

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1264/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
	
	
DATE	30.5.2018
SIGNATURE	<i>[Handwritten Signature]</i>

In the matter between:

MASHUDU JANE MABATA

APPLICANT

And

MEMBER OF THE EXECUTIVE COUNCIL

SAFETY, SECURITY AND LIASON LIMPOPO

1ST RESPONDENT

HEAD OF DEPARTMENT:

SAFETY, SECURITY AND LIASON

2ND RESPONDENT

JUDGMENT

SEMENYA J:

1. The resolution of the dispute between the parties in this application revolves around the enquiry into whether the issues raised are to be dealt with in terms of the Labour Relations Act 66 of 1996 (the LRA), as submitted by the respondents, or in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), as contended by the applicants. Put in another way, whether this court has jurisdiction to hear the matter or whether the applicant should have approached the CCMA.
2. The authors, **Iain Currie & Johan de Waal** in their handbook, **The Bill of Rights, fifth edition on page 518 paragraph 23.7** stated the following:

“LABOUR LAW AND THE PROMOTION OF ADMINISTRATIVE JUSTICE
ACT

...A difficult issue that has emerged since the establishment by PAJA of a statutory administrative justice regime is the relationship between that regime and the LRA. The first is that s145 of the LRA provides for judicial review by the Labour Courts of decisions of the CCMA on a limited number of grounds. But if the CCMA acts as an ‘administrator’ in terms of PAJA – its decision will be susceptible to judicial review in terms of s6 of PAJA. Judicial review under PAJA is the province of the High Courts

(and designated magistrates' courts) and the list of grounds of review in s6 of the Act is more extensive than the grounds in s145 of the LRA.

The second area of difficulty is encountered when the decision by an employer in the field of labour relations also amounts to administrative action. A dismissal of employees by a public body is a good example. Ordinarily, an enquiry into the validity of the dismissal decisions is the province of the CCMA and the Labour Courts. However, PAJA's mechanism for judicial review of administrative action on the grounds for legality, procedural fairness and reasonableness may well provide an alternative path for litigants aggrieved by a labour – relations decision that happens also to qualify as administrative action."

3. The applicant launched this application in two parts. In Part A, she seeks an interim order in terms of which the respondents are interdicted from re-advertising and filling a position of Director: Promotion of Safety. The said order will be of force and effect until the issues raised in Part B are resolved.

4. The salient facts in this application are that the applicant, who is defining herself only as a civil servant, without specifying the government department she belongs to, applied for a post of Director: Promotion of Safety as advertised by the respondents' department. She was shortlisted and invited for an interview. The developments that took place after the interviews made her believe that she was recommended for the post. Whilst waiting to hear from the department, she was surprised when she found out in a newspaper article that the same post has been re-advertised.

5. The application for an interdict is brought under the applicant's belief that the action or decision of the MEC (the 1st respondent) contravenes the provisions of PAJA and stand to be set aside on that basis.
6. The applicant states that upon learning about the re-advertisement of the post, she requested the respondents to furnish her with information that led to the decision to do so. She only received a document she referred to as the Memorandum for Recommendations after an uphill battle.
7. According to the applicant, it was noted on the said memorandum that the panel which consisted of seven members considered her to be highly appointable. Her appointment was recommended by the Chief Director: Corporate Services and one Mr Maenetja, the Chief Financial Officer whose names does not appear on the list of the panelist as furnished by the applicant.
8. The applicant states further that it appears from the said memorandum that the second respondent (the HOD) recommended her, but added that 'there were anomalies during the shortlisting process and requested to be released from the process.' According to the applicant the statement made by the HOD is the reason why the first respondent decided not to appoint her. She avers that the fact that the

memorandum was prepared by the Director: Human Resources Management alone is an indication that the recruitment processes were compliant with the Public Service Regulations stipulations.

9. In opposing the application, the respondents deemed it necessary to deal first with the issues raised in Part A and to defer the issues in Part B to the review application. In the answering affidavit the respondents aver firstly, that the issues raised by the applicant are labour related and should be dealt with in terms of the LRA and not in the High Court. It was submitted that the Labour Court has exclusive jurisdiction in such matters as provided for in section 157(1) read with section 186(2) of the LRA. Secondly, that the applicant failed to satisfy the requirements laid down in **Setlogelo v Setlogelo 1914 AD 221** being:-

- a. *Prima facie* right;
- b. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- c. a balance of convenience in favour of the granting of the interim relief; and
- d. the absence of any other satisfactory remedy.

10. With regard to jurisdictional issues, the respondent contended that the applicant's main complaint is that she was treated unfairly by the respondent's failure to appoint her despite the fact that the panel has regarded her as being highly appointable. It

was submitted that the LRA provides remedies in such situations and that the high Court has no concurrent jurisdiction.

11. The first respondent states that the mere fact that the applicant has been recommended by the panel does not give her a substantive right to be appointed as the decision to do so falls squarely within the domain of the employer. The respondent submits further that the applicant has no *prima facie* right that has been infringed for the same reasons, also that she has been furnished with reasons why she was not appointed to the position.
12. According to the first respondent, the applicant failed to show that she has no alternative remedy as the Bargaining Council provides mechanisms that cater for an applicant who is aggrieved by the decision of the employer not to appoint her, more so that the applicant in this case is employed within the civil service.
13. With regard to the requirement that the applicant must show that she stands to suffer irreparable harm should she not be appointed to the position, the first respondent contends that the applicant failed to allege facts from which the court can find that such harm can be reasonably apprehended.

14. The first respondent dispute the applicant's allegation that the balance of convenience favour the granting of an interdict in that, among other reasons, the review application has no prospects of success. The first respondent refers to a number of instances in which the Public Service Regulations were not complied with during recruitment processes which are not disputed by the applicant.
15. During argument, it was contended on behalf of the applicant that the application is founded on PAJA and not on the LRA. It was maintained that the grievance lies on the fact that the respondents failed to afford the applicant an opportunity to make representations before the decision to re-advertise was taken. Further that the applicant was not informed about the outcome of the recruitment process before the position was readvertised.
16. It is my view that the determination of the issue of jurisdiction is to be made on the basis of an analysis of the facts as alleged by the applicant in the founding affidavit. The label that the applicant himself or herself attaches to the action is therefore immaterial. This view is in line with what was stated in the Constitutional Court case of **Fraser v ABSA Bank LTD (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) BCLR 219 (2007) (3) SA 484 (CC)**. It was held that:

"An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant

could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgement by this Court that an issue is a constitutional matter, furthermore, does not have the result in finding on the merits of the matter in favour of the applicant who raised it."

17. The respondents submitted, correctly so in my view, that the main issues in this application fall within the ambit of the LRA. It is evident from the founding affidavit that her main complaint lies in the fact that the first respondent failed to appoint her despite of the recommendation by the panelists.

18. It cannot be correct that the respondents failed to furnish her with the reasons for the decision taken. Those reasons are attached to the founding affidavit by the applicant herself in the form of the Memorandum of Recommendations. Furthermore, the respondents substantiated the reasons why it is alleged that the recruitment procedures were not done correctly. It appears that although about 57 people applied for the post, only three people, and among them, only one person suited the requirement of the position to be filled.

19. I can safely assume that the applicant somehow accepted the reasons furnished by the applicant that the procedures were flawed. This is in view of the fact that the applicant limited her argument to the respondents' failure to afford her an opportunity to make submissions before the decision to readvertise was taken. I am of the view

that the applicant is resorting to PAJA simply because she is aware that she may not have succeeded had she decided to bring an application under LRA. This is what the Constitutional Court referred to as forum shopping in a number of related cases.

20. In addressing the issue of concurrent jurisdiction of the High Court and the Labour Court, the Constitutional Court as follows in **Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC)** at 64:

"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action."

At paragraph 68 the court held that:

"Accordingly, the failure to promote and appoint the applicant was not an administrative action."

21. I have already stated that I agree with the respondents that the issues raised by the applicant, a civil servant, are labour related. Notwithstanding the argument raised on behalf of the applicant that the issues falls under PAJA, the main complaint is that the respondents failed to appoint her despite the fact that the panel recommended her. These are the issues that should be dealt with in terms of the LRA and

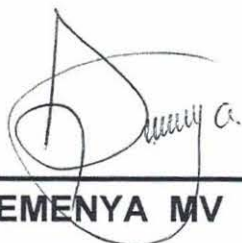
mechanisms provided therein. The right to be given an opportunity to make representation under the circumstances of this case alone cannot establish jurisdiction under PAJA.

22. This brings me to the question whether the applicant satisfied the requirements laid down in Setlogelo. It follows from what I have stated above that it cannot be correct that the applicant is without an alternative remedy. The LRA provides remedies in this regard. The applicant may approach the Bargaining Council if she so wish. I further agree with the respondents that the balance of convenience do not favour the applicant. It is required that proper procedures should be followed whenever an appointment to fill a vacant post is to be made. The application for an interdict cannot succeed both on the issue of jurisdiction and the merits

23. It is ordered:

The application is dismissed.

There is no order as to costs.



SEMENYA MV

**JUDGE OF THE HIGH COURT; LIMPOPO
DIVISION**

APPEARANCES

FOR THE PLAINTIFF : MOBOKU MANGENA ATTORNEYS

INSTRUCTED BY : ADV.

FOR THE DEFENDANT: MR. A MASEKOAMENG

INSTRUCTED BY : STATE ATTORNEYS

DATE OF HEARING : 19 MARCH 2018

DATE OF JUDGEMENT: 30 MAY 2018