IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR3518/09

DATE: 2010-06-10

Reportable

In the matter between

KRIEL, JAN PAUL Applicant

and

LEGAL AID BOARD Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant brought an application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 ("the LRA") for the review and setting aside of certain actions and decisions of the respondent, an organ of state, in its capacity as employer ("the review"). The grounds for the review are that the respondent acted unlawfully in that it failed to comply with the requirements of legality and the rule of law (as referred to in section 1(a), 1(c) and 2 of the Constitution, Act 108 of 1996), the Legal Aid Act[1], the Public Service Act, the Doctrine of Separation of Powers and the Disciplinary Code and Procedures for the Public Service. The nub of the review is the respondent's failure to comply with the Legal Aid Act in that it did not validly delegate its powers to the chairperson of the applicant's disciplinary enquiry and

1 Act 22 of 1969.

appeal hearing ("the chairpersons"). The applicant seeks to review and set aside the purported delegation of authority as being unlawful and unconstitutional, rendering his dismissal void.

[2] The respondent brought a Rule 11 application seeking dismissal of the review, following which the two matters were consolidated by order of this Court. The respondent raised various *in limine* objections and in an *ex tempore* order the court upheld the respondent's objections save for the non-joinder point. This dispensed with the need to determine the merits.

Background

[3] This matter has an extensive history. The applicant was dismissed following a disciplinary enquiry in 2003. His dismissal was confirmed on appeal in September 2004. He brought a review application in the High Court in 2005 to assert his right to fair administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") : see *Kriel v Legal Aid Board & Others* (2009) 29 *ILJ* 1091 (T). The High Court held that it lacked jurisdiction to determine the matter since the dismissal of employees fell within the ambit of the LRA. It accordingly dismissed the review. On appeal the Supreme Court of Appeals ("SCA") held that the High Court had retained jurisdiction but that the true issue for decision was whether the dismissal constituted administrative action as envisaged by PAJA. See *Kriel v Legal Aid Board & Others* (2009) 30 *ILJ* 1735 (SCA). The applicant then approached the Constitutional Court, which refused leave to appeal in November 2009[2].

[4] In January 2010 the applicant referred an automatically unfair dismissal dispute as envisaged by section 187(1) of the LRA to this Court, which is pending.

Preliminary objections

2 Its decision had been delayed pending *Gcaba v Minister for Safety and Security and others* (2010) 1 BCLR 35 (CC).

[5] The respondent raised the following *in limine* points: non-joinder, *res judicata* and *lis pendens,* section 158(1) (h) review non-competent, and undue delay. I turn now to deal with each of these.

Non-joinder

[6] The respondent submitted that the applicant should have joined the chairpersons since their appointments form the subject of the review. Relying on *Minister of Labour v Amalgamated Engineering Union* 1949 (3) SA 637 (A), the respondent submitted that they have a direct and substantial interest in the outcome of the proceedings and should have been joined to answer or defend the nature and extent of their involvement. The applicant does not seek an opportunity to join them and disputes their interest. It submits that it is not their decisions that are being challenged, but the purported delegation of authority to them in contravention of the Legal Aid Act. Thus, they have no interest in the delegation being declared unlawful. The respondent further contended that the applicant had not complied with rule 7A (1) of the Rules for the Conduct of Proceedings in the Labour Court in that it had not served the notice of motion on *all affected* parties, which is mandatory. Since no condonation is sought this should be held to be fatal to its case.

[7] I agree with the applicant that in circumstances where the purported delegation of authority and not the outcome of the disciplinary process is subject to review, the chairpersons lack a direct interest. If the applicant were to succeed it would result in the disciplinary proceedings being set aside as *void ab initio* and this would not affect the rights or interests of the chairpersons[3]. It follows then that compliance with rule 7A (1) in this respect was not necessary.

3 See however *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC), where the High Court's remedy was to declare the dismissal a nullity and order that the employee be reinstated, but Cameron JA took a different view, preferring that the matter be remitted to Transnet for a fresh and proper hearing. See in this regard the judgment of the majority (per Skweyiya J) at [33] – [34]. Neither approach would affect the chairpersons in that they are *functus officio.*

Lis pendens and res judicata

[8] The respondent submitted that the authority of the chairpersons and the powers delegated to them formed part of the review application in the High Court, and had been disposed of. Furthermore, the applicant's dismissal is the subject of a pending trial before this court. In *Makhanya v University of Zululand* (2009) 30 *ILJ* 1539 (SCA), the implications arising from this approach to litigation was made clear. The Court[4] held:

> *"Naturally a claim that falls within the concurrent jurisdiction of both the High Court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of lis pendens (the claim is pending in another court) or by a plea of res judicata (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court".*

[9] Furthermore, the respondent submitted, it is clear from *Chirwa v Transnet Ltd & Others* (2008) 29 *ILJ* 73 (CC), that a public sector employee is not in a preferential position so as to be afforded an election, and having elected to bring his action in the High Court cannot now seek the same remedy here, particularly in circumstances where his unfair dismissal claim is pending. In his majority judgment Ngcobo J[5] cautioned against forum shopping when he held:

> *"Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, was held, has two causes of action, one flowing from the LRA and another flowing from the Constitution and PAJA".*

[10] The applicant submitted that this review, unlike that in the High Court, did not

4 At para [27].
5 At para [149].

rely on a cause of action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), but on the doctrine of legality. Moreover, the SCA, in dismissing the applicant's appeal, did not consider it necessary to decide on the lawfulness of the delegation, but had held:

> "*By a parity of reasoning, it is also unnecessary to decide whether the second respondent lacked the authority to adjudicate at the disciplinary enquiry and whether there had been any impermissible delegations of authority. The resolution of these issues is irrelevant to whether the decision to dismiss amounted to administrative action which could be reviewed*[6]*".*

[11] The applicant thus submitted that for present purposes it was not relevant whether the functions exercised by the respondent constituted administrative action or not, since it seeks to challenge the respondent's functions under its empowering statute. This is a constitutional rather than an administrative justice challenge. The applicant's counsel submitted that in citing *Makhanya* (supra) the respondent had failed to point out that the Court[7] had acknowledged that "*where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued simultaneously or sequentially, either both in one court or each in one of those courts".* The applicant is therefore entitled, the applicant submitted, to enforce his right both in regard to the lawfulness as well as the unfairness of his dismissal. This is moreover a separate and distinct cause of action from his unfair dismissal claim, and despite the fact that the latter is pending, if he were to succeed *in casu* it would follow that he would abandon the unfair dismissal claim.

[12] This Court's concern about this course of conduct constituting parallel litigation and forum shopping was raised with the applicant's counsel, who addressed this by reiterating (in the light of authorities such as *Fedlife Assurance v Wolfaardt* (2001) 22 ILJ 2407 (SCA), *Denel v Vorster* 2004 (4) SA 481 (SCA) and *Fredericks and others v MEC for Education and Training Eastern Cape and others* 2002

6 At [20].
7 At [27].

(2) SA 693 (CC)), that employment related actions give rise to more than one cause of action. The applicant relied further on *Nakin v MEC Department of Education, Eastern Cape Province and Another [2008] 5 BLLR 489 (Ck)* as authority for the proposition that employment gave rise to a combination of contractual, administrative, and statutory rights and it was not desirable to classify particular rights into exclusive categories if they all expressed similar underlying constitutional values. Furthermore, in *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation* (2000) 21 *ILJ* 482 (NW) the Court commented on the tendency, following promulgation of the LRA, particularly by practitioners, to subsume all matters concerning employer and employee under the aegis and authority of the LRA, and to engage in a "*blind surge towards simplification*" which is "*a dangerous tendency, because then the practice of labour law becomes like an inverted pyramid balanced insecurely on a slender apex*[8]*".* On this basis applicant's counsel contended that the applicant was entitled to rely on a combination of contractual, labour, constitutional and administrative law rights.

[13] This review, applicant's counsel submitted, is based on what would have been *ultra vires* under common law by reason of a functionary exceeding a statutory power, and is now invalid under the Constitution according to the doctrine of legality. That this is still the applicable approach, she contended, was confirmed in *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) and in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* (2007) 1 SA 343 (CC) *at* [40], where the Bill of Rights was held to apply unconditionally as to the function performed, irrespective of whether it was administrative, legislative or executive.

[14] Lastly on this issue, applicant's counsel submitted that in *Makambi v MEC for Education, Eastern Cape Province* 2008 (5) SA 449 (SCA), the Court found that the High Court had jurisdiction to entertain a claim arising from employment disputes in

8 At 492A.

the public sector, although on different grounds. Thus while the employees could still pursue an unfair dismissal dispute, they elected to pursue it on other grounds. The same conclusion was reached in *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA), where it was held that the High Court retained jurisdiction to adjudicate employment disputes provided that they were formulated in terms of contractual unlawfulness rather than unfairness.

[15] On the basis of these authorities the applicant submitted that it has a separate course of action arising from the same facts, namely the rule of law, which reinforces the rights of an employee not to be denied constitutional rights or freedoms through the arbitrary exercise of its delegation of powers by an organ of state.

Review not competent

[16] This then raises the further objection that a review under s 158(1) (h) (of the conduct of an organ of state to hold a disciplinary hearing that results in a dismissal) is not competent in that it does not constitute administrative action. The respondent relies in this regard on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (7) *BCLR* 687 (CC*),* where O'Regan J held that PAJA gives effect to the s 33 right to fair and lawful administrative action, and there is no residual common law remedy. The Court confirmed further that a decision must constitute administrative action as defined in PAJA in order to found a review[9]. The applicant is therefore obliged to bring his review in terms of PAJA unless the constitutionality of PAJA is being challenged, which is not the case. However, the respondent submitted, even if a principled approach is taken as advocated in *President of the RSA and others v SA Rugby Football Union and others* 2000 (1) SA 1 (CC), and regard is had to the nature of the power exercised rather than the functionary (and ignoring *Chirwa* for these purposes*),* there is still no administrative

9 At [22] it held: "There are not two systems of law regulating administrative action – the common law or the Constitution – but only one system of law grounded in the Constitution. The groundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution".

function that can be subject to review. In the applicant's appeal, the SCA applied the principle expounded in *Chirwa* namely that the conduct of an employer in terminating a contract of employment does not constitute administrative action under section 33 of the Constitution[10]. *A fortiori,* the review is not competent as s 158(1) (h) does not contemplate a review on any other ground.

[17] This, the respondent submitted, is consistent with the approach taken by the Labour Court in similar matters. In *Ekurhuleni Metropolitan Municipality v Mashazi N.O and another* [2009] 12 *BLLR* 1196 (LC) Francis J concluded that there is no review under section 158 (1) (h) of a public sector dismissal. The learned judge[11], quoting the following *dictum* from *Fredericks,* held that where there is no other residual common law ground of review the applicant can no longer attempt to fashion some cause of action under section 158(1)(h) by falling back on the Constitution:

> *"Whatever the precise ambit of s158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the state acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by s 157(2), it would be a strange reading of the Act to interpret s158(1)(h) read with s 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by s157(2). Section 158(1)(h) cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient, when read with s157(1), to exclude the jurisdiction of the High Court".*

[18] Similarly, in *Ngutshane* v *Ariviakom (Pty) Ltd t/a Arivia.kom and others* (2009) 30 *ILJ* 2135 (LC)[12] Pillay J (distinguished the LAC decision in *Member of the Executive Council for Finance, Kwazulu Natal and another v Dorkin NO and another*

10 This principle found application both in *Transman (Pty) Ltd v Dick & another* (2009) 20 *ILJ* 1565 (SCA) and *Makambi v MEC, Department of Education, Eastern Cape Province* (2008) (5) SA 449 (SCA).
11 At [34].
12 At [23].

(2008) 29 *ILJ* 1707 (LAC) relied upon by the applicant *in casu* where a review was granted due to public interest considerations), held that following *Chirwa* it was clear that:

> *"Section 158 (1) (h) of the LRA, which empowers the Labour Court to review any decision or act of the state in its capacity as employer, and s157 of the LRA must be construed in the context of the primary objects of the LRA (Chirwa per Ngcobo J at paras 108 -110).One of the primary objects of the LRA is to resolve disputes effectively (s 3(a) read with s 1(d) (iv) of the LRA)".*

Further:

> *"[19] A termination of employment that is unlawful is also unfair. When the reason for the termination is misconduct, the termination is dismissal. In this case, the substance of the dispute is the fairness and lawfulness of the dismissal. The effective resolution of a dismissal dispute is through conciliation and arbitration".*

Conclusion

[19] In considering the applicant's appeal the SCA observed that the applicant had not clearly set out the cause of action upon which he relied. It delineated his cause of action as:

> *"(a) his dismissal was unlawful and thus void. He was thus entitled to relief in terms of PAJA;*
>
> *(b)his dismissal was unfair and unlawful as, due to improper delegation of authority, the chairperson of the disciplinary enquiry was not entitled to act as such; and*
>
> *(c) his dismissal was unlawful and unfair as his report to the Law Society had been protected under the Protected Disclosures Act."*

[20] It is apparent that, save for the abandonment of any claim arising from PAJA, his cause of action *in casu*, in substance at least, emulates (a) and (b). It was on this basis that relief was sought in the High Court, which was refused and which decision

was confirmed on appeal to the SCA and Constitutional Court. In my view this would justify upholding the *res judicata* point on the facts without having regard to the legal issues. Furthermore, in the light of the authorities cited by the respondent, the review is equally prevented by *lis pendens.*

[21] However, even if regard is had to the legal issues, I agree with the respondent that the applicant would not pass the first hurdle in the review, namely that his dismissal did not constitute administrative action[13]. Indeed in substance the applicant is challenging the very conduct PAJA circumscribes, namely that the functionary unlawfully abdicated a power it was not entitled to abdicate under its empowering statute[14]. He has already availed himself of and exhausted the appropriate remedy for this conduct. Insofar as the applicant sought to rely on the authority of *Ntshangase v MEC: Finance of KwaZulu-Natal & Another* [2009] 12 *BLLR* 1170 (SCA) in support of his contention that the conduct under review is administrative action capable of being reviewed, this decision is in conflict with *Chirwa* and more importantly, the binding authority of *Gcaba v Minister for Safety and Security and others* (2010) 1 *BCLR* 35 (CC). Furthermore, as was submitted by the respondent, *Ntshangase* is at odds with the decision of that very court in *Transman (Pty) Ltd v Dick & another* (2009) 20 *ILJ* 1565 (SCA)*[15]*. This was discussed at length in *Chirwa* and also *Makhanya*[16] where the court relied upon the views of Professor Cheadle on the jurisdictional complexity[17]. The applicant appears that to ignore the fact that *Gcaba* has finally determined the question of overlapping jurisdiction, overruling not only *Ntshangase* but also *Nakin* and *Louw* (supra) on which the applicant places much reliance. Indeed what the applicant seeks to do is to approbate and reprobate in contending, firstly that administrative action is not relied upon (thus falling within *Chirwa)*, whilst at the same time

13 As decided by *Chirwa* and finally by the Constitutional Court in Gc*aba.*
14 See section 6(2) (a) of PAJA.
15 Which dealt with a private sector employer and where a dismissal was held not to be reviewable under section 33 of the Constitution or PAJA. The court also held (at para 27) that there was no review based on principles of fairness being introduced into a contract and that *Chirwa* excluded a review of a dismissal decision by a court.
16 Supra at [68].
17 H.Cheadle 'Deconstructing *Chirwa v Transnet'* (2009) 30 ILJ 741. In this regard see also T. Ngcukaitobi 'Life after Chirwa : Is there Scope for Harmony between Public Sector Labour Law and Administrative Law?' (2008) 29 ILJ 813.

contending that if the respondent's conduct constitutes administrative action the review is nevertheless permissible (on the authority of *Ntshangase*). For obvious reasons this cannot be countenanced.

[22] I do not, moreover understand the applicant to be relying on contractual unlawfulness as considered in *Boxer Superstores* (supra), and insofar as it seeks to do so, the SCA has already disposed of this issue. The SCA[18] dispensed with the argument that the power to dismiss derived from statute; that the cause of action was in terms of the contract of employment and statute; and that the dismissal constituted administrative action. It held these submissions to be without merit.

[23] Therefore, it is in my view incontrovertible that since the applicant relies in substance on a constitutional right to lawful and fair administrative action, this falls within the ambit of PAJA and has already been disposed of by the High Court, the SCA and the Constitutional Court. The applicant cannot seek another bite at the cherry under the guise of a constitutional legality review. He is however not bereft of a remedy in that his unfair dismissal claim is still pending, and is indeed the appropriate remedy[19]. Accordingly, on the *lis pendens, res judicata* and non-competence objections the merits of the review fall not to be entertained at all, and in these circumstances it is not necessary to consider the undue delay objection.

[24] In the premises, the following order was made:

"The respondent's objections *in limine,* save for the non-joinder objection, are upheld".

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18 *Kriel* supra at [12] and [13].

19 The SCA held in *Kriel* supra (at [21]): *"It was open to him to review his dismissal under section 158(1)(g)of the LRA as an act 'performed by the State as employer, on such grounds as are permissible in law'. It was certainly open to him to contend that the termination of his employment had constituted an unfair dismissal as envisaged by section 185 and 186 of the LRA. In particular, if his employment had indeed been terminated because he was a white Afrikaner as he alleged had been the case, it would probably have amounted to an automatically unfair dismissal under s 187(1) (f). Similarly, if his report to the Law Society was protected under the Protected Disclosures Act, to dismiss him as a result would probably also be automatically unfair under s187 (1) (h). By the same token, many of the other allegations relied on by the appellant, if accepted, even if not necessarily automatically unfair under s187, could well justify the conclusion that it was otherwise unfair under s188".*

BHOOLA J:

Date of judgment: 30 July 2010

Appearance:

For the Applicant: Advocate Van Der Walt instructed by J P Kriel and Associates

For the Respondent: Advocate Venter instructed by the Legal Aid Board