

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1893/2013

In the matter between:-

M.L. LETELE

Applicant

and

THE MEC: FREE STATE PROVINCIAL
GOVERNMENT DEPARTMENT OF EDUCATION

Respondent

HEARD ON: 8 AUGUST 2013

JUDGMENT BY: THAMAGE, AJ

DELIVERED ON: 29 AUGUST 2013

[1] Applicant is an unemployed female residing at Hillsboro, Bloemfontein. The respondent is the Member of the Executive Council Free State Provincial Government Department of Education, cited in his official capacity.

[2] Applicant approached this court for 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 re-instate the applicant as Chief Director: Free State Provincial Government

Department of Education within seven days after 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 date of her formal reinstatement.
4. That the respondent be ordered to pay the costs of the application.
5. Further and/or alternative relief.”

[3] Prior to the applicant’s dismissal, she was employed by the Department of Education as a Chief Director for at least a period of 12 years with an annual salary of R833 000.00. During 2010, she was charged with misconduct and the charges were contravention of treasury regulations. On 3 March 2012, she was exonerated from any wrongdoing by the Misconduct Presiding Officer and this prompted the respondent to file notice to appeal. The appeal was never held nor did the respondent request any representation from her. Respondent then furnished applicant with a dismissal letter on 10 May 2012 stating that the appeal was upheld. Applicant then approached the Government Public Service Sectoral Bargaining Council whereupon the Commissioner issued a ruling that the action of the respondent was *ultra vires*.

[4] The primary issues are whether the court has jurisdiction to entertain and adjudicate the applicant’s case and whether,

from the applicant's papers, applicant has made out a case for adjudication by this court.

[5] Section 169 of the Constitution states as follows:

“A High Court may decide-

- (a) any constitutional matter except matter that-
 - (i) only the Constitutional Court may decide
 - (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court, and any other matter not assigned to another Court by an Act of Parliament.” (my emphasis)

[6] Section 157 of the Labour Relations Act 66 of 1995 states as follows:

- “(1) Subject to the Constitution and section 173, an except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
- (2) The labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of South Africa, 1996 and arising from-
 - (a) employment and from labour relations
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the state in its capacity as an employer, and

- (c) the application of any law for the administration of which the Minister is responsible.” (my emphasis)

[7] Counsel for the applicant submitted that this court has jurisdiction to entertain the matter and secondly this court has to decide whether or not the applicant’s case is valid in law. On the contrary, counsel for the respondent argued that this court has no jurisdiction and that the applicant ought to have proceeded in terms of the Labour Relations Act 66 of 1995, alternatively she should have taken the decision of the respondent in terms of PAJA, but the High Court would still lack jurisdiction as respondent’s action does not constitute a reviewable decision on the principle of legality, because it would be a review relating to a dismissal of the employee.

[8] Applicant on her papers specifically stated as follows:

“I do not in these proceedings wish to assert any kind of unfairness as to my dismissal, nor do I rely on my rights given to me in terms of the Labour Legislation and more specifically, those commensurate with fair labour practices as defined in the Labour Relations Act 66 of 1995.”

She further on specifically stated that she does not rely on PAJA.

[9] The question of jurisdiction and the formulation of a cause of action has been decided by the Constitutional Court in **Gcaba v Minister for Safety and Security and Others** 2010 (1) SA 238 (CC) at p 263 paragraph 75:

“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.” (my emphasis)

[10] The provisions of section 157 of the Labour Relations Act is very clear, the High Court has concurrent jurisdiction on matters which are not exclusive to the Labour Court. The result being that not all matters relating to labour or employment are *per se* excluded from the High Courts' jurisdiction. The pleadings or the notice of motion, together with the supporting affidavits should be scrutinised and be interpreted so as to determine the legal basis of the applicant's claim. See **Gcaba v Minister for Safety and Security and Others**, *supra*.

[11] Having said that, I had to interpret the applicant's claim and to determine the legal basis of her claim. Her main claim is to get a declaratory order declaring her dismissal by the respondent *ultra vires* and *void ab initio*. She also prays for what she calls ancillary relief of re-instatement and her salary from date of dismissal till date of re-instatement. For purpose of this judgment I will deal with the main claim of

declaratory order and the ancillary claim will be dealt with later on this judgment.

- [12] Applicant is relying on what is called SMS Handbook, which is a subsidiary legislation from the Public Service Regulations of 2001. She also states that the SMS Handbook as well as the Public Service Regulations, do not allow the filing and the prosecuting of the appeal by the employer on the findings of the chairperson of the misconduct hearing. In short, the applicant's case is that the respondent acted *ultra vires* the subordinate legislation namely Public Service Regulations. This averment was never challenged nor disputed by the respondent in its affidavit and the response to this was

"The contents of this paragraph are irrelevant."

Although the applicant had indicated in her affidavit that the SMS Handbook will be made available on the date of hearing of this application, she never did. I am inclined to believe her statement as the contents of her averments were never challenged nor disputed in the opposing affidavit, the probabilities are thus in favour of the applicant.

- [13] From the Notice of Motion as well as applicant's affidavit, it is clear that applicant's case is based on the action of the respondent being *ultra vires* the subordinate legislation. I thus come to the conclusion that the nature of applicant's claim does not fall exclusively in the jurisdiction of the Labour

Court hence this court's jurisdiction is not ousted to entertain the application for a declaratory order.

[14] At the hearing of this matter, I requested both counsel to argue the point *in limine* of jurisdiction, as well as the merits of the application as the issues were so intertwined to each other.

[15] Applicant's argument was heavily based on the SMS Handbook as being the subsidiary legislation. Respondent on the other hand as per his heads of argument and the opposing affidavit, did not address the merits but rather concentrated on the issue of the court lacking jurisdiction. Having said so, respondent further argued that applicant has no cause of action as she does not assert any right in terms of the SMS Handbook, and that the handbook is silent as to the procedure of appeal by the respondent if he is aggrieved by the decision of the misconduct hearing chairperson. Respondent further argued that applicant does not assert any right based on contract of employment.

[16] It is common cause that SMS Handbook does not have provision for the appeal by the employer once dissatisfied with the decision of the misconduct hearing chairperson, whilst on the contrary it has appeal process by the employee. The recourse of the employer is therefore to take the matter on review.

- [17] Applicant seeks declaratory relief based on the principle of legality. In **MEC for Education, Northwest Provincial Government v Gradwell** (2012) 33 ILJ 2033 (LAC) at 2039, Murphy AJA stated as follows:

“The ‘SMS Handbook’ referred to in the letter is the ‘Senior Management Service Handbook’ which applies to senior management in the public service. The terms and conditions of the senior management of the public service, from the level of Director upwards, are not regulated by collective bargaining, but are determined by the Minister for the Department of Public Service and Administration by means of subordinate legislation issued in terms of the Public Service Regulations 2001, which determinations are referred to and known as the ‘SMS Handbook’.”

- [18] I fully align myself with the remark of Murphy AJA. The action of the respondent was contrary to the subordinate legislation, thus the respondent had acted *ultra vires*. Consequently the respondent’s action is *void ab initio*.

- [19] Applicant also claimed an amount of R973 671.72 being her remuneration from the date of dismissal to date of hearing of this application as well as re-instatement. Counsel for the applicant argued that once an employee can accordingly show that the termination of his contract was unlawful, he or she is entitled to ancillary relief. Counsel for respondent argued that the claim for ancillary relief is purely a Labour Court matter and the High Court does not have jurisdiction to entertain the application. Applicant referred to **Fedlife**

Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) and that the decision was confirmed by the SCA on **Gcaba**, *supra*.

[20] Reliance on **Fedlife Assurance Ltd** and **Gcaba** decisions is misplaced. In **Fedlife Assurance Ltd**, *supra*, the cause of action was based on a breach of contract of fixed term employment, i.e. the enforcement of contract of employment. Contrary to this current application, applicant wishes the court to declare the action by respondent *ultra vires*, i.e. she applies for a declaratory order. If she was seeking the enforcement of employment contract, she could have done so unequivocally in her papers and not only put what she calls ancillary relief. In **Gcaba's**, *supra*, cause of action was based on violation of Constitutional rights to just administrative action as contemplated by the Promotion of Administrative Justice Act (PAJA). So, **Gcaba's** matter is distinguishable from this matter.

[21] Furthermore, applicant relied on an unreported decision of this court's full bench, namely **Moeketsi Fredi Tlali v Mantsopa Local Municipality**, Appeal No. A78/11. Once again reliance on this decision was misplaced, particularly on the issue of ancillary relief. The court was not called upon to decide the re-instatement and arrear remuneration, but to decide on the lawfulness of the dismissal. I fully endorse the court's decision on the unlawfulness of the dismissal.

[22] This court does not have jurisdiction to entertain matters which are exclusively meant for the Labour Court. See

section 157 of LRA, *supra*. In **Transnet Ltd and Others v Chirwa** [2007] 1 BLLR 10 (SCA), the minority judgment of Cameron JA (as he then was) and Mpati DJP concurring state as follows on page 36 paragraph [66]:

“However, as mentioned earlier, Brassey AJ also granted retrospective reinstatement. In my view, that was wrong. In administrative law the subject is usually entitled only to have the decision at issue set aside, and the matter remitted for a fresh decision. By reinstating the employee, Brassey AJ substituted his view of her fitness and capacity for that of the employer.”

On page 29 paragraph [48] Cameron JA further stated:

“However, he granted the employee reinstatement with nine months’ back-pay. That I think was wrong. In my view, reinstatement should be refused altogether: the matter should go back to Transnet for a proper hearing. Even on this approach, however, the employee was entitled to at least declaratory relief...” (my emphasis)

[23] The Labour Court is thus a specialised court to entertain the ancillary relief claimed by the applicant, Cameron AJA on **Transnet** matter *supra* at page 36 paragraph [67] further stated:

“... ordinary courts must be careful in employment-related cases brought by public employees not to usurp the labour courts’ remedial powers, and their special skills and expertise.”

[24] This court has common law jurisdiction to award a declaratory order, it is however not having jurisdiction to award consequential relief or what the applicant calls ancillary relief. This court had declared the unlawfulness of the action by the respondent and leaves it to the parties to act in whatever manner is necessary to correct the situation.

In the circumstances applicant does not succeed in regards to the claims for the re-instatement and arrear remuneration.

ORDER

[25] The following order is thus made:

1. The applicant's dismissal by the respondent on or about 10 May 2012 is declared *ultra vires* hence unlawful and *void ab initio*.
2. The respondent is ordered to pay the costs of the application.

S.J. THAMAGE, AJ

On behalf of applicant: Adv. S. Grobler
Instructed by:
Kramer Weihmann & Joubert
BLOEMFONTEIN

On behalf of respondent: Adv. W.R. Mokhari SC
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