THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case numbers: JS 776/2018

In the matter between:

PHINDILE MBANJWA **Applicant**

and

MINISTER OF THE NATIONAL DEPARTMENT OF PUBLIC WORKS **First Respondent**

PREMIER: GAUTENG PROVINCE **Second Respondent**

MEC FOR GAUTENG ECONOMIC DEVELOPMENT **Third Respondent**

Heard: **13 April 2021**

Delivered: **23 April 2021**

Summary: Section 77 (3) of the Basic Conditions of Employment Act (BCEA) referral. This section is reserved for any matter concerning a contract of employment. Whether a claim involves a matter concerning a contract of employment a pleaded case is important for the purposes of jurisdiction. The applicant's pleaded case is one of an existence of a transfer agreement and or decision and the alleged breach and or reneging thereof. Such a claim does not fall within the contemplation of section 77 (3) of the BCEA. Choice of process -

the applicant chose a referral process as opposed to motion proceedings. Ordinarily, action or referral process is chosen where a dispute of fact is anticipated. In such an instance oral hearing – *viva voce* evidence - happens unless if the parties submit a proper stated case. Motion proceedings are preferred where there is no dispute of fact anticipated. Ordinarily, in motion proceedings three sets of affidavits are expected; namely founding or supporting affidavit; answering or opposing affidavit; and replying affidavit. Where a dispute of fact arises in motion proceedings, three options presents themselves to the Court; namely; (a) at its discretion refer a disputed fact to oral hearing; (b) apply the *Plascon-Evans* rule in order to grant the motion; or (c) dismiss the application because the dispute cannot be resolved on the papers.

Where a party has chosen action or oral proceedings, ordinarily, *viva voce* evidence must be tendered. In terms of rule 6 (4) (b) (viii) of the Rules of the Labour Court parties may agree in a pre-trial conference that evidence on affidavit will be admitted with or without any party to cross-examine the deponent. In *casu*, parties have agreed that the affidavits of the applicant and that of the DDG: Cooperative Services will be admitted without any party cross-examining the deponents. Such an agreement does not necessarily convert the action proceedings into motion proceedings as they became to be known.

The parties did not agree on a separation of issues nor was there such a request. Damages claim requires quantification evidence. In the absence of evidence quantifying the damages, the respondent must be absolved from the instance.

Held: (1) The applicant's claim is dismissed. (2) The applicant to pay the costs of the proceedings.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral made in terms of rule 6 of the Labour Court Rules. The referral is made in accordance with section 77 (3) read with 77A (e) of the Basic Conditions of Employment Act[1] (BCEA). In terms of section 77 (3) the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. Section 77A (e) mainly deals with the issue of the relief. Precisely, the relief sought by the applicant is in the following terms:

> "1. An order declaring that there was a valid transfer from the Gauteng Department of Economic Development (GDED) to the National Department of Public Works (DPW);
> 2. That the applicant (Phindile Mbanjwa) was transferred into the permanent post of Senior Executive Officer: PMTE;
> 3. An order declaring that the first respondent's (Minister of Public Works) unilateral review of his own decision constitutes a repudiation of her employment in the new employment capacity;
> 4. Alternatively; that the applicant was entitled to be appointed as a result of being the recommended candidate as well as objectively having met all the requirements of the post;
> 5. That the first respondent be ordered to pay damages in the amount of R46 188 600.00 to the applicant, which amount is subject to verification by an actuary;
> 6. Interest in the aforesaid amount at the rate of 10.25% per annum *a tempore morae*;
> 7. That the first respondent be ordered to pay the applicant's costs on an attorney and own client's scale[2]."

[2] Strangely, without seeking an amendment of the statement of case, the applicant in the heads of argument presented on her behalf seeks a different relief, which is:

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2 As set out in the pre-trial agreement.

"1. An order declaring that there was a valid transfer from Gauteng Department of Economic Development to the National Department of Public Works;
2. That the Applicant was transferred into permanent post of Senior Executive Officer: PMTE;
3. An order declaring that the first respondent's unilateral review of his own decision constitutes a repudiation of her employment in the new employment capacity;
4. That the first respondent be ordered to pay damages in the amount of R 7 612 965.00 to the applicant;
5. Interest in the aforesaid amount at the rate of 10.25% per annum a tempore morae;
6. That the first respondent be ordered to pay the applicant's costs on an attorney and own client's scale;
7. Further and or alternative relief."

[3] I must state that the applicant is bound to the case as set out in the pre-trial agreement and is not entitled to present a different case only at argument stage.[3] It is worth mentioning at this stage that judging by the relief sought the claim is not one concerning and or linked to a contract of employment. Such implies that section 77 (3) of the BCEA does not avail to the applicant.

[4] On or about 30 April 2019, the parties concluded a pre-trial agreement as required by rule 6 (4) of the Labour Court Rules. In the agreement, the parties estimated that the hearing of oral evidence will be three to four days. They also agreed that there was no need to produce any proof by way of an affidavit. Unfortunately, the date allocated for trial fell within the period when the country was placed under level one lockdown restriction in view of the Covid-19 pandemic. Due to these restrictions, the Judge President issued directives in relation to hearing of cases in an open Court. In terms of the directives, parties are to submit a joint practice note after a special pre-trial conference. In terms of the directive, the joint practice note must in all matters ready for trial and

[3] *SAB (Pty) (Ltd) v Louw* [2018] 39 ILJ 189 (LAC) at para 8 -12 of the judgment.

parties wish to proceed to trial address amongst others what evidence can be adduced on affidavit.

[5] Owing to the prescripts of the directives on 31 March 2020, the parties reached the following agreement and recorded it in a joint practice note.

> "10. What evidence can be adduced on affidavit?
>
> 10.1 The applicant has undertaken to deliver an affidavit of its only witness on 6 April 2020.
>
> 10.2 The first respondent will also provide an affidavit that will be filed with this Court on 7 April 2020.
>
> 10.3 The two sets of affidavits will be the only evidence that will be provided to the Court. This in view of the fact that most of the facts are common cause. Furthermore, the facts that are not common cause would be determined by the Court in accordance with the principles in motion proceedings.
>
> 10.4 The parties will thereafter file heads of argument on 12 April 2020."

[6] As the allocated judge, I was not satisfied with the arrangements of the parties, particularly the one seeking to apply motion proceedings principles in a trial action. I then issued further directives in relation to the trial. Subsequent thereto, a supplementary joint practice note was filed, which recorded the following:

> "4.2.1 The parties are not converting these proceedings into motion proceedings but have agreed that in view of the COVID-19 Directives as well as the absence of a real dispute of fact, they thought convenient that the matter be determined on the basis of all the papers that are before the Court, including the two sets of affidavits.
>
> 4.2.2 Further, the parties are satisfied that their respective affidavits constitute the evidence that would have been presented by their respective witnesses.
>
> 4.2.3 Furthermore, there is no need for cross-examination as the matter turns on the interpretation of law in view of the facts that are largely common cause. In essence, no purpose will be served by any cross-examination. As such parties forego their respective rights in that regard."

[7] In light thereof, it became clear to this Court that what the respective deponents states is all common cause facts. There is no dispute of facts. Further, other than the two affidavits no additional evidence will be received by the Court. Surprisingly, on 15 April 2020, a report prepared by an actuary was annexed to the heads of argument. This is improper. In terms of the pre-trial agreement no expert testimony was to be given. It is practice though that any party seeking to deliver expert testimony must notify the other party. The first respondent was not duly notified about this evidence. It does appear that this step was prompted by a submission made by the first respondent in its heads of argument regarding lack of evidence to support the damages claim. In any event according to the actuarial certificate, the loss amounts to R6 354 178. The improperly amended amount is R7 612 965.00, with no indication how that amount was computed.

Background facts and evidence.

[8] On or about 1 August 2014 the applicant after being appointed by the Premier of Gauteng Province, concluded a written contract of employment with the Premier in accordance with section 12 of the Public Service Act[4] (PSA). In terms of that contract she was appointed as Head of Economic Development. During August 2017, the DPW advertised a permanent position of Executive Officer: Property Management Trading Entity (PTME). The applicant applied for the advertised post. Six candidates including the applicant were shortlisted. The applicant was recommended for appointment to the post. After the interviews and recommendations, the Department of Public Services and Administration (DPSA) raised certain concerns about the process. Mainly the concerns were that (a) the post being level 16 post was advertised at eighth notch of level 15; (b) there was no security screening of the applicant; (c) the qualifications of the applicant required verification; and (d) there was no information that the applicant met the undergraduate qualifications requirements of the advertised post.

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[9] Owing to those concerns, Advocate Sam Vukela (Vukela), the acting Director-General suggested that a horizontal transfer within the contemplation of section 12 of the PSA. This suggestion found favour on the part of the applicant. On or about 24 November 2017, the DPW initiated the transfer process by making an offer and intimated an intention to accept the transfer of the applicant to the DPW. The offer was subject to certain conditions; namely; (a) consent and approval of the provincial department; (b) consent of the Premier and the MEC of the provincial department. The letter of 24 November 2017 was acknowledged by the applicant. She consented to the transfer and indicated that she awaited her release date from the provincial department. Suffice to mention that her appointment at the provincial department was for a fixed duration, which was lapsing on 30 June 2019 after having been extended once.

[10] On 22 January 2018, the MEC for Economic Development, Gauteng Province, issued a missive advising the then Minister of Public Works that the applicant shall be released from the provincial department on 31 March 2018. This missive was transmitted to Vukela by the applicant. She indicated that she is accepting the transfer and that she shall be reporting for duty at the DPW on 15 April 2018. Vukela indicated that the details of the terms and conditions of employment of the applicant were pending finalisation.

[11] Shortly thereafter, the office of the Premier of Gauteng Province advised the applicant that her transfer within the contemplation of section 14 of the PSA from the provincial department to the national department was approved effective 1 April 2018. In the meanwhile, the cabinet of the South African government was reshuffled and the ministry of public works was affected thereby. A new Minister was appointed. The newly appointed Minister advised the applicant that the horizontal transfer was no longer proceeded with due to the reviewed capacity requirements of the PMTE. A wrangling ensued amongst the parties involved in the contemplated horizontal transfer. In the meanwhile, the fixed term position at the provincial department was subjected to a recruitment process and an official was appointed to act in it. Later in September 2018, the contested position was re-advertised. There was never

an agreement between the Premier of Gauteng and the President of South Africa that the applicant be transferred to the national department.

[12] On 04 June 2018, the applicant issued a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act[5] (ILPACOS). On or about 3 September 2018 and in response to the section 3 notice, the Minister recorded that there has never been an employment contract between the applicant and the DPW. Subsequently, on or about 4 October 2018, the applicant instituted the present action.

Evaluation

[13] Before this Court can consider the merits of this case, it is apposite to consider a number of preliminary issues relevant to this dispute. The first of which is the jurisdictional powers of the Labour Court.

Pleaded case and jurisdiction

[14] In her statement of case, the applicant alleged that the Labour Court has jurisdiction to entertain this referral by virtue of the provisions of section 77 (3) and 77A (e) of the BCEA. This factual allegation was not disputed by the first respondent. Jurisdiction is a question of law as opposed to one of fact. In order for section 77 (3) to be invoked, the matter to be heard and determined must concern a contract of employment. It is by now settled law that jurisdiction is determined with reference to the pleadings.

[15] Where a claim is predicated on a contract, a party relying on such a contract must state whether the contract is in writing or oral; when, where and by whom it was concluded and if the contract is in writing a true copy thereof or the part relied on in the pleading shall be annexed to the pleading[6]. A contract of employment being a contract, in a claim in terms of section 77 (3) a party must

[5] Act 40 of 2002.
[66] See rule 18 (6) of the Uniform Rules of the High Court.

plead in accordance with rule 18 (6) of the Uniform Rules. The applicant did not plead accordingly. From a proper reading of the statement of case, it is perspicuous that the applicant alleged a transfer agreement and a breach thereof. Strictly speaking, what the applicant alleged was more an exercise of statutory power as opposed to a consummation of a contract, let alone an employment contract.

[16] The applicant pleaded as follows:

> "48. The first respondent's failure and or refusal to allow the applicant to commence her duties in terms of the offer of employment dated 24 November 2017 and subsequent transfer constitutes a repudiation of the applicant's contract of employment with the first respondent (the approved transfer in terms of section 14 of Act 103 of 1994).
>
> 49. The applicant accepted the first respondent's repudiation of her contract of employment, alternatively hereby accepts the first respondent's repudiation and cancellation of her contract of employment.
>
> 50. Had it not been for the first respondent's repudiation of the applicant's contract of employment, the applicant would have commenced her duties in her new capacity as Senior Executive Officer: PMTE with the first respondent in April 2018.
>
> 51. As a result of the first respondent's repudiation of the applicant's contract of employment, the applicant has suffered the following damages:
>
> 52. R2 008 200.00 x 23 (from 1 April 2018 until retirement) which amount is subject to an actuarial calculation."

[17] I interpose to state that nowhere in the statement of case does the applicant allege a contract of employment between her and the DPW. She only alleges a contract of employment with the Premier of Gauteng which was concluded on 1 August 2014. In relation to her relationship with the DPW she alleges a transfer within the provisions of the PSA. On her allegations the transfer was approved and the failure to allow her to commence duties is at odds with the properly exercised statutory power. This Court accepts that where a transfer

within the contemplation of the PSA happens an employment contract arises. By definition an employment contract or contract of employment is a kind of contract used in labour law to attribute rights and responsibilities between parties to a bargain. The contract is between an employee and an employer. Section 1 of the BCEA defines an employee to means any person, excluding an independent contractor, who works for another or for the State and who receives, or is entitled to receive, any remuneration and any person who in any manner assists in carrying on or conducting the business of an employer. Therefore, the question is whether the applicant was transferred to the DPW so as to ensure that there is a contract of employment in place between the applicant and the DPW.

[18] This Court has no qualms with any contention that the applicant worked for the State and in that regard an employee of the State. However that does not imply that a contract of employment existed between the applicant and the DPW. I now turn to the question whether a lawful transfer had occurred or not.

Transfer in the Public Service.

[19] As a point of departure, there is no iota of doubt in my mind that a transfer of a public servant is an exercise of public power which exercise is constrained by the constitutional principle of legality. An exercise of public power must be lawful. An unlawful exercise of public power is a nullity and ought to be declared as such. Relevant to this matter are the provisions of section 12 (3) (b), (c) and (d) of the PSA read with section 14 of the PSA. Section 12 (3) (b), (c) and (d) reads as follows:

> "(b) The Premier of a province may transfer the head of the Office of the Premier, a provincial department or a provincial government component before or at the expiry of his or her term, or extended term, to perform functions in a similar or any other capacity in the Office of the Premier, provincial department or a provincial government component of the

relevant province in a post of equal higher, higher or lower grading or additional to the establishment, as the Premier considers appropriate.

(c) The President may, in consultation with the Premier or Premiers concerned, transfer before or after the expiry of his or her term, or extended term-

(i) …

(ii) The head of the Office of a Premier, a provincial department or a provincial government component to perform functions …in a national department or national government component...

(d) A transfer in terms of this subsection may only occur if-

(i) The relevant head consents to the transfer; or

(ii) After due consideration of any representation by the head, the transfer is in the public interest."

[20] A transfer from a provincial department or provincial component to a national government or component is a statutory power that falls within the discretionary powers of the President. It is common cause in this matter that the transfer was not initiated by the President. The purported transfer by the Premier of Gauteng does not fit the provisions of section 12. Mr Nhlapo, appearing for the applicant submits that since the applicant was being transferred to a position lower than the head of a department, the transfer does not require the President. I cannot agree with this submission. The wording of the section is clear. The issue is not about where the transferee is heading to but who the transferee is. If the transferee is a head of a provincial department, which the applicant was, the law requires that at the discretion of the President, a transfer may take place. Regard being had to the text of the enabling section, practically, the President must initiate the transfer of a head of a provincial department. Once so initiated, a consent of the head must be sourced. Ordinarily, a transfer from one department to another involves change of the terms and conditions of employment. In terms of the law an employer cannot unilaterally change the

terms and conditions of employment[7]. An argument that section 12 does not apply in this instance is rejected.

[21] The relevant parts of section 14 reads as follows:

> "(1) Subject to subsections (2), (3) and (4), <u>any employee</u> of a department may be transferred-
>
> (a) …
>
> (b) To another department <u>by the executive authorities of the two relevant departments.</u>
>
> (2) Such transfer shall be made in such a manner and on such conditions as may be prescribed.
>
> (3) An employee may be transferred under subsection (1) only if-
>
> (a) The employee requests the transfer or consents to the transfer; or
>
> (b) In the absence of such request or consent, after due consideration of any representations by the employee, the transfer is in the public interest."

[22] What is immediately discernible is that the legislature employed the phrase "a*ny employee*" as opposed to an employee. Where the word 'any' is employed in a statute the intention is to differentiate. In other words this section excludes the transfer of the head of a department. *Black's Law Dictionary*[8] defines "*any*" to mean:

> "Some, one out of many, an indefinite number. One indiscriminately of whatever kind of quantity… Any has a diversity of meaning and may be employed to indicate all or every as well as same or one and its meaning in a given statute depends upon the context and the subject matter of the statute. It is often synonymous with either, every, or all."

[7] *Mauche (Pty) Ltd Precision Tools v Numsa and others* [1995] 16 ILJ 349 (LAC) and *Mazista Tiles (Pty) Ltd v NUM and others* [2004] 25 ILJ 2156 (LAC).

[8] 6th Edition p 94

[23] Therefore, in the context of the PSA transfer of a head of department is dealt with differently. Thus contextually, the word "*any*" means some State employees and not all. When read with section 9 of the PSA, the context becomes much clearer. In terms of section 9 the executive authority is empowered to appoint any person as opposed to any employee. Once appointed in terms of section 9 that person so appointed becomes an employee.

[24] For the purposes of this matter, the relevant executive authorities are the Premier of Gauteng and the Minister of Public Works. Therefore, in the circumstances of this case, the statutory power to effect a transfer of any other employee other than the head of a department lies with the Premier acting jointly, as it were, with the Minister of Public Works. On the undisputed evidence, on 24 November 2017, Minister Nhleko made a provisional offer which was subject to the consent of the Premier of Gauteng Province and the MEC. It remains undisputed that the consent from the Premier of Gauteng never came. In terms of section 12 (1) (b) of the PSA, the head of a provincial department or component is appointed by the Premier. Therefore, in my view, the executive authority in relation to the applicant is the Premier as opposed to the MEC. Assuming for a moment that the MEC was the executive authority, the MEC only advised that the applicant will be released on a particular date – 31 March 2018 and noted that the final offer will be finalised with the applicant. This in my view does not constitute a transfer within the contemplation of section 14 of the PSA. All the MEC did was to agree to release the applicant should a final offer be finalised with the applicant. Besides, I fail to understand how a provincial head appointed by a Premier can be transferred by the MEC. The legal position that obtains is that the President may in consultation with the Premier transfer a head of a provincial department to a national department. Any argument that the applicant was transferred within the provisions of section 14 is rejected.

[25] The situation contemplated in section 14 happens when; (a) an employee requests a transfer; and (b) where the department, in the public interest,

initiates the transfer. In *casu,* the applicant did not request a transfer, it happened as a compromise to alleviate the conundrum presented by the DPSA. The question whether that compromise was legally competent is not one that this Court will answer in this judgment.

[26] Therefore, the conclusion this Court reaches is that the applicant was not transferred to the national DPW, as such, there is no contract of employment between the DPW and the applicant. On a proper reading of the enabling sections, where a transfer happens lawfully, the concluded prescribed contract transfers with the employee. In other words upon transfer, what governs the employment relationship is the same contract concluded within the contemplation of section 12 (2) (b) of the PSA. This conclusion is fortified by the usage of the phrase "*before or at the expiry of his or her term, or extended term".* Such a phrase suggests that after the expiry of the term, a transfer is not legally possible. Logically, where the employment term expires, the appointment ends and so ends the employer and employee relationship. A non-employee cannot be transferred.

[27] In *Rand Water v Stoop and another*[9]*,* the Labour Appeal Court (LAC) concluded that the words "*concerning a contract of employment"* means about or in connection with an employment contract. The pleaded case in this matter is not about or in connection with an employment contract. Since I conclude that there is no transfer within the contemplation of section 12 or 14 of the PSA, the employment contract concluded in 2014 did not transfer to the DPW. The Constitutional Court in *Amalungelo Workers' Union and Others v Phillip Morris South Africa (Pty) Ltd and another*[10] concluded that section 77 (3) expands the Labour Court's jurisdiction to cover disputes arising from contracts of employment. Further, it concluded that what locates a matter within the jurisdiction of the Labour Court is the application of the BCEA to it. Therefore, if this Court is correct in its conclusion that the dispute does not arise from a

[9] [2013] 2 BLLR 162 (LAC).
[10] [2020] 3 BLLR 225 (CC) .

contract of employment, then and in that event, the BCEA does not apply and as a consequence, the Labour Court lacks jurisdiction over this dispute.

[28] Although the applicant suggests that the review of the decision to effect a horizontal transfer by the Minister is unlawful, this matter is not a review brought in terms of section 158 (1) (h) of the LRA. Ordinarily, reviews in this Court are brought by way of motion proceedings. As pointed out earlier, before me are not motion proceedings. The submissions made by Mr Nhlapho regarding the legality of the decision to review are made in vain since the applicant is not seeking a legality review. A prayer for alternative relief does not assist the applicant in this regard. In *Geza v Minister of Home Affairs and Another*[11], the following was said:

> "Whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*, Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever a court 'can vividly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not enlarge in any way "the terms of the express claim" as pointed out by Tindall JA'…[12]

[29] Normally in review proceedings an applicant is obligated to place before a review Court the record of the proceedings sought to be reviewed. No such record has been placed before me. Ultimately, the appropriate order to make is to dismiss the application for want of jurisdiction.

Discussion

[11] [2010] ZAECGHC 15 (22 February 2010) at para 12.
[12] See also *Elefu v Lovedale Public Further Education and others* [2016] ZAECBHC 10 (11 October 2016) and *National Stadium South Africa (Pty) Ltd and others v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA)

[30] In the event I am wrong that this matter does not concern a contract of employment, I shall hereunder deal with the merits of the claim. The case of the applicant is that of repudiation of a contract of employment. Repudiation can only happen where a contract exists. Where the existence of a contract is disputed by the other party, there can be no speak of repudiation until the contract is shown to exist. In *casu*, the only contract shown to exist is the fixed one that expired in 2019. In *Street v Dubbin*[13], it was held that the test as to whether conduct amounts to repudiation is whether fairly interpreted it exhibits deliberate and unequivocal intention no longer to be bound. Simply put in order to claim a breach of contract, a party claiming a breach must allege and prove the existence of a contract. Before I deal with the merits, I find it apposite to deal with the choice of process made by the applicant.

The choice of process

[31] In this Court, a party may approach it using a referral process or motion proceedings. Where a party choses the referral process, such a party ultimately must lead *viva voce* evidence in support of its claim. Where a party choses motion proceedings, affidavits are filed which serve two purposes; namely; as pleadings and as evidence. Ordinarily, motion proceedings are chosen where a dispute of fact is not anticipated. Should a dispute of fact arise in motion proceedings, a Court has three options available to it, namely (a) refer a disputed fact to oral evidence; (b) resolve the dispute of fact by applying the *Plascon-Evans*[14] rule; or (c) dismiss the motion. In motion proceedings, three sets of affidavits are anticipated, namely; (a) founding or supporting affidavit; (b) opposing or answering affidavit; and (c) replying affidavit.

[32] In this matter the parties made it clear, more particularly the applicant as a *dominus litis* that they do not intend to convert the referral into motion proceedings. For some unknown reasons the parties rejected a suggestion

[13] 1961 (2) SA 4 (W).
[14] See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

from the bench to proceed by way of a stated case. The LAC in *Arends v SALBC and others*[15] advised thus:

> '[16] …Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to the statement copies of documents necessary to enable the Court to decide upon such questions.
>
> [17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case.'

[33] When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed to by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him or her. The stated case must set out agreed facts, not assumptions.

[34] It appears to be the parties' contention that the chosen process was somewhat forced on them by the directives issued by the Judge President due to the pandemic. The practice directive affords parties two options with regard to physical Court appearance. Those are (a) admitting evidence on affidavit or (b) any other procedure or technique that may afford an elimination or limitation of the risk of physical proximity among the persons involved. One technique available to the parties was to hear oral evidence through video conferencing. The parties opted not to use this safe and valuable technique. Given that the country was at the time at restricted lockdown level 1, physical hearing, if suggested would have been acceded to. Despite an agreement that the evidence will be tendered by way of affidavit, the applicant now submits that the evidence of the Deputy Director General: Cooperate Services constitutes inadmissible hearsay evidence since he is not the involved Ministers. This submission is without merit.

[15] [2015] 1 BLLR 23 (LAC)

[35] Parties herein agreed upfront that evidence by way of affidavit shall be admitted without agreeing who those witnesses should be. In this regard, the applicant has agreed to buy what is in the poke believing it to be a pig without verifying that it is indeed a pig in the poke. The applicant took a risk and she must live with that chosen risk. Most importantly, the applicant foregoes the most valuable and sacrosanct tool of litigation – the right to cross-examination. When it comes to hearsay evidence, regard is had to section 3 of the Law of Evidence Amendment Act[16] (Evidence Amendment Act). In terms thereof, hearsay evidence is admissible if a party against whom it is to be adduced agrees to the admission thereof as evidence at such proceedings. The applicant has agreed that the affidavit should be used in these proceedings. Therefore, in terms section 3 (1) (a) of the Evidence Amendment Act, the evidence of the DDG: Cooperate Services is admissible.

The merits

[36] Effectively before Court there are no agreed facts except those recorded in the pre-trial agreement. The parties stated that there is no real dispute of facts. This turned out to be incorrect. On the one hand the applicant testified that her transfer was properly effected by the MEC as she was being transferred to the position of the Deputy Director General. Further she testified that she had accepted the remuneration offered. On the other hand, the Director General: Cooperate Services testified that the offer of 24 November 2017 was provisional and conditional on the Premier's consent and such a consent was not given. Further, he testified that the applicant had not unequivocally accepted any offer from the DPW and that the essential term of a contract of employment – remuneration – was not agreed upon. Clearly the existence of a valid contract of employment between the applicant and DPW is hotly disputed.

[16] Act 5 of 1988.

[37] The *onus* to prove the existence of the contract of employment lies with the applicant. The applicant is required to prove the existence of the contract as well as its terms allegedly breached by the first respondent. This Court is thus faced with two conflicting versions with regard to the existence of a contract of employment with the DPW and its terms. The approach to be adopted is the one suggested in *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and others*[17]. What needs to be considered is (a) the credibility of the various factual witnesses; (b) the reliability of the witnesses, and (c) the probabilities. Having not observed and/or received oral evidence, it is difficult to assess factors (a) and (b). Similarly, when weighing probabilities, a trier of facts must take into account factors (a) and (b). Since these are not motion proceedings, it will be wrong to apply the *Plascon-Evans* approach. Where the probabilities are evenly balanced, the party with an *onus* would have failed to discharge that *onus* and must fail.

[38] However, the version presented by the DDG: Cooperate Services that no agreement to transfer was reached is one that is probable, regard being had to the letter by Minister Nhleko. On any interpretation of the letter the offer was conditional upon the consent by the Premier. There is no dispute that such a condition was not met. In our law of contract, it is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, be made with the intention that when accepted it will bind the offeror.[18] It stands to reason that in the absence of the consent of the Premier and the MEC, there was no firm offer to contract with the applicant. The conclusion to reach is that the applicant failed to discharge the onus that a contract of employment with DPW came into existence. The applicant must fail in her quest for repudiation of an alleged contract of employment with DPW. The fact that the applicant consented to a transfer is of no moment. Where a transfer is invalid, as it is the case in this matter, a consent to it does not produce legal consequences. As discussed above section 12 requires that a transfer of the head of department must be effected by the President in consultation with the

[17] 2003 (1) SA 11 (SCA).
[18] *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D per Levy J.

Premier. This legal requirement was not met and on application of the principle of legality, the purported transfer is conduct that is unlawful and cannot be enforced by a Court of law. To make matters clear this Court refuses to enforce the purported transfer and does not set aside the decision to transfer since there is no review application before it.

Damages – quantification

[39] The quantification of damages requires presentation of factual oral evidence or expert evidence or both. The amount claimed by the applicant has not been verified by an actuary. No actuarial calculations have been provided to this Court as part of evidence. The applicant simply annexed a calculation to her heads of argument. In cases where damages are capable of exact mathematical computation, a party claiming those damages must produce sufficient evidence to substantiate the exact amount of the damages.[19] It is correct, as submitted by the first respondent's counsel, Mr Ramawele SC, that there is paucity of facts which would enable proper quantification. The Court is not told of the age of the applicant and by which date she would have retired. It is common cause that she took up employment with the provincial department of Human Settlement and as such she has mitigated her damages. Despite that she still claims damages – loss of income - until retirement. The Court notes that an improperly amended claim has been substantially reduced. There is no proper explanation for that reduction. In order to succeed the applicant needed to prove both the merits and the quantum of his claim. There is no agreement reached that issues are to be separated. Accordingly, having failed to produce evidence on the quantum, the first respondent must be absolved from the instance.[20]

[40] For all the above reasons, the following order is made:

Order

[19] *Versfeld v SA Citrus Farms Ltd* 1930 AD 452
[20] LAWSA Vol 14.1 – Third Edition, *Damages: Practice and Procedure: Proof.*

1. The applicant's claim is dismissed
2. The applicant to pay the first respondent's costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

No appearances: (Written heads of argument submitted)

Heads on behalf of the applicant:	Prepared by Mr SB Nhlapho
Instructed by:	Phakedi Attorneys, Johannesburg.
Heads on behalf of the 1st respondent:	Prepared by Mr R Ramawele SC
Instructed by:	State Attorney Pretoria.