

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A233/2013

In the appeal between:-

THE MEC: FREE STATE PROVINCIAL
GOVERNMENT: DEPARTMENT OF EDUCATION

Appellant

and

M L LETELE

Respondent

CORAM: EBRAHIM, J, VAN DER MERWE, J *et JAJI*, AJ

HEARD ON: 23 JUNE 2014

JUDGMENT BY: VAN DER MERWE, J *et JAJI*, AJ

DELIVERED ON: 23 OCTOBER 2014

- [1] The sole issue in this appeal is whether the court *a quo* was vested with jurisdiction to entertain the respondent's claim that she was unlawfully dismissed from employment.
- [2] The salient facts of the matter are not in dispute. The respondent (Ms Letele) was employed by the Free State Provincial Department of Education (the department) in the position of chief director. During 2010 she was charged with alleged misconduct pertaining to the appointment of a

company of which her husband is a director, as principal agent in respect of a project to build a school hall. A disciplinary hearing took place before an independent presiding officer and on 3 March 2012 Ms Letele was found not guilty of the alleged misconduct. Shortly afterwards the head of the department addressed a document to the appellant (the MEC) in terms of which he purported to note an appeal against the findings of the presiding officer.

- [3] No appeal hearing involving Ms Letele took place. Nevertheless she received a letter of termination of employment from the MEC dated 10 May 2012, in terms of which she was informed as follows:

- “1. Please be informed that the appeal lodged by the Head of Department of Education was upheld on the 07/05/2012.
2. Having been found guilty thereof, you are hereby dismissed as from the date of receipt of the above letter.”

- [4] On 18 May 2012 Ms Letele referred a dispute to the relevant bargaining council, that is the Government Public Service Sectoral Bargaining Council (the council). She relies on unfair dismissal and seeks compensation. The matter was heard on 30 and 31 January 2013. On 2 February 2013 the presiding commissioner issued a ruling that the MEC is directed to file an application for review of the outcome of the disciplinary hearing within 30 days and that should he fail to do so, Ms Letele must request the council to reschedule the arbitration of the dispute. The essential reasoning on which

this ruling was based was that the applicable public service Senior Management Services Handbook (the SMS handbook) does not provide for an appeal by an employer and that if the MEC was dissatisfied with the outcome of the disciplinary hearing, the remedy was to have it set aside on review.

[5] On behalf of the MEC Ms Letele was informed per letter dated 8 March 2013 that the MEC does not intend to launch a review application and indeed desired that the arbitration be rescheduled and continued. Ms Letele, however, launched the application that served before the court *a quo*. In the papers before the court *a quo* the parties were *ad idem* that the dispute was still pending before the council and had been postponed pending finalisation of the application before the court *a quo*.

[6] In this application Ms Letele claimed an order in the following terms:

- “1. The applicant’s dismissal by the respondent on or about **10 May 2012** be declared *ultra vires* and *void ab initio*;
2. The respondent be ordered to reinstate the applicant as Chief Director: Free State Provincial Government of Education within seven days after the date of this order;
3. The respondent be ordered to effect payment to the applicant of all remuneration owing to her, calculated from **10 May 2012** until the date of her formal reinstatement;”

- [7] In support of prayer 1 above, Ms Letele said the following in her affidavits:

“5.3 Thirdly, I have been advised that this court may deal with the matter precisely because the conduct complained of on the part of the respondent had been unlawful. I do not in these proceedings wish to assert any kind of unfairness as to my dismissal, nor do I rely on any of the rights given to me in terms of the Labour legislation, and more specifically, those commensurate with fair labour practices as is defined in the Labour Relations Act 66 of 1995.

5.4 It is my case that my dismissal had been unlawful as being contrary to subordinate legislation, the respondent acted *ultra vires* its powers and I am thus entitled to declaratory relief declaring these actions to be such.

5.5 I reiterate that I do not wish to indicate in these proceedings that what has been done to me is unfair – in the Labour Law context of the word, I reiterate furthermore that relief based on the unfairness will be sought at the hearing of the labour dispute that is pending before the relevant bargaining council.”

- [8] The crux of Ms Letele’s case was that the SMS handbook has the status of subordinate legislation, that it does not provide for an appeal by the department and that the action of the MEC was therefore *ultra vires* and unlawful. The MEC contended that the court *a quo* did not have jurisdiction to entertain Ms Letele’s claims. The MEC argued that the essential issues were whether the dismissal of Ms Letele had been unfair and if so, whether she was entitled to reinstatement and compensation. The MEC correctly

pointed out that in terms of section 191 of the Labour Relations Act 66 of 1995 (the LRA) such disputes between the parties had to be determined by the council.

[9] The court *a quo* agreed with the MEC in respect of prayers 2 and 3 above and dismissed those prayers. It however granted prayer 1 of the notice of motion. The court essentially adopted the stance of Ms Letele set out above. The appeal to this court is with its leave. There is no cross appeal.

[10] In the seminal judgment in respect of jurisdiction in labour related matters, **Gcaba v Minister of Safety and Security and Others** 2010 (1) SA 238 (CC) it is explained that the Constitution recognises the need for specialisation in a modern and complex society under the rule of law. The legislature is therefore sometimes specifically mandated to create detailed legislation for a particular area, such as the LRA. The court said that once a set of carefully crafted rules and structures has been created for the effective and speedy solution of disputes and protection of rights in such a particular area of law, it is preferable to use that particular system and that if litigants are at liberty to relegate these structures, a dual system of law would fester in cases of dismissal of employees, resulting in undesirable forum-shopping by litigants.

[11] In paragraph [75] of **Gcaba** the following is said:

“[75] 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 the 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, cognisable 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 cognisable by the High Court, should thus approach the Labour Court.”

[12] Therefore, in order to ascertain whether the court *a quo* had jurisdiction, the notice of motion and supporting affidavits before it had to be properly interpreted. What is in essence a labour dispute, is not changed by giving it another name or label. Substance must prevail over form. Ms Letele admits that the MEC was clothed with the power to dismiss her. What she contends is that the SMS handbook does not

provide for an appeal by the employer. The SMS handbook was not placed before the court. I accept, without deciding, that it has the status of subordinate legislation. There is however no reason not to accept the submission on behalf of the MEC that the SMS handbook deals solely with matters of procedure. On this basis it must be concluded that in essence Ms Letele's case was that she was dismissed by a person admittedly empowered to do so, but despite the fact that she had been found not guilty at the disciplinary hearing. Despite her disavowal this is nothing other than a complaint of dismissal without fair reason and not in accordance with fair procedure. This falls squarely within section 188 of the LRA, with the result that the jurisdiction of the High Court was excluded by section 191 of the LRA.

- [13] This conclusion can be tested by asking whether an order simply declaring that the dismissal was unlawful, could have any practical effect for Ms Letele. The answer is no. Ms Letele can only obtain the compensation that she seeks if the council finds that she had been unfairly dismissed.
- [14] Counsel for the respondent referred us to the judgment of the full court of this division in the matter of **Tlali v Mantsopa Local Municipality and Others** (A78/11) [2011] ZAFSGC (1 December 2011). In that matter a municipal council resolved that a contract of employment of an employee thereof would expire on a certain date in the future. Without reference to **Gcaba**, the full court declared the resolution to be unlawful on the ground that it constituted termination of a contract of

employment without "... sufficient reason recognised by law". In my view it is not necessary to consider this judgment any further as it is clear that the determination of what a case amounts to on a proper interpretation of the pleadings, depends on the particular facts of each case.

[15] It follows that the appeal must succeed. Counsel for the appellant fairly did not ask for costs of the appeal or in the court below.

[16] The following order is issued:

1. The appeal is upheld, with no order as to costs.
2. The order of the court *a quo* is set aside and replaced with the following:

- "1. The application is dismissed.
2. There is no order as to costs."

C.H.G. VAN DER MERWE, J

N.P. JAJI, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant:

Adv W.R. Mokhari SC
Instructed by:
c/o State Attorney
BLOEMFONTEIN

On behalf of respondent:

Adv. S. Grobler
Instructed by:
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