

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A196/08

In the matter between:-

MPHETHENG LUCAS RANTSO

Appellant

and

MEC DEPARTMENT OF HEALTH FREE STATE

Respondent

CORAM: H.M. MUSI, JP *et* WRIGHT, J *et* EBRAHIM, J

HEARD ON: 21 SEPTEMBER 2009

DELIVERED ON: 4 FEBRUARY 2010

JUDGMENT

H.M. MUSI, JP

Introduction

[1] This is a full bench appeal against a judgment of Cillié J delivered in this court on 15 May 2008, wherein the learned Judge dismissed with costs an application brought by the appellant to set aside a decision of the respondent refusing

to reinstate the appellant in his employment. The appeal is with leave of the court *a quo*.

Factual Background

[2] It is important to briefly narrate the history of the matter. But first, the factual background. The appellant had been employed for 22 years as a senior official by the Free State Department of Health, which is represented in these proceedings by its Member of the Executive Council (MEC) as respondent. His employment was terminated on 25 February 2005 in terms of section 17(5)(a)(i) of the Public Service Act, 103 of 1994 (the Act) on the basis that he had absented himself from his official duties without the permission of his head of department for a period exceeding one calendar month. This arose from the fact that the appellant had enrolled for a study course with the University of Stellenbosch which would require his presence at the University for a period in excess of a month and he accordingly applied for special leave for 33 days with effect from 28 February 2005. The appellant completed the formal leave application forms and handed these to his immediate supervisor. He did not, however, await the outcome of the application, but simply departed for University. Upon his

return, the appellant learned that his application for leave had not been approved and that this had triggered the deeming provisions of section 17(5)(a)(i) of the Act.

- [3] He was subsequently advised to make representations to the respondent requesting to be reinstated, but the latter refused the request. He then referred the dispute to the Public Health and Welfare Sectoral Bargaining Council (the Bargaining Council) ostensibly for conciliation and arbitration as an unfair dismissal. The Bargaining Council held that it had no jurisdiction to entertain the matter as there had been no decision to dismiss; the appellant's employment having been terminated by operation of law.

The High Court Application

- [4] The appellant then launched an application in the High Court and it is significant to note how his prayers were framed:

- “1. That the Respondent be ordered to reinstate the Applicant to his employment with immediate effect,
2. Costs of suit;
3. Further and/or alternative relief.”

In opposing the application the respondent not only dealt with the merits of the matter, but also raised an objection to jurisdiction of the court by way of a point *in limine*. The essence of the point *in limine* was that this was an employment related matter that fell within the exclusive jurisdiction of the Labour Court and that the High Court therefore had no jurisdiction.

- [5] When the matter came up for hearing, the court *a quo* was not satisfied that the respondent had been requested to exercise the power he had to reinstate the appellant in terms of section 17(5)(b) of the Act and postponed the matter in order to enable the appellant to make the necessary representations in this regard. These were duly forwarded to the respondent. The respondent's response was simply to repeat his earlier intimation to the effect that he confirmed the appellant's discharge. The court *a quo* correctly interpreted this to amount to a refusal to reinstate in terms of section 17(5)(b). The appellant then applied for and was granted leave to amend his prayers to read as follows:

- “1.1 That the decision of the respondent dated 19 June 2007 not to reinstate the applicant in terms of section 17(5)(b) of the Public Service Act 103 of 1994 be reviewed and set aside.
- 1.2 That the respondent be ordered to reinstate the applicant with immediate effect.”

[6] The court *a quo* first dealt with the issue of jurisdiction and found that it had jurisdiction to hear the matter. I shall in due course deal with the basis of such finding. In considering the merits of the application, the court *a quo* found that there was a dispute of fact that could not be resolved on the papers in relation to the question of whether the appellant had *bona fide* believed that his leave application would be approved in his absence and referred the issue to oral evidence in terms of Rule 6(5)(g) of the Uniform Rules. The matter was postponed for the purpose. After hearing the *viva voce* evidence the court *a quo* delivered a second judgment dealing with the merits. It found that the appellant had known that his leave application would be not be granted and that he had absented himself without permission. It further found that the appellant had not shown good cause

for reinstatement and that the respondent's decision refusing to reinstate could not be faulted.

The Issues

[7] There are two issues that fall for decision in this appeal. The first is whether the court *a quo* was correct in its finding that it had jurisdiction to hear the matter. The second is the factual question of whether the appellant had shown good cause to be reinstated. Put otherwise, was the court *a quo* correct in finding that the decision not to reinstate could not be faulted? It stands to reason that if it is found that the court *a quo* had no jurisdiction in the matter the second question will fall away. Now both Mr. Phalatsi, the attorney for the appellant, and Advocate Motloun, for the respondent, were agreed that it is preferable to dispose first of the issue of jurisdiction for the simple reason that if we should find that the High Court had no jurisdiction then that will be the end of the matter. It is an approach that commends itself, especially given the nature of the pleadings in this matter.

Jurisdiction

[8] The court *a quo* reasoned that the gist of the appellant's complaint was that the respondent had failed to apply his mind to what section 17(5)(b) required of him to do. The court then proceeded as follows:

“This in essence is an allegation that his constitutional right to fair labour practices has been violated. Section 185 of the Labour Relations Act of 1995 gives every employee the right not to be subjected to unfair labour practices. Section 186(2)(c) defines a failure or refusal by an employer to reinstate or re-employ a former employee brought about by any unfair act or omission as an unfair labour practice.”

Although Cillie J did not say so in so many words, it is clear that he regarded the matter as implicating a constitutional issue in respect of which the High Court has concurrent jurisdiction with the Labour Court in terms of section 157(2) of the Labour Relations Act, 66 of 1995 (the LRA).

[9] In support of the decision of the High Court on the point, Mr. Phalatsi relied on FEDLIFE ASSURANCE LTD v WOLFAARDT [2002] ALL SA 295; 2002 (1) SA 49 (SCA). It

was there held that section 157(1) of the LRA does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. The SCA referred to specific sections of the LRA in respect of which the Labour Court has exclusive jurisdiction and held that matters not so specifically identified can be adjudicated upon by the High Court. Mr. Phalatsi also relied on **FREDERICKS AND OTHERS v MEC FOR EDUCATION AND TRAINING, EASTERN CAPE, AND OTHERS** 2002 (2) SA 693; 2002 (2) BCLR 113; [2002] 2 BLLR 119 (CC) where the Constitutional Court endorsed the view expressed in **FEDLIFE**, *supra*, that the LRA does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. O'Regan J, writing for the unanimous court, put the matter as follows in paragraph 40:

“As there is no general jurisdiction afforded to the Labour Court in employment matters the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court’s jurisdiction will only be ousted in respect of matters

that are to be determined by the Labour Court in terms of the Act.”

Regarding constitutional issues arising out of employment relations, the Constitutional Court held that section 157(2) of the LRA confers concurrent jurisdiction with the Labour Court and the jurisdiction of the High Court is therefore not ousted.

- [10] Mr. Phalatsi also sought to rely on the judgment of the Supreme Court of Appeal in **PHENITHI v MINISTER OF EDUCATION AND OTHERS** 2008 (1) SA 420 (SCA). In this case the SCA followed the decision in **MINISTER VAN ONDERWYS EN KULTUUR EN ANDERE v LOUW** 1995 (4) SA 383 (A) where it was held that a discharge in terms of a provision similar to section 14(1)(a) of the Employment of Educators Act, 76 of 1998 (a similar provision to 17(5)(a)(i)) was not an administrative act and therefore not capable of review, since the discharge transpired by operation of law. See also the judgment of the Labour Appeal Court in the matter of **THE HEAD OF THE DEPARTMENT OF EDUCATION (FREE STATE PROVINCE) v SADTU AND ANOTHER**, Case No. JA 68/05 delivered on 27 September 2007. It had been argued in **PHENITHI** that section 14(1)(a)

had the effect of ousting the jurisdiction of the High Court. In dismissing the contention Mpati DP (as he then was) pointed out that if the educator concerned were to contend that he had the necessary permission, that would raise a factual dispute which would be justiciable by the courts. In the same vein the refusal to reinstate in terms of section 14(2) of the Educators Act would be reviewable. Mr. Phalatsi submitted that this portion of the judgment indicated that the High Court has jurisdiction to entertain an application such as the present.

- [11] The latter submission can readily be disposed of. It seems to be based on an incorrect of reading of **PHENITHI**. The court was not called upon to address the question of whether the refusal to reinstate was a matter falling within the exclusive jurisdiction of the Labour Court, with the result that the jurisdiction of the High Court is thereby ousted. The argument seems to have suggested that because the discharge was not reviewable that would put the entire provision outside the reach of the courts of law. It was more about justiciability rather than jurisdiction.

[12] Following **FEDLIFE** and, in particular **FREDERICKS**, the High Courts generally accepted that where a labour related dispute raised constitutional issues, they had concurrent jurisdiction with the Labour Court in terms of section 157(2) of the LRA. A violation or threatened violation of the right to fair labour practices being enshrined in section 23 of the Constitution came to be accepted as sufficient to clothe the High Court with concurrent jurisdiction in employment related matters. That is the background against which the decision of the court *a quo* in this matter should be viewed. The other side of the coin is that if an issue raised in the pleadings was not one of those specifically assigned to the Labour Court in terms of section 157(1) of the LRA, then the High Court would have jurisdiction. That was the effect of **FEDLIFE** and **FREDERICKS**.

[13] For his submission that the court *a quo* had erred in finding that it had jurisdiction, Mr. Motlounq relied on the judgment of the Constitutional Court in **CHIRWA v TRANSNET LTD AND OTHERS** 2008 (4) SA 367; [2008] 2 BLLR 97; 2008 (3) BCLR 251 (CC). Whilst accepting that section 157(1) of the LRA does not confer exclusive jurisdiction generally on the

Labour Court, Skweyiya J, writing for the majority, made it plain that the Labour Court and other tribunals and fora created by the LRA are meant to enjoy preference in the resolution of all employment related matters. The learned Judge put the matter as follows in 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.

The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes.”

Referring to section 240 of the LRA Skweyiya J had this to say in paragraph [50]:

“This section heralds the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act. Only the

Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters. When PAJA was promulgated, five years after the current LRA came into force, s 210 remained untouched. The legislature, aware of the implications of this provision in the LRA, enacted PAJA without altering s 210. This is significant, in that it would appear that the legislature intended that PAJA should not detract from the pre-eminence of the LRA and its specialised labour disputes mechanisms.”

- [14] It was pointed out in **CHIRWA** that conduct in the workplace may give rise to two causes of action, one based on the LRA which is sourced directly from section 23 of the Constitution, and the other based on PAJA, which is sourced directly from section 33 of the Constitution. If this occurs, the employee must elect which cause of action he/she wishes to pursue. If he/she chooses to pursue her claim under the LRA then the Labour Court and other structures of the LRA will have to be used. In this context, section 157(2) was interpreted as conferring jurisdiction on the Labour Court to determine constitutional issues arising out of labour disputes. The High Court will have no jurisdiction in such matters, so it was held. It was further held that the manner in which the employee in

that case had framed her claim as gleaned from the pleadings made it clear that her cause of action was based on the provisions of the LRA over which the Labour Court enjoyed exclusive jurisdiction. It is precisely in this respect that **CHIRWA** was found to be distinguishable from **FREDERICKS**. In **FREDERICKS** the employees had disavowed any reliance on the provisions of the Labour Relations Act and squarely based their claim on the equality and administrative justice provisions of the Constitution (respectively sections 9 and 33). It is worth noting that this was before the advent of PAJA.

- [16] In the most recent judgment of **GCABA v MINISTER FOR SAFETY AND SECURITY & OTHERS** [2009] 12 BLLR 1145; 2010 (1) BCLR 35; 2010 (1) SA 238 (CC) the Constitutional Court, in a unanimous decision, endorsed the decision in **CHIRWA** but clarified aspects thereof and reconciled it with **FREDERICKS**. It is not necessary to go into the details of what was said in **GCABA**. Suffice it to refer to another important aspect of the **CHIRWA** judgment that was fully endorsed, namely, that the decision of a functionary of a state organ to dismiss does not amount to

administrative action as defined in PAJA. I deem it necessary for purposes of clarity to quote in full what Van der Westhuizen J, writing for the court, said in paragraphs [66], [67] and [68]:

“[66] In *Chirwa* Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as ‘public’ or ‘private’ cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.

[67] This view is consistent with the judgment of Skweyiya J in *Chirwa*, who did not decide this issue, but indicated a leaning in this direction. It furthermore does not contradict the unanimous judgment of this Court in *Fredericks*, which left the issue open. There was no dispute about whether the decision at the centre of the dispute was administrative action.

[68] Accordingly, the failure to promote and appoint the applicant was not administrative action. If his case proceeded in the High Court, he would have been destined to fail for not making out the case with which he approached this Court, namely an application to review what he regarded as administrative action.”

[17] It is important to note that the Constitutional Court in **GCABA** came to its decision after a comprehensive review of the major decisions on this aspect of the law, including the judgments of the Supreme Court of Appeal in **BOXER SUPERSTORES MTHATHA AND ANOTHER v MBENYA** [2007] 8 BLLR 693; 2007 (5) SA 450 (SCA) and **MAKHANYA v UNIVERSITY OF ZULULAND** [2009] 8 BLLR 721 (SCA), and quite clearly it intended to draw the curtain on the debates around the issue. It is worth noting what Van der Westhuizen J said in paragraph [3]:

“The decisions of this Court in *Fredericks* and *Chirwa* as well as preceding jurisprudence of the Supreme Court of Appeal and other courts, have resulted in differences of opinion in subsequent jurisprudence on the proper interpretation and application of overlapping constitutional, administrative and

labour law provisions and principles, especially with regard to disputes between public sector employees and their employers. This matter gives this Court, as the highest court in all constitutional matters, an opportunity to provide some clarity and guidance, based on a proper interpretation of the relevant provisions of the Constitution, the Labour Relations Act (“LRA”) and the Promotion of Administrative Justice Act (“PAJA”).”

[18] It can now safely be said the law has been laid and it can be summarised as follows:

- (a) Once a dispute can be classified as a quintessential labour matter, it should be pursued through the provisions of the LRA, in which event the Labour Court would have exclusive jurisdiction. It is otherwise imperative to determine with reference to the pleadings which cause of action is relied upon. If reliance is placed on the provisions of the LRA, then the High Court would have no concurrent jurisdiction with the Labour Court even if the dispute raises constitutional issues.
- (b) The decision of a functionary of an organ of state to dismiss or to refuse to appoint or promote an

employee, does not amount to administrative action and is not reviewable under PAJA.

Applying the law to the facts

[19] Turning to the facts of the instant matter, the dispute herein was essentially a complaint about the refusal to reinstate the appellant in terms of section 17(5)(b) of the Act. It was correctly characterised by the court *a quo* as alleging an unfair labour practice (compare **GCABA**, *supra*, at para 66 & 68). The appellant, just like the employee in **CHIRWA**, initially referred the dispute to the Bargaining Council in terms of the provisions of the LRA. The Bargaining Council was the correct forum to refer the matter to and would have dealt with it had the appellant treated it, as he should have, as an unfair labour practice. The reason why the Bargaining Council could not entertain it, is because it had been incorrectly treated as an unfair dismissal when in fact there had been no decision to dismiss. This does not, however, detract from the fact that the appellant's cause of action was based on the provisions of the LRA. It is a matter that fell within the terms of section 186(2)(c) read with section 191(1)(a)(i) of the LRA. The Bargaining Council would have

attempted conciliation and if that failed the matter would have been referred to arbitration in terms of section 191(5)(a) (iv) and ultimately for review by the Labour Court. It is a quintessential labour dispute.

[20] It is significant that the appellant initially sought from the court *a quo* an order to reinstate him on the basis that he had been unfairly dismissed, which is again a quintessential labour matter which fell within the exclusive jurisdiction of the Labour Court. He subsequently amended his pleadings and sought to set aside the decision not to reinstate him on the basis that such decision was reviewable under PAJA. That was the only basis on which it was alleged that the court *a quo* had jurisdiction. But as was held in **CHIRWA** and **GCABA** the refusal to reinstate did not amount to administrative action and was not reviewable under PAJA. That being so, there was no basis on which the High Court could assume jurisdiction.

[21] I have no hesitation in coming to the conclusion that the court *a quo* erred when it found that it had jurisdiction in the matter. Certainly this is a matter in which the Labour Court

had exclusive jurisdiction. It is plain to me that the seminal judgment of the Constitutional Court in **CHIRWA** was not brought to the attention of the court *a quo*. Had this been done, the result would certainly have been different. The finding on the issue of jurisdiction disposes of the entire appeal and it becomes unnecessary to go into the factual findings of the court *a quo*.

Order

[22] The appeal fails and the appellant is to pay the costs. The order of the court *a quo* is altered to read as follows:

“The application is dismissed with costs for lack of jurisdiction.”

H.M. MUSI, JP

I concur.

G.F. WRIGHT, J

I concur.

S. EBRAHIM, J

On behalf of appellant:

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