

IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 41054/2007

DATE: 13/3/2009

NOT REPORTABLE

IN THE MATTER BETWEEN

DR DIPHOKO E MAHANGO

APPLICANT

AND

THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF ROADS AND TRANSPORT
LIMPOPO PROVINCE

1ST RESPONDENT

MAPHIRI H LESLEY
HEAD OF THE SALARY SECTION

2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] In this opposed application which came before me, Mr Moshwana appeared for the applicant and Mr Tokota SC, assisted by Ms Snyman, appeared for the respondents.

Introduction and background

- [2] The applicant is employed by the Limpopo Provincial Government as the General Manager Corporate Services, Department of Roads and Transport, Limpopo province.
- [3] There is a dispute between the parties as to whether the applicant, as the holder of this post, should be paid at Salary Level 15 or at Salary Level 14. The applicant contends for the former (a higher salary) and the respondents for the latter.
- [4] In June 2005 the Limpopo Government's Job Evaluation Committee assessed the post of the applicant and made a recommendation that the applicant's post be kept at a Level 14.
- [5] The applicant was not happy with this recommendation and persuaded the then member of the Executive Council for the Department of Roads and Transport ("the then MEC") to increase the salary level to Level 15. This happened in December 2005. With effect from January 2006, the applicant was paid his salary on the higher level. The salary amounted to some R647 000,00 per annum.
- [6] It appears that the secretary of the Central Job Evaluation Committee carried on with the original evaluation process and, in June 2006, sought the approval of the Director General to have the original recommendations implemented. Those recommendations, as I have pointed out, reflect that the applicant's post as

General Manager: Corporate Services was evaluated and recommended to be at a Level 14.

[7] The applicant was informed, in writing, that the upgrading of December 2005 to a Level 15 was irregular and had to be rectified. He was invited to make representations as to why this should not happen, but, through his attorneys, declined the invitation.

[8] With effect from July 2007, the applicant was again paid at Salary Level 14.

[9] This development prompted the applicant to approach this court for the following relief:

"Reviewing and setting aside the decision by the first respondent to reduce the salary level of the applicant from Salary Level 15 to Salary Level 14."

This is the application that came before me. The first respondent is the present MEC for the Department of Roads and Transport of the Limpopo province and the second respondent is the head of the salary section.

Brief remarks about some of the submissions made by the respective parties

[10] In a very short founding affidavit, the applicant states that in January 2006 his salary level was "adjusted to a salary level equivalent to the position of post level 15 but the rank of the applicant was left at post level 14". He alleges that the

whole process was done by the Work Study Group and finally approved by the then MEC.

[11] It appears that the applicant relies heavily on the point of 833,26 which was awarded to him by the Work Study Committee.

[12] From the annexures attached to the founding affidavit, it seems that a very short memorandum (and recommendation) was addressed to the then MEC in November 2005 by the "acting SM: WSD and JE". The recommendation to the then MEC was that an approval be granted "that the grading of a position of General Manager: HRM be that of Level 15 as dictated by the score as generated by the equate system".

[13] Pursuant to this recommendation the then MEC wrote a letter to the Director General of the Office of the Premier on 24 November 2005. The main thrust of this letter, if I understand it correctly, was that the points allocated to the applicant in terms of the "equate system", namely 833,26, militated in favour of "placing the grading of the post to Level 15" as opposed to Level 14. The then MEC then asks the Director General to apply his mind to the matter and to afford same his earliest attention.

[14] It appears that the then MEC did not wait for any response from the Director General because days later, on 5 December 2005, he upgraded the post to Level 15.

[15] What I find significant, for reasons which will appear later, is the following submission made by the applicant in his founding affidavit:

"The applicant is not aware of any disciplinary hearing which might have caused his salary to be lowered, nor any pending disciplinary hearing."

[16] What I also find significant, for reasons which will appear later, is the applicant's description, in his founding affidavit, of his terms of employment. He states the following:

- "1. The applicant's rank will remain the same.
2. The contract of employment will not be for a fixed term.
3. The terms and conditions of the contract will be in terms of the Public Service Act, read with the Collective Agreements of the Public Service Sectoral Bargaining Council (GPSSBC).
4. The applicant will be responsible for the Corporate Services Division which include, Human Resource Development, Human

Resource Management, Labour Unit, Legal Services, Workstudy and Job Evaluation.

5. The applicant will receive a salary of R647 727,00 per annum as at January 2006, subject to increases as determined by the relevant authority or collective agreements endorsed at the GPSSBC."

(Emphasis added.)

[17] The applicant then alleges that the respondents, in collusion with one another, and "without the required legal authority" lowered the salary of the applicant as described. He alleges that the lowering of the salary was "unlawful having regard to the terms and conditions of the Contract of Employment".

[18] In a comprehensive opposing affidavit, the Head of the Department: in the Office of the Member of the Executive Council responsible for Roads and Transport made submissions which places the dispute in a different perspective.

[19] She states that the applicant's post is a post with a Level 14 grading which level is an indication of the occupant's seniority and salary scale.

[20] She states that during the process of improving service delivery, several posts within the Department, including that of the applicant, were evaluated. Job evaluations are executed by an independent committee, namely the Central Job

Evaluation Committee which assesses all the relevant applicable aspects of the post in accordance with the uniform system utilised throughout the public service, namely the "equate system". She talks about the score which is allocated to individual aspects of the post but states that the Evaluation Committee will then have regard to the total score, the grade generated by the equate system, and the existing structure of the department, and based on the aforementioned, make a recommendation of the grade for the specific post. This is what led to the Job Evaluation Committee assessing the applicant's post at Level 14. This happened in June 2005.

[21] This official states that the Job Evaluation Committee did not only have regard to the scores and "mean" of the applicable post, but also had regard to the structure of the department in making the recommendations. At the time of the recommendation, the structure of the department only allowed for one post at Level 15. This was the post of the Head of Department. In a replying affidavit, this allegation is disputed by the applicant.

[22] According to the deponent of the respondent's opposing affidavit, the process leading to the then MEC upgrading the salary level to 15, was irregular. She details the reasons for making this allegation: it was done contrary to the approval of the Director General and the recommendation of the Job Evaluation Committee.

She states that the procedure, for a staff member unsatisfied with the outcome of the evaluation, is stipulated in the guide on job evaluation as issued by the Department of Public Service and Administration ("DPSA") and she attaches a copy to the opposing affidavit. According to this procedure, the then MEC should have referred the matter back to the job evaluation unit and, if he decided not to accept their final recommendations, he should have informed the panel of the decision and provided the panel with reasons for deviating from their recommendations. This was not done.

There was also a standing order that appointments of Senior General Managers (such as the applicant) should be submitted to the Executive Council ("EXCO") for concurrence before formalisation in the departments. This was also not done. The then MEC also acted contrary to the EXCO decision that the MEC's should inform the Premier, prior to the appointment of senior managers. This was also not done.

- [23] The deponent then states that a letter was written to the applicant on 15 January 2007 indicating that the upgrading of the post was done irregularly and alleging that the applicant had presented misleading information to the MEC. The applicant's attorneys denied that the upgrading of the applicant's post was irregular or that the applicant had misled the department.

A further letter was directed to the applicant on 30 April 2007 wherein he was afforded the opportunity to make representations and provide reasons why the irregularity should not be reversed and demanded a refund of the monies paid to the applicant.

The applicant's attorneys replied to this letter in the following terms:

- "1. We refer to your letter dated 30th April addressed to our client regarding allegations of undue enrichment and unlawful upgrading and/or promotion.
2. Save to state that any unlawful and illegal tempering (*sic*) with our client's salary will be met with an interdict, our client will not dignify any of your wild and unfounded allegations and will await the legal process before court to unfold.
3. With regard to all other shenanigans including your so-called secondment and its so-called extension at another institution, in this case a public company which our client's rights are fully reserved at this stage."

[24] The executive authority of the Department of Roads and Transport then wrote another letter to the applicant on 4 July 2007 reminding him that he failed to make representations on the issue, pointing out that the department views this case in a serious light and that input from the applicant would have been useful in the

circumstances and recording that the salary would be adjusted downwards from July 2007.

[25] In his replying affidavit, the applicant states that the upgrading was done in terms of the Public Service Regulations. He relies on clause C(4) of the regulations, which he interprets as meaning that the then MEC acted properly in upgrading the salary level. Counsel for the respondents, on the other hand, quote chapter C, or extracts thereof, in their heads of argument and argue strongly that the then MEC failed to comply with all the requirements prescribed in that chapter before authorising the upgrade. No case is made out by the applicant to the effect that the requirements of the regulations were met.

[26] In his replying affidavit, the applicant admits that the Job Evaluation Committee, on 25 June 2005, recommended that his post be kept at Level 14.

Does this court have jurisdiction to entertain this application?

[27] Counsel for the respondents argued that this dispute falls inside the ambit of the exclusive jurisdiction of the Labour Court and that this court does not have concurrent jurisdiction to entertain the application.

[28] This argument was not raised in the opposing affidavit of the respondents, but counsel for the respondents, correctly in my view, submitted that they were entitled to argue this legal point provided it arises from the facts even though the

point had not been pertinently raised in the papers. They invited my attention to the well-known case of *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 2 SA 279 (T) at 324H-I where the following is stated:

"In *Heckroodt NO v Gamiet* 1959 4 SA 244 (T) at 246A-C and *Van Rensburg v Van Rensburg en Andere* 1963 1 SA 505 (A) at 509E-510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. As was held in *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 1 SA 349 (A) at 360G, the principle is clear but its application is not without difficulty."

I was also referred to the case of *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) at 471E-F.

[29] Counsel for the applicant offered some resistance to these submissions, but I ruled that I would entertain the jurisdiction argument. The issue of whether or not the High Court has concurrent jurisdiction, in certain instances, with the Labour Court, is a contentious one and cannot be ignored. There is authority for the proposition that a Court may raise the jurisdiction aspect *mero motu*, if necessary. See for example *Runeli v Minister of Home Affairs & Others* 2000 2 SA 314 (TkHC) at 317A-E.

[30] The main thrust of the argument advanced by the respondents' counsel, if I understood it correctly, was that the upgrading of the post of the applicant amounted to a "promotion" in the true sense of the word and the corresponding downgrading of the salary level amounted to a "demotion".

[31] Consequently, so the argument goes, these developments fall inside the ambit of "an unfair labour practice" as defined in section 186(2) of the Labour Relations Act, Act 66 of 1995.

It is convenient to quote the wording of section 186(2):

"Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals or a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- (c) a failure or refusal by an employee to reinstate or re-employ a former employee in terms of any agreement; and
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 ..."

(Emphasis added.)

[32] In support of the argument that, what happened here, amounted to a "promotion" and a subsequent "demotion", I was referred to what was said in a judgment by this court, through PONNAN, J, as he then was, in *National Commissioner of the South African Police Service v SA Police Union and Others* (2004) 25 ILJ 203 (T) at 210F-211C, paragraph [20] of the judgment:

"Expatriating on his submission, Mr Luderitz argued that chapter V of the regulations related neither to appointments nor promotions. Accordingly, so the submission went, 'the achievement of a representative service' as also the guiding principles such as 'employment equity', 'fairness' and 'affirmative action' find no application in the filling of a higher graded post. I cannot agree. The retention, with increased benefits, of an incumbent on a newly upgraded post, has as its consequence the same substantive outcome as a promotion. I find support for my view in *National Commissioner of the SA Police Service v Potterill NO and Others* (2003) 24 ILJ 1984 (LC) at paragraph [18], where FREUND AJ held:

'In my view, regulation 24 requires one to draw a distinction between a decision to regrade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view, "promoted". In my view such a situations falls within the first meaning

given for the word "promote" in the *Concise Oxford Dictionary* 9th ed, namely: "Advance or raise (a person) to a higher office, rank, etc"."

[33] Counsel for the applicant argued that the upgrading of the salary level, as illustrated, did not amount to a promotion (with a subsequent "demotion") so that the applicant was not the victim of an unfair labour practice. No specific authority was advanced for this argument.

[34] In my view, the events leading to the upgrading of the post, and the subsequent downgrading thereof, fall inside the ambit of an "unfair labour practice" as defined.

Even if this was not a "promotion" or "demotion" on any interpretation, the events still, in my opinion, "relate to the provision of benefits to an employee" as included by the definition prescribed in section 186(2)(a) of the Labour Relations Act ("the LRA").

[35] Section 191 of the LRA provides a detailed procedure which can be adopted to settle disputes about unfair dismissals and unfair labour practices. The aggrieved employee can, for example, refer the matter to a bargaining council or to the Commission for Conciliation, Mediation and Arbitration. There is also provision for arbitration, or ultimate referral to the Labour Court.

None of these options was adopted by the applicant. I pointed out, *supra*, that he was invited to make representations, but declined to do so.

[36] Section 157 of the LRA, and, particularly, subsections (1) and (2), read as follows:

- "(1) Subject to the Constitution and section 173, and 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 the Republic 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 ...; and
 - (c) the application of any law for the administration of which the Minister is responsible."

[37] Section 173 of the LRA deals with the jurisdiction of the Labour Appeal Court, and does not apply for present purposes.

[38] The applicant does not rely on any "alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution" as provided for in section 157(2), *supra*.

[39] Counsel for the applicant, if I understood him correctly, argued that the applicant relies on a breach of his employment contract, as also expressly alleged in paragraphs 5, 6 and 7 of the founding affidavit, portions of which I have quoted.

[40] As I indicated, the applicant, in his founding affidavit, seems to acknowledge that a "disciplinary hearing, in the department, may have led to his salary being lowered". He also points out, as quoted, that the terms of the employment contract, on which he relies, make this contract subject to the terms and conditions of the Public Service Act, read with the collective agreements of the Public Service Sectoral Bargaining Council ("GPSSBC"). Reference to a bargaining council forms part of the machinery, as mentioned, of the dispute resolution mechanisms provided for by the LRA.

[41] Not surprisingly, counsel for the respondents relied heavily on the recent constitutional court judgment in *Chirwa v Transnet Ltd and Others* 2008 4 SA 367 (CC).

It is a very lengthy and complicated judgment, but, for present purposes, it can be stated that the applicant in that case, a public sector employee, approached the

High Court for the review and setting aside of the third respondent's decision to dismiss her from her job, and for reinstatement. She alleged that the decision had violated her right to just administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). She contended that she had two causes of action available to her, namely one under the LRA and one flowing from the provisions of the Constitution, read with PAJA, and that the High Court therefore had concurrent jurisdiction with the Labour Court in respect of her claim.

It was held that since the LRA and associated legislation had created a specialised framework for the resolution of labour disputes, it was primarily through the mechanisms established by the LRA that an employee had to pursue his or her claims – at 380D-E.

It was held, even against the background of the provisions of section 157(2) of the LRA, *supra*, the applicant's claim that she was not fairly dismissed raised a dispute envisaged by section 191 of the LRA, which provided a procedure for its resolution by, *inter alia*, the Labour Court. The High Court accordingly had no concurrent jurisdiction – at 387I-388B.

- [42] In *Chirwa*, the Constitutional Court also held that even if the applicant, or a similarly situated employee, sought to challenge the dismissal by relying on a constitutional issue other than one implemented through PAJA (as has been done

here by relying on section 195 of the Constitution), for example discrimination, it was necessary that all remedies under the LRA are exhausted before raising such an issue in a different forum. This is required so that the LRA and its structures, which were crafted to provide a comprehensive framework for labour dispute resolution, are not undermined – at 389D-E.

Of course, in the present instance, no constitutional issue was raised, as I pointed out.

I am also of the view that the fact that the instant applicant does not seek relief flowing from an unfair dismissal, should not lead to a different interpretation of the principles laid down in *Chirwa*.

[43] As I have pointed out, the present applicant relies on a breach of his contract of employment. In *Chirwa* the following is said at 415E-G:

"The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises its public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33."

It follows, in my view, that the same approach has to be adopted where employment terms have been altered or adjusted upwards or downwards, as would apply in cases involving termination of an employment contract.

I add, that in the present case the applicant did not, in his founding or replying papers, even rely on the provisions of PAJA. When I invited Mr Moshwana to explain this apparent *lacuna* in the papers, he pointed out that whilst he did not draft the papers, reliance on PAJA and, more particularly, the issue of "illegality" should be read into the applicant's papers. I have difficulty in accepting these submissions. In any event, this topic may be academical, given the finding of the Constitutional Court that reliance on the breach of a contract of employment does not amount to administrative action as intended under section 33 of the Constitution, and PAJA.

[44] Under all these circumstances, I have come to the conclusion that the dispute between the parties is a labour dispute as intended by the provisions of the LRA. This much is also evident from submissions made by both parties in their papers. The applicant has opted not to exhaust his remedies provided for in terms of the LRA. No constitutional issue is relied upon which may bring the matter inside the ambit of section 157(2) of the LRA. The conduct of the respondents in adjusting, and re-adjusting the salary level, does not amount to administrative action as intended by PAJA. In line with the principles laid down in *Chirwa*, as I

understand them, the High Court does not have concurrent jurisdiction to entertain this application. The dispute resorts under the exclusive jurisdiction of the Labour Court.

[45] For these reasons, the application falls to be dismissed. It is unnecessary, and inappropriate, to consider the merits of the application.

The order

[46] I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the respondents' costs, including the costs flowing from the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

41054-2007

HEARD ON: 17 FEBRUARY 2009

FOR THE APPLICANT: G N MOSHOANA

INSTRUCTED BY: MOHLABA & MOSHOANA INC

FOR THE RESPONDENTS: B R TOKOTA SC AND F M M SNYMAN

INSTRUCTED BY: THE STATE ATTORNEY