IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1747/06

In the matter between:

DR MM DYASI Applicant

and

THE UNIVERSITY OF LIMPOPO First Respondent

ADVOCATE MODISE GEOFFREY KHOZA NO Second Respondent

THE MINISTER OF EDUCATION Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant is employed by the University of Limpopo, the first respondent in these proceedings. The second respondent is advocate Modise Geoffrey Khoza SC who was appointed to chair the disciplinary enquiry of the applicant. The third respondent is the Minister of Education (the Minister).

2. This is an application for leave to amend the applicant's notice of motion to include a prayer to review certain decisions taken by the first respondent on 29 September 2006.

3. The application for leave to amend was opposed by the first respondent.

The background facts

4. On 1 January 2005, the former Universities of the North and the Medical University of South Africa (Medunsa) were merged in terms of the applicable merger provisions of the Higher Education Act, No 101 of 1997. The merged entity is the University of Limpopo, the first respondent. The applicant held the position of personal assistant to the principal and vice-chancellor, before the merger between Medunsa and the University of the North, on 1 January 2005. The first respondent, by way of a decision of its interim council (the Council), appointed the applicant as interim campus principal and interim deputy vice-chancellor at its Medunsa campus, pending the finalisation of a major restructuring process, which had been mandated by the merger guidelines. The applicant was reporting to the acting principal and vice-chancellor of the first respondent, Prof M N Mokgalong.

5. During the applicant's tenure as campus principal, the Council received unfavourable reports regarding the applicant's management abilities, including reports of nepotism involving his son, a student at the Medunsa campus. The applicant has denied that he is guilty of the allegations levelled against him. As a result of the reports a decision was taken by the first respondent to suspend the applicant on full pay, pending the outcome of a formal disciplinary enquiry. He was duly suspended on 30 September 2005. The suspension was purportedly done in terms of the disciplinary dispensation that was applicable to the applicant which is contained in a document called the "Staff Code".

6. The applicant appointed attorneys Deneys Reitz as his attorneys of record for the purposes of the disciplinary enquiry. The first respondent consulted with Deneys

Reitz attorneys on the possibility of deviating from the onerous requirements of the Staff Code, to expedite the disciplinary process. The parties agreed that the requirements of the Staff Code could be dispensed with, to the extent possible. However, certain requirements involved participation by the Minister and the first respondent believed these requirements could not be dispensed with, without the Minister's approval. Upon enquiry however, the Minister indicated in no uncertain terms that she would not involve herself.

7. The applicant was duly presented with a detailed charge sheet, further particulars, documentation etc to prepare himself for the enquiry. The parties had expressly agreed to legal representation and the appointment of an independent arbitrator namely the second respondent. A venue had been secured plus mutually suitable dates for the hearing, during July 2006. However, shortly before the hearing was set to commence, Deneys Reitz attorneys informed the first respondent that they could no longer act for the applicant and his current attorneys of record would continue the matter. The applicant cited financial considerations as the reason for the change in representation. The first respondent agreed to a postponement of the enquiry, to provide the new attorneys an opportunity to prepare for the hearing. The first respondent carried the costs associated with the postponement.

8. The applicant's current attorneys indicated that they and counsel would be available to commence the disciplinary hearing during October 2006. They participated in the exchange of documentation, attended a number of pre-trial meetings and indicated their approval of the second respondent to chair the hearing. However, shortly before

the hearing was set to commence, the applicant brought an urgent application, with the result that the first respondent had to postpone the hearing and incurred wasted costs. The notice of motion was filed on 29 September 2006 and the application was set down for a hearing on 4 October 2006. In the unamended notice of motion the applicant is seeking a declarator to the effect that the decision that he was suspected of misconduct; the putting of charges to him; the appointment of the second respondent to conduct the inquiry; the first respondent's decision to appoint the second respondent without obtaining the Minister's approval and the fixing of a time and place of the inquiry were unlawful and of no force or effect. Further that his purported suspension by the first respondent on 30 September 2005 was unlawful and of no force or effect and that he be directed to resume his duties as campus principal and deputy vice-chancellor of the first respondent. The applicant also sought an order interdicting and restraining the first and second respondent from convening or conducting the inquiry into alleged misconduct on the part of the applicant which was due to commence on 9 October 2006 and interdicting and restraining the first and second respondent from convening or conducting any further disciplinary inquiry against him without complying with the relevant provisions of the Staff Code.

9. On 4 October 2006 the matter was postponed in terms of a draft court order to 11 October 2006. The first respondent had to file its answering affidavit by 5 October 2006 at 14h00 and the applicant's his replying affidavit by 12 October 2006 at 14h00. The cost of the postponement was reserved.

10. The applicant in a notice filed with this Court on 10 October 2006 gave notice that he would bring an application on 11 October 2006 for leave to amend his notice of

motion as follows:

'1 granting leave to the applicant to amend his notice of motion by inserting the following prayer 5A:

"5A.1 directing the first respondent to furnish the applicant and the registrar of the above Honourable Court with the full record of the meeting of the Council of the first respondent held on 29 September 2006, including -

a) the notice convening the meeting;

b) the agenda of the meeting;

c) details of the persons to whom the notice of the meeting and notice of the resolution forming annexure M47 to the first respondent's answering affidavit was given and how this was effected;

d) the attendance register of the meeting;

e) the minutes and any other recording of the meeting;

f) all other documentation pertaining in any way to the meeting.

5A.2 reviewing and setting aside in its entirety the resolution forming annexure M47 to the first respondent's answering affidavit;

5A.3 reviewing and setting aside in their entirety the decisions referred to in paragraph 124.2 of the first respondent's answering affidavit, including the decisions to -

5A.3.1 abolish the position of campus principal of the first respondent's Medunsa campus;

5A.3.2 replace the position of campus principal with three posts of

deputy vice-chancellors;

5A.3.3 proceed to fill the posts of deputy-vice chancellors.

2. Condoning the late filing of the applicant's replying affidavit.

3. Granting further or alternative relief;

4. Directing the first respondent to pay the costs of this application."

11. When the matter was heard in court on 11 October 2006, the applicant had wanted to argue the whole matter which is the declarator, the interdict and the review application. This was so although he had given the first respondent less than a day's notice that he would seek an amendment to include the review. The only issue that was eventually debated was the issue of urgency. The Court ruled that the matter was urgent and than postponed the matter *sine die* and costs were reserved.

12. The judge president of this Court and the Labour Appeal Court was approached and a direction was issued that the matter be enroled for a hearing on 23 February 2007. Further papers were filed by both parties.

The application for leave to amend

13. An issue that arose on 23 February 2007 was whether the application to amend was consented to by the first respondent or granted by the Court on 11 October 2006. The applicant contended that the first respondent had consented to the amendment on 11 October 2006 and that it was granted. This was vigorously disputed by the first respondent. It was further contended by the applicant that if it were found that the application to amend was not consented to or granted that it would move for the

application to amend to be granted. The first respondent indicated that if the application to amend was granted it would seek a postponement to deal with the amended application.

14. Much was made by the applicant about the issue whether the amendment was granted. In his notice of intention to amend he made it clear that he would on 11 October 2006 be seeking leave to amend his original notice to include a prayer for review. The applicant has in an attempt to bolster his case that the application to amend was granted filed many documents most of which are not relevant to the proceedings. A transcript of the proceedings of 11 October 2006 was also filed which was not necessary. There is no shred of evidence before me that indicates that the application to amend either was granted by this Court or consented to by the first respondent. The application to amend was simply not argued. The only ruling that the Court made on 11 October 2006 was that the matter was urgent.

15. The Rules of this Court do not deal with applications to amend. Rule 28 of the High Court Rules is applicable. In deciding whether to grant or refuse an application for an amendment the court exercises a discretion and, in so doing, leans in favour of granting it to ensure that justice is done between the parties by deciding the real issue between them. In this regard see *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) D&CLD 632. An amendment which would render the relevant pleadings excipiable cannot lead to a decision of the real issues and should not be granted. It would serve no purpose to grant such an amendment and than allow the other party to file an exception. An

amendment which does not disclose a cause of action should not be allowed since it would be an exercise in futility. An amendment will normally not be granted if there will be prejudice to the other party which cannot be cured by an order of costs or a postponement. Prejudice in this context is not limited to factors which affect the pending litigation but embraces prejudice to the rights of a party in regard to the subject-matter of the litigation. See *South British Insurance Co Ltd v Glisson* 1963(1) 289 NPD. The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice taken into account. The onus rests upon an applicant seeking an amendment to show that the other party will not be prejudiced by the amendment.

16. Counsel for applicant contended that the proposed review application was brought in terms of section 6 of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) and not in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 (the LRA). It was contended that this Court has jurisdiction to hear reviews brought in terms of PAJA and support for this contention was the *Rustenburg Platinum Mines Ltd v CCMA* [2006] SCA 115 (RSA) judgment.

17. The application to amend was opposed by the first respondent on the basis that the relief sought by the applicant could not be granted by this Court. It was contended that the applicant should have approached the High Court for the appropriate relief. It was further contended that the decision that the applicant seeks to review is not an administrative action and that the provisions of PAJA do not apply. Further that this Court cannot review decisions of disciplinary enquiries since there is an overlap in the relief that the applicant is seeking in the application to amend and the relief sought in

the original application.

Analysis of the facts and arguments raised

18. Several issues arise in this matter. The first is whether the decisions that the applicant seeks to review are administrative actions as defined in section 1 of PAJA. If I find that they are not administrative actions as defined in PAJA than no purpose would be served to grant the amendment. If I do find that they are administrative actions, the further issue is whether this Court has jurisdiction to review those decisions and whether the applicant should not have approached the High Court for relief. The applicant made it clear did not place any reliance on section 158(1)(h) of the LRA so I need not have to deal with it. If I do find that decisions are administrative actions and that this Court does have jurisdiction the question that further arises is whether the review application was made timeously and what prejudice the first respondent has suffered.

19. Section 6(1) of PAJA states that any person may institute proceedings in a court or tribunal for the review of an administrative action. In the *Rustenburg Platinum Mines Ltd* matter the SCA found that the reference in PAJA to court includes the Labour Court. However I am of the view that the jurisdiction of the Labour Court is limited and is confined to the various pieces of labour statutes like the LRA, the Skills Development Act, the Basic Conditions of Employment Act, the Employment Equity Act that grants it jurisdiction. Not all PAJA reviews can be dealt with by the Labour Court. The issue that need to be reviewed will still have to be considered in relation to the jurisdiction of this Court.

20. Administrative action is defined in section 1 of PAJA as follows:

"Administrative action means any decision taken or any failure to take a decision, by -

(a) an organ of State, when -

(i) exercising a power in terms of the Constitution or a Provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of State, which when exercising a public power or performing a public function, in terms of an empowering provision which adversely affects the rights of any person and which has a direct external legal effect, but does not include a court or a judicial officer."

21. The applicant seeks to review both the resolution adopted by the first respondent on 29 September 2006 and all decisions taken by the Council in respect of the restructuring process referred to in paragraph 124.2 of the first respondent's answering affidavit. The resolution seeks to ratify all actions taken by the vice-chancellor and principal of the first respondent and/or any other functionary or body of the Council of the first respondent regarding the disciplinary actions pending against the applicant and *inter alia* includes ratification of the applicant's suspension, the initiation of due disciplinary proceedings against him and any decision or steps taken about the disciplinary proceedings against him and any decision or steps taken

about the disciplinary actions pending against him in terms of the Staff Code and/or conditions of service of the first respondent.

22. Ratification is equivalent to prior authorisation and confirms the transaction concerned with retroactive effect. In this regard see *Neugarten and Another v Standard Bank of South Africa* 1989 (1) 797 SCA at 802J. The applicant contends that the matters raised by the review application are matters incidental to the determination of the main relief sought in the application. In effective terms therefore the decision to initiate, continue and complete the disciplinary enquiry against the applicant is under review.

23. The Constitutional Court had found with regard to this Court, in *Fredericks and Others v MEC for Education and Training Eastern Cape and Another* [2002] 23 ILJ 81 (CC) at 102A-G, that the LRA does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from the employment relationship.

24. In *Mantazaris v University of Durban - Westville and Others* [2001] 21 ILJ 18 (LC) at paragraph 5.2, at page 1825, the court found that the Labour Court does not have jurisdiction to review any acts or omissions of a disciplinary committee or panel. The following was said in paragraph 5.2 at page 1825:

"It is trite law that the conduct of a disciplinary enquiry does not constitute an act or omission of any person or anybody constituted in terms of the LRA. The concept of a disciplinary enquiry, or committee or panel, is not referred to in the Act at all, as is mentioned obliquely in the Code of Good Practice, which is nothing more than a

guideline in dismissal matters."

25. This principle was also followed in the case of *Feinberg v African Bank and another* [2004] 10 BLLR 1039 (T) where Daniels J said the following at page 1040H:

"The concept of a disciplinary enquiry, or committee or panel is not referred to in the Act at all, and is certainly not specifically referred to in the context here under consideration. The Labour Court does not have jurisdiction."

26. It appears from these authorities that the High Court might be the only Court that has jurisdiction on some relief that the applicant is seeking in the review application. The second portion of the review application relates to the review of decisions taken by the first respondent's Council regarding a restructuring process at the Medunsa campus of the first respondent. The application should fail on the same grounds as referred to above namely that this Court has only has a limited review jurisdiction and that it cannot review or set aside any decision relating to a restructuring process. The concept of a restructuring process envisaged by the first respondent is not referred to in the LRA at all and therefore section 158(1)(g) and (h) of the LRA and from which the Labour Court derives its powers to review is not applicable.

27. However, as stated in paragraph 16 above the applicant did not seek to rely on the review provisions of the LRA but PAJA. Counsel for applicant contended that this Court has jurisdiction to hear reviews brought in terms of PAJA and support for this contention was the *Rustenburg Platinum Mines Ltd v CCMA* [2006] SCA 115 (RSA) judgment. The applicant's reliance on *Rustenburg Platinum Mines* judgment is clearly misguided. The SCA had found that PAJA applies in the review of decisions

of CCMA commissioners. PAJA had by necessary implication extended the grounds of review available to parties to CCMA arbitrations. The term court in section 1 of PAJA includes a High Court or another court of similar status, which plainly encompassed the Labour Courts. The court found that there could be no doubt that a CCMA commissioner's arbitral decision constitutes administrative action. The Court found that section 6 codificatory purpose subsumed the grounds of review in section 145(2) of the LRA, and PAJA's constitutional purpose must be taken to override that provision's preceding, more constricted, formulation. Section 6 of PAJA is the legislative embodiments of the grounds of review to which arbitration parties became entitled under the Constitution. The SCA did not decide whether decisions taken by employers are administrative actions and is therefore reviewable in terms of section 6 of PAJA. That case dealt with the review of a decision of a CCMA commissioner but not the review of a decision of an employer like the first respondent in this case. The question here is different in that it is not an award that the applicant is seeking to review but a decision taken by the Council that it seeks to review.

28. In *President of the Republic of SA v SA Rugby Football Union* 2000 (1) SA 1 (CC) at 67, paragraph 1.4.1 the CC ruled as follows:

"In sec 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a Legislature may constitute

administrative action. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry whether conduct is administrative action is not the arm of government to which the relevant actor belongs, but to the nature of the power he or she is exercising."

29. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SCA 1023 at paragraph 16, Streicher JA held that section 33 of the Constitution -

"is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it exercises public power. Whether or not the conduct is administrative action would depend on the nature of the power being exercised. Other consideration which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely it is related to the implementation."

30. In *Greyvenstein v Kommissaris van die SA Inkomstediens* [2005] 26 ILJ 1395 (T), Webster J had to decide the question whether a decision by the respondent to institute disciplinary proceedings against the applicant was an administrative action in terms of PAJA. The Court found at 1402 F-G that the act of instituting disciplinary proceedings could not be said to constitute the exercise of a public power or the performance of a public function. This was simply an act by the employer, albeit an organ of State, against an employee in their capacities as master and servant.

31. In *Public Servants' Association on behalf of Haschke v MEC for Agriculture and*

Others [2004] 25 ILJ 1750 (LC) the applicant union contended that the respondent's refusal to promote Haschke had constituted an unfair labour practice and unfair administrative action. The CCMA refused condonation to the applicant union for the late referral of the dispute for conciliation. The question arose whether CCMA awards and rulings are administrative actions under PAJA. Pillay J found that the distinction between Ministerial and other decisions are irrelevant in employment disputes and that all decisions affecting employment should be processed in terms of labour laws and the Constitution. She found that awards and rulings of the CCMA were therefore not deemed to be administrative action in terms of PAJA. However the SCA found in the *Rustenburg Platinum Mine* judgment that awards and rulings of Commissioners are administrative actions and can be reviewed either in terms of PAJA or in terms of section 145 of the LRA.

32. In *SAPU and Another v National Commissioner of the South African Police Service and Another* [2006] 1 BLLR 42 (LC), the applicants challenged the validity of a decision taken by the Commissioner of Police to change their shifts from 12 hours to 8 hours and sought an order from the Labour Court reviewing and setting aside this decision. The court found however that the Commissioner's action was not administrative action in terms of PAJA and that it did not constitute a public power or a public function. The application was dismissed. Similarly Claassen J found in *Klein v Dairnfern College and Another* 2006 (3) SA 73 (W) that a decision of a domestic tribunal established by contract did not constitute administrative action in terms of PAJA and therefore such decision was not reviewable.

33. The SCA in *Transnet Limited v Chirwa* [2006] 27 ILJ 2294 had to decide whether the termination of an employment contract by a state organ like Transnet violated the respondent's right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution. The Court also had to deal with the question whether a chairperson conducting a disciplinary enquiry leading to a dismissal, was performing an administrative action. Mthiyane JA and Jafta JA found that the dismissal of the respondent after a disciplinary enquiry was not an administrative action. They said as follows at 2307 B - C:

"The nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public function in terms of some legislation. Ordinarily the employment contract has no public element to it and is not governed by administrative law. The mere fact that Transnet is an organ of State does not impart a public law character to its employment contract with the applicant.... When it dismissed the applicant, Transnet did not act as a public authority but simply in its capacity as employer..... For the above reasons it has not been shown that the dismissal of the applicant by Transnet was an administrative action as defined in PAJA or that any of her rights under sec 33 of the Constitution were violated." [at 2037F-G].

The Court per Mthiyane JA and Jafta JA further said that when the respondent was dismissed she enjoyed the protection under the LRA which is the statutory embodiment of the constitutional right to fair labour practices. It was not shown that the dismissal of the respondent was an administrative action as defined in PAJA or that any of her rights under section 33 of the Constitution were violated. Conradie JA

found that the respondent's reliance on PAJA was misplaced and that insofar as she might have had a claim under PAJA, she chose the wrong forum to enforce it. Also misplaced was her alternative attempt to find a cause of action directly on section 33 of the Bill of Rights. The minority court found that her dismissal was an administrative action under PAJA. For the respondent to succeed she had to establish that the dismissal constituted administrative action as defined in section of PAJA or may violate section 33 of the Constitution.

34. In *SANDU v Minister of Defence and* Others 2007 (1) SA 402 SCA, the appellant relied on the violation of its members' rights to fair labour practices in terms of section 23(1) of the Constitution. Conradie JA said the following at page 421 C - D:

"Insofar as SANDU relies on a violation of its and its members' right to fair labour practices in terms of s23(1) of the Constitution, I consider that it is impermissible for SANDU to rely on a violation of a constitutional right without first attacking the relevant Statutory Labour Provisions as unconstitutional or demonstrating that they are inadequate to ensure fair labour practices".

35. In the light of these authorities the applicant cannot in my view rely on the various provisions of section 6 of PAJA in his review application, as the whole process leading to the disciplinary hearing, including the resolution of 29 September 2006, with the decision to initiate and proceed with the restructuring process, clearly does not involve the exercise of any public power or the performance of a public function in terms of legislation. In proceeding with the disciplinary enquiry against the applicant and initiating a restructuring process, the first respondent was acting as an

employer as part of the normal employer/employee relationship. It can also not be found that any of the applicant's rights in terms of section 33 of the Constitution had been violated. The decision to initiate and proceed with a disciplinary enquiry is not an administrative action and can therefore not amount to a violation of the Constitution. The applicant's reliance on s 23(1) of the Constitution is likewise also misplaced and provides no ground for interference by this Court.

36. The application to amend should also fail on the basis that the applicant has delayed for almost two years in attempting to bring the application reviewing the Council's decisions relating to the restructuring. The applicant's version that he only became aware of the fact that the ongoing restructuring process may affect his position after reading the first respondent's answering affidavit is patently untrue. Any restructuring process would inevitably have some or other effect on employment relationships and the applicant is no different from any other employee. The applicant has been aware of the restructuring process at least since the merger during January 2005. The very reason that the applicant had been occupying the position of interim campus principal has been due to the restructuring process. The applicant's substantive position is that of personal assistant to the principal and vice-chancellor. It has always been common cause that his interim appointment would lapse when the restructuring process has been finalised, as appears from his appointment letter.

37. It is also clear from the facts placed before me that the first respondent will be severely prejudiced if the applicant's application for amendment is granted, as it would effectively bring the restructuring process to a halt, after more than two years.

Even if it could found that the relevant Council decisions amounted to administrative action, the application to amend should be disallowed on the basis of his unreasonable delay in applying for this relief. The application should have been brought within 180 days. There is no application for condonation for the late filing of the application and the application to amend should be refused on this basis also. See *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); and *Setsokosane Busdiens (Edms) Bpk v Voorsitter Nasionale Vervoerkommissie* 1986 (2) SA 57 (A).

38. The application to amend the applicant's notice of motion stands to be dismissed.

39. There is no reason why costs should not follow the result. The costs are limited to the employment of one counsel.

40. In the circumstances I make the following order:

40.1 The application for leave to amend the notice of motion filed on 10 October 2006 is dismissed.

40.2 The applicant is to pay the costs of the application which costs are limited to the employment of one counsel.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : A DODSON INSTRUCTED BY STRB ATTORNEYS

FOR FIRST RESPONDENT	:	H VAN R WOUDSTRA SC WITH R DU PLESSIS INSTRUCTED BY HLATSHWAYO DU PLESSIS VAN DER MERWE NKAISENG ATTORNEYS
DATE OF HEARING	:	23 FEBRUARY 2007
DATE OF JUDGMENT	:	14 MARCH 2007
DATE OF AMENDED JUDGMENT	:	14 N0VEMBER 2007