lagrange J**  
**Judge of the Labour Court of South Africa**

**Appearances/Representatives**

For the Applicant:

N Xulu instructed by Themba Mkhize  
Attorneys

For the Respondents:

N S Mfeka instructed by Hlela  
Attorneys Inc.