

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 3510/2020

In the matter between:

LUNGISWA NOMKOPO

Applicant

And

MEC FOR RURAL DEVELOPMENT AND
AGRIRIAN REFORM, EASTERN CAPE

1st Respondent

HEAD OF THE DEPARTMENT OF RURAL
DEVELOPMENT AND AGRARIAN REFORM,
EASTERN CAPE

2nd Respondent

JUDGMENT

NHLANGULELA DJP

[1] These are application proceedings in which the applicant seeks a relief, firstly, reviewing the respondent's failure to take a decision on whether to reverse the applicant's demotion and reduction of her salary scale and to write off the debt arising from salary overpayments to her to the extent that the failure to take a decision is inconsistent with s 9 (1) of the Constitution, 1996 and s 11 (1) of the Public Service Act, 1994. Secondly, the applicant seeks an order that if it is found that such omission is unlawful the respondent be directed to take a decision within

a period of thirty days from the date of the order. An interlocutory relief that the delay in launching of these proceedings be condoned is also sought by the applicant.

[2] For the purposes of convenience, I quote hereinunder the provisions of s 9 (1) of the Constitution, 1996. They read as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

And s 11 (1) of the Public Service Act, 1994 read as follows:

“In making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.”

[3] The background facts of this matter is the following: Before 1994, todate, the applicant, an adult female, was employed by the Department of Rural Development and Agrarian Reform, Transkei (the respondent). As an employee, the applicant is entitled to be paid a salary in terms of pre-determined salary scales applicable in the respondents’ department. She was employed as a clerk, and earning a salary at level 7. During 1996 the Director General in the Department of Public Service established a Human Resource Operational Project Team (HROPT) for the purposes of rationalizing the public services of the former Transkei, Ciskei and the Cape Provincial Administration. Pursuant thereto, on 04 December 1997 Agreement 1/1997 was concluded in the Eastern Cape Public Service Bargaining Council (the ECPSBC) in terms of which compensation and rank promotions were to be awarded to an individual employee based on auditing by the HROPT. On 25 March 1998 the Director General issued a directive setting out certain criteria for rank / leg promotions. On 1 July 1999 regulations issued under the Government Notice No. R679 were promulgated abrogating the leg / rank promotion dispensation that had applied before regulations issued in 1994. The 1999 regulations introduced changes on the conditions of service of public servants in relation to requirements for promotion to a higher rank. However, in 2001 these

regulations were repealed by new regulations. Pursuant thereto, in February 2008 a Departmental Task Team (the DTT) was established to, *inter alia*, audit files for all staff appointed in the public service prior to 2001, and to recommend fair adjustment of salary scales. It was out of the work of the DTT that in 2009 the applicant's salary scale was raised from Level 7 (Chief Clerk) to Level 8 (Administrative Officer). Many other co-employees of the applicants benefited out of the findings of the DTT. However, in January 2013 the respondent reversed the promotions of the applicant and many other employees in her situation, contending that their promotions were irregular by reason that they were not effected in accordance with the requirements of the Personal Administration Standards (the PAS), which made it a requirement that for appointment as Administrative Officer an employee must have proof of 4 years experience gained after obtaining an appropriate 3 year Bachelor's Degree with R V Q 13 or equivalent qualification. As a result, the respondent effected "corrections" in respect of those employees who allegedly did not make the grade by way of reversing their promotions and salary increases. The applicant happened to be one of those employees.

[4] Later on in 2013, forty-two co-workers of the applicant referred an unfair labour practice dispute to the General Public Service Sectoral Bargaining Council under case number GPBC 304/2013 (the matter of *Gotshana & 41 Others v Department of Rural Development and Agrarian Reform*). This matter was later on settled out of court on the basis of an order that the respondent discontinues the demotions and puts on hold the process of recovering of overpaid salaries. Since the applicant was not amongst those 42 co-workers, the benefits of the settlement order did not accrue to her. In 2015 another group of 50 co-employees of the applicant who had not participated in the *Gotshana* matter referred their own unfair labour practice dispute to the Bargaining Council. A settlement similar to the one obtained in the *Gotshana* matter was granted by the Bargaining Council and applied only to those 50 employees. That is, the benefits of that settlement

did not accrue to the applicant as she was not amongst those 50 employees. Nonetheless, on 26 March 2015 the respondent issued Circular 1/2015 (annexure “LN 1”) which provides to the effect that the respondent had embarked on an action which seeks to address the issues of demotions, lowering of salary scales and recovery of overpayments affecting all the employees who did not participate in the two cases that had been placed before the Bargaining Council. In that Circular, the undertaking made was that all remaining grievances would be settled “internally”. Time lines for the completion of that process was not stipulated in the Circular.

[5] When the promise made by the respondent to address her complaint was not fulfilled, she decided to refer an unfair labour practice dispute against the respondent to the CCMA, General Public Service Sectoral Bargaining Council and Bargaining Council. She was not successful in those endeavours for the reason given by the Bargaining Council that the process of arbitration, pursued by the respondent in terms of Circular 1/2015, would be harmful to the ongoing investigation into demotions and lowering of salary scales. That outcome caused the applicant to wait until the investigation was completed and on the expectation that an appropriate decision would thereafter follow. With neither the investigation completed nor a decision made by the respondent, the applicant resorted to launching the present proceedings challenging the failure by the respondent to decide whether to recognize her promotion as the Administrative Officer and reverse overpayments.

[6] The respondent placed the jurisdiction of this court in issue, contending that the Labour Court, not the High Court, is the correct forum where the relief sought by the applicant must be addressed. The applicant took a different view. Relying on the case of *Gcaba v Minister of Safety & Security And Others* 2010 (a) SA 238 (CC) at para [75] it was submitted on behalf of the applicant that this Court does have jurisdiction to adjudicate the dispute between the parties because the cause of

action is administrative review of the respondents' failure to take a decision in terms of s 6 (2)(g) of Promotion Administrative Justice Act 3 of 2000 (PAJA) in breach of its obligation to correct any action or omission

purportedly made in terms of the Public Service Act, 1994. In *Gcaba*, the Constitutional Court held at para [75] as follows:

“Jurisdiction is determined on the basis of the pleadings; as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba’s case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court’s jurisdiction being challenged at the outset (in *limine*), the applicant’s pleadings are the determining factor. They contain legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognizable by the High Court, should thus approach the Labour Court.”

[7] It was submitted on behalf of the respondent that in so far as the applicant seeks a review of a decision on the ground that the respondent did correct the promotions of some of the workers (the 92 employees who had approached the Bargaining Council under the auspices of the Labour Relations Act No. 66 of 1995) the Labour Court has exclusive jurisdiction to adjudicate the dispute between the respondent and the remaining employees, including the applicant.

[8] It seems to me that in these proceedings the case for the applicant is not that she seeks an order that her promotion from the position of a Clerk to that of an Administrative Officer should be recognised by the respondent. On the proven facts, the respondent did inform the applicant that she was demoted by reason that her promotion was irregular and payment of salaries made at a salary scale for

Administrative Officers constituted overpayments that had to be paid back to the respondent. She has protested the decision of the respondent reversing her rank and reducing her salary scale in the CCMA and Bargaining Council on the ground that the respondent committed an unfair labour practice. Those proceedings were very clearly a litigation that warranted a redress by means of the processes that are established under the Labour Relations Act. It is common cause that the applicant did utilize the machinery that is set up in terms of the Labour Relations Act; *albeit* without success. On the contrary, in these proceedings the applicant asserts that she continued her pursuit for redress inside the work place with the result that in the midst of such ongoing protest the respondent addressed the applicant, together with her colleagues in similar situation, by means of a Circular 1/2015 stating that:

“This serves to advise all the employees of the department (DRDAR) that a settlement was reached between the department and a group of employees in the HROPT arbitration matter.

The two parties reached a settlement agreement on the 25th of February 2015. The settlement covers only those employees who were involved in the arbitration.

The department embarked on an action of addressing other employees who are not covered by the arbitration award, but affected by the same conditions. Each case will be treated on an individual basis.

The department stresses that it sees no reason why the matter cannot be entirely settled internally.”

[9] Quite clearly, it cannot be disputed that the respondent undertook to conduct investigation and advise the applicant whether her demotion and recovery of overpayments will be reversed. It is plain from the papers filed of court that the respondent has failed to decide whether it intends to sustain or reverse the prevailing status *quo*. Based on this analysis of the events constituting the cause of action, under s 6(2)(g) of PAJA, the applicant has succeeded to make out a case that the respondent has breached its statutory obligations as envisaged in s 5 (7)(a) of the Public Service Act, which reads:

“A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.”

The failure to act in terms of the Circular is indeed the error that is envisaged in s 5 (7)(a); and it does invoke the administrative review jurisdiction of this Court in terms of s 6 (2)(g) of PAJA, which reads:

“6. Judicial review of administrative action:

(1) ...

(2) A court or tribunal has the power to judicially review an administrative action if -

...

(g) the action concerned consists of a failure to take a decision.

...”

[10] On the foregoing, it appears to me that the case pleaded by the applicant is that the failure by the respondent to take a decision, as it is enjoined to do so in terms of s 5 (7) of the Act, infringes her right to just administrative action as envisaged in s 33 (1) of the Constitution that is reviewable by the High Court in terms of s 6 (2)(g) of PAJA as it is a “court” as described in s 1 (b)(i) of the same Act. In other words, the right that is asserted by the applicant is not one that can be determined exclusively by the Labour Court acting in terms of s 158 (1)(h) of the Labour Relations Act 66 of 1995, which reads:

“(1) The Labour Court may – review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.”

[11] Counsel for the respondent submitted that the impugned conduct of the respondent, the failure to take a decision, is not an administrative action within the meaning of s 1 of PAJA. She argued that this Court should for that reason dismiss the application in the same way that the court did so in *SAPU and Another v National Commissioner of the South African Police Service and Another* [2006] 1 BLLR 42 (CC). It was held in the *SAPU* case that the decision taken by the

Commissioner introducing a new 8 hour shift system in respect of members of the SAPS engaged in line activity duties across the entire country was an internal contractual matter, as opposed to performance of a public function, that had no external legal effect.

[12] Section 1 of PAJA defines administrative action as follows:

“(i) ‘administrative action’ means any decision taken, or any failure to take a decision by -

(a) An organ of State when –

(i) ...

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

(b) ...

which adversely affects the rights of any person and which has a direct, external legal effect, ...”

[13] In the context of the objection based on s 1 of PAJA, the question to be answered is whether the respondent’s failure to address the applicant’s demotion, lowering of her rank and indebtedness flowing from the process of recovery of salary overpayment is an administrative action.

[14] It cannot be disputed that the respondent is an organ of State which is vested with statutory power under the Public Service Act, 1994 to administer its affairs, including the merger of the TBVC with the broader public service component under the Republic of South Africa that was necessitated by the establishment of one democratic South Africa in 1994. The challenges that were produced by the process of merger warranted adjusting of public service employees’ ranks and salary scale disparities. The tool that was used to harmonize the workforce was a Commission of Enquiry whose findings and recommendations to the Eastern Cape provincial government delivered both success and failure resulting in the continuation of adjustments using a myriad of challenging administrative methods. The Circular issued in 2015 is but one of the indicators that the respondent is still looking for correct answers to the on-going grievances within the public service. The cases stated by 94 co-workers of the

applicant in the Bargaining Council were founded on rank promotions and salary grievances as such, which could very well be categorized as an internal / contractual dispute as between the employer and employee; but for the reason that the disputes had the origin in the merger processes that gave rise to a need for a broad structural adjustment of rank promotions and / salary adjustments within the department, the Circular could not be a step taken in isolation from the process of adjusting the systems of governance of the department as an organ of the State. It is in that light that the failure to take a decision in terms of the undertaking that was made in 2015 must be seen. Such a failure is not in keeping with determining fair public service as envisaged under the Constitution, hence the obligations contained in s 5 (7) of the Public Service Act that the functionary in the respondent's department "shall" correct the failure to take the decision. If not checked, such a failure does undermine the service delivery obligation of the department itself. The respondent should not ignore its statutory obligations. The imprimatur against the malfunctioning of government departments was made in *Khumalo v MEC for Education, KwaZulu Natal* 2014 (5) SA 579 (CC) at para [32] as follows:

“In this matter, the constitutional and legislative approach must inform an approach which does not undermine the hard-won protections afforded to public-sector employees whilst understanding the uniqueness of the public sector employment. Of significance is the demand that decisions are made and executed lawfully, fairly and expeditiously...”

[15] In my view, the nature of the function performed by the Commissioner in the case of *SAPU, supra*, is different from the public function omitted to be performed by the respondent's functionary in the present matter. The recalcitrance on the part of the respondent is a breach of the administrative power given to it under s 5 (7) of the Public Service Act. Therefore, it is my finding that the respondents' failure to decide is the administrative action as described in s 1 (a)(ii) of PAJA.

[16] I proceed to deal with the argument advanced on behalf of the respondent that this application falls to be dismissed by reason that the applicant places reliance for judicial review on Circular 1/2015 in 2020 for demotion that took place in January 2013. Based on this, it was contended that the applicant must be non-suited for having delayed the bringing of her application as envisaged in s 7 (1)(b) of PAJA, which provides that an applicant for review must approach the court within 180 days from the date on which she was informed of the administrative action, became aware of the action or might reasonably have been expected to have become aware of the action and reasons for such action. The respondents stated on affidavit, without more, that "... no decision had to be made by the respondents regarding the applicant ... save for finalizing the audit which would determine the position of each employee."

[17] As I understood the respondents' case on the objection based on delay argument, the implementation of Circular 1/2015 would require the profile of applicant to be audited by the HROPT and, further, validation thereof by the Office of the Premier (OTP). It is those processes that the respondent is obliged in terms of s 5 (7) of the Public Service Act to set in motion so that the applicant could know the fate of her complaint regarding her demotion or lowering of her rank and salary level. Therefore, at issue here is not the demotion that took place in January 2013, but it is the decisions of the HROPT and OTP that are as yet to be made. Simply put, the applicant has not been informed of those decisions despite the undertaking made in terms of Circular 1/2015 that they would be made in order to resolve the complaint of the applicant. Consequently, this application, being taken as a step to compel the respondent to implement the Circular, cannot be said to be restricted by the 180 days period that is prescribed in s 7 (1)(b) of PAJA. The fact that the applicant has not taken an unreasonable step in seeking redress of breach and that the respondent has not placed facts before this court to show existence of prejudice suffered by it due to the launching of this application on 05 October 2020, the objection based on alleged non-compliance with the provisions

of s 7 (1)(b) of PAJA cannot stand. And the concerns raised by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) para [22] do not arise in this case. I state those concerns herein-below for the purposes of completeness:

“[22] It is important for the efficient functioning of the public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroceries Afslaers (Edms) Bpk v Munisipaliteit va Kaapstad* 1978 (1) SA 13 (A) at 41-F (my translation):

‘It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has lapsed - *interest reipublicae ut sit finis litium*.... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.’”

[18] I am not persuaded that a declaratory relief, in para [2] of the Notice of Motion, that the respondents’ failure to take a decision, which is a common cause fact, is necessary in this case. The respondents’ failure to take a decision in this case does not raise any legal controversy fit for an order of declaration of rights to be made. Instead, the substantive relief sought in paragraphs 1 and 3 of the Notice of Motion is a competent one, lest the court slides the judicial review jurisprudence back to the trappings once countenanced regarding the interphase between PAJA, the Constitution and common law. That the applicant cannot premise her administrative justice claim under both PAJA and the Constitution was settled finally in the case of *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd and Others (treatment Action Campaign and Another as*

Amici Curiae)2006 (2) SA 311 (CC), where Chaskalson CJ said the following at 364 – 5:

“[95] PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

[96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33 (1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.

[97] Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:

‘The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor it is possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.’

I agree”

[19] In the same case of *New Clicks*, Ngcobo J (as he was then), in a concurring judgment, said the following at 444-5:

“[431] Now there can be no question that the pharmacies sought judicial review of the recommendation of the Pricing Committee and the Regulations based on that recommendation. For their causes of action, they expressly relied upon the provisions of section 6 of PAJA. They were right. In *Bato Star* this Court held the ‘the cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.’ And it went on to hold that the authority of PAJA to ground such causes of action rests squarely on the Constitution.’

[432] The rationale for the holding in *Bato Star* appears from the following passage:

‘In Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others, the question of the relationship between the common-law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power’s always a constitutional matter. There are not two systems of law regulating administrative action – the common law and the Constitution – but only one system of law grounded in the Constitution. The Courts’ power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm 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. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.’”

[20] The applicant has achieved substantial success in this matter. She is for that reasons entitled to an appropriate substantive relief in paragraphs 1 and 3 as well as the costs of the application.

[21] In the result the following order shall issue:

- 1. The failure by the second respondent to take a decision on whether to reverse the applicant’s demotion or lowering of her rank and salary level, and on whether to write off the debt which was incurred by the applicant as a recovery of a salary overpayment paid to the applicant, occasioned in consequence of the applicant’s aforesaid demotion be and is hereby reviewed and set aside.**

2. The second respondent be and is hereby directed to take a decision on whether to reverse the applicant's demotion or lowering of her rank; salary scale, and on whether to write off the debt which was incurred by the applicant as a salary overpayment occasioned in consequent of the aforesaid demotion or not, within thirty (30) days from the date of this order.

3. The respondents to pay costs of the application jointly and severally, the one paying, the other being absolved from liability.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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Heard on: 23 August 2021

Delivered on: 14 October 2021