

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A286/2012

In the matter between:

MSIBI M.S.

Applicant

and

THE PREMIER: FREE STATE PROVINCE

Respondent

CORAM:

RAMPAI, AJP *et* LEKALE, J

HEARD ON:

13 MAY 2013

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

30 MAY 2013

INTRODUCTION AND BACKGROUND

[1] The applicant was employed as the Head of the Government Garage within the Free State Provincial Government until 5 September 2012 when he received a letter dated 29 August 2012 from the respondent which terminated his five year employment contract prior to its expiry in June 2014 as follows:

“... I have decided to redetermine your contract of employment to terminate on the 31st August 2012 and you are released from

service with immediate effect.”

- [2] The letter in question was preceded by a letter of 13 August 2012 which was delivered to the applicant in strictest confidence by the Free State Director General who, after learning that the applicant never signed a fixed term contract as required by applicable law, advised him not to act on it and to await a feedback from her after her consultation with the respondent. On 4 September 2012 the applicant learned from the Director General that a letter was already on its way to him. That letter turned out to be the termination letter referred to above. He feels aggrieved by the termination of his employment contract and now moves this court in terms of Rule 53 of the Uniform Rules of Court (the Rules) for an order in terms of which:

- “1. The respondent’s decision to terminate and the respondent’s termination of the applicant’s fixed term contract of employment on the 5th September 2012, by way of letter dated the 29th of August 2012 ... are ... reviewed and set aside.**
- 2. The respondent is ordered to pay the costs of this application.”**

- [3] In response to the motion the respondent filed a notice in terms of Rule 6(5)(d)(iii) of the Rules on 6 December 2012 to the effect that:

- “5. A claim by a public sector employee to review the**

termination of his employment contract on the grounds that it is a breach of his constitutional right to lawful, rational or fair administrative action guaranteed under PAJA, is bad in law.”

ISSUE IN DISPUTE

- [4] The parties, thereafter, filed heads of arguments effectively confined to the question whether or not the termination of the applicant’s employment contract constitutes an administrative action as defined by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) read with section 33 of the Constitution of Republic of South Africa 1996 (the Constitution) so as to be reviewable in terms of PAJA.

CONTENTIONS FOR THE APPLICANT

- [5] Mr Halgryn contends that the question for determination is really whether or not the termination of the applicant’s employment contract, as Head of Department as opposed to ordinary general public service officer, constitutes administrative action in terms of PAJA. In his view the present matter is distinguishable from matters such as **Chirwa v Transnet Ltd** 2008 (4) SA 367 (CC) (**Chirwa**) in that the applicant was a Head of Department and his contract was a statutory instrument. The enquiry into whether or not the termination of such a contract is an administrative action ends with the finding that it was a statutory instrument and it is, as

such, not necessary to enquire into whether or not the termination in question has a direct external legal effect. The termination of the contract in the instant matter was arbitrary insofar as the respondent used the provisions of the Public Service Act 14 of 2004 (the PSA), which empower him to appoint officers such as the applicant, to achieve an irrational purpose not intended by the PSA.

CONTENTIONS FOR THE RESPONDENT

- [6] Mr Bruinders, appearing for the respondent, submits that the termination of the employment contract *in casu* does not constitute an administrative action in the same way that the dismissal of the applicant in **Chirwa** did not amount to administrative action. The applicant was an employee as against the respondent, when the impugned decision was made, and the fact that he was the Head of Department does not change that relationship. The applicant's remedy does not reside in PAJA and may be assessed through a claim for alleged unfair labour practice and/or a claim based on contract. In employment relationships the constitutional right implicated is the right to fair labour practices and the applicable legislation for enforcing the same is the Labour Relations Act 95 of 1996 (LRA) and not PAJA which seeks to enforce and protect the constitutional right to fair administrative justice.

APPLICABLE LEGAL PRINCIPLES

[7] Mr Halgryn correctly submits that the respondent, as the Premier, is authorised to appoint heads of departments, such as the applicant, and further has the power to grant special service benefits to such heads of departments before or at the expiry of their terms of office or at the time of dismissal from the public service under certain circumstances. (See **section 12(1) and (4) of PSA.**)

[8] Section 1 of PAJA defines an **administrative action** in relation to an organ of state, such as the respondent, as

“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 of a Provincial constitution; or**
- (ii) exercising a public power or performing a public function in terms of any legislation.**

(b) ...

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

[9] Section 33 of the Constitution and PAJA are concerned with and are applicable to situations where organs of state or private persons engage with the public through the exercise of public power and performance of public functions by virtue of the Constitution, provincial constitution, legislation or any other empowering provisions. They are intended to protect members of the public in their capacities as such and not employees as

and when they receive raw deals at the hands of their employers. Skweyiya J observed as follows in Chirwa at paragraph [47]:

“The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public.”

- [10] The following dictum by Sachs J in Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC) at paragraph [583] is, further, apposite:

“I believe that s 33 of the Constitution and PAJA are together designed to control the exercise of public power in a special and focused manner, with the object of protecting individuals or small groups in their dealings with the public administration from unfair processes or unreasonable decisions.”

- [11] As Mr Bruinders correctly points out,

“Generally employment and labour relationship issues do not amount to administrative action within the meaning of PAJA... When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.”

(See **Gcaba v Minister for Safety and Security** 2010 (1) BCLR 35 (CC) at paragraph [64] (**Gcaba**).

- [12] It is correct, as contended for the respondent, that section 23 of the Constitution guarantees the right to fair labour practices as between employer and employee while LRA gives effect to that right. Section 33 of the Constitution, on its part, deals with the relationship between the State, as bureaucracy, and citizens by according to everyone the right to lawful, reasonable and procedurally fair administrative action in their dealings with organs of state and private persons when exercising public power or performing public functions. PAJA elaborates upon and gives effect to that right. (See **Gcaba** at paragraph [64] and **Makhanya v University of Zululand** 2010 (1) SA 62 (SCA) at paragraph [11]).

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [13] Mr Halgryn contends that, if it is found that the applicant's employment contract was a statutory instrument, it is not necessary to determine whether or not termination of the same had direct and external legal effect so as to constitute an administrative action within the meaning of PAJA. This cannot, with respect, be correct because PAJA clearly requires the impugned decision to, *inter alia*, have a direct external legal effect in the sense that its "**impact**" is not limited to the

applicant but has “**direct consequence**” for “**other citizens**”. (See section 1 of PAJA and Gcaba at paragraph [66].)

- [14] It is, thus, imperative for the applicant to show not only that his employment contract was a statutory instrument but also that its termination, by the respondent, impacts him not only in his capacity as an employee but that it also extends beyond the employment relationship and affects him as a member of the public who was related to the respondent in that capacity as and when the impugned decision was made. In my view, what comes out of decisions such as Chirwa and Gcaba is that, for the purposes of the definition of administrative action in employment relationships, what matters is the relationship between the exercise of public power and/or performance of public function and the aggrieved applicant when the impugned decision is made. The decision in question, when it is made, should strike beyond the employment relationship to have a direct external effect in the sense of impacting upon people outside that relationship or the aggrieved applicant in his capacity as a member of the public. The seniority of the affected employee does not determine whether or not the impugned decision or conduct of the employer is administrative action as opposed to an unfair labour practice in much the same way as the nature of the employer, as either a public or private employer, cannot determine whether its conduct is administrative action or unfair labour practice. Indeed, as correctly submitted for the respondent, the status of the

applicant as Head of Department does not change the relationship between him and the respondent from one of employment as at the time of the impugned decision. (See **Chirwa** at paragraph [142] referred to with approval in **Gcaba** at paragraph [66].)

- [15] In our view the termination of the applicant's employment contract is not an administrative action and appears to be a "**quintessential**" employment matter in the same way as the failure to promote and appoint the applicant in **Gcaba** was found to be a "**quintessential labour- related issue**". The point raised by the respondent is, therefore, well taken. (See **Gcaba** at paragraph [66].)

ORDER:

- [16] The application is dismissed with costs.

L. J. LEKALE, J

I concur.

M.H. RAMPAL, AJP

On behalf of applicant:

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On behalf of respondent:

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