

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1570/2007

In the matter between:

PATRICIA VAN SCHALKWYK
AND 48 OTHER APPLICANTS

Applicants

and

NP MKIVA (in her capacity as **THE**
CHIEF FINANCIAL OFFICER: THE
PROVINCIAL TREASURY, FREE
STATE PROVINCE)

1st Respondent

DR BARLOW (in her capacity as the **CEO**
OF THE DEPARTMENT OF FINANCE AND
EXPENDITURE, FREE STATE PROVINCE)

2nd Respondent

PHI MAKGOE (in his capacity as **MEC:**
DEPARTMENT FINANCE AND
EXPENDITURE, FREE STATE PROVINCE)

3rd Respondent

CORAM:

EBRAHIM J

JUGDMENT:

EBRAHIM J

HEARD ON:

24 MAY 2007

DELIVERED ON:

5 JULY 2007

BACKGROUND

[1] The applicants are employees of the Department of Finance in the Provincial Government of the Free State which is represented in these proceedings by the 1st, 2nd and 3rd respondents. I shall refer in this judgment to the three respondents conjunctively as “the Department”.

[2] During 2001 the Department underwent a restructuring process as a result of which the salary levels of employees including that of the applicants was upgraded. In terms of the new structure posts which were upgraded were accompanied by the appropriate salary increases as approved in October 2001 by the then MEC for Finance, one Dingane, who is no longer in the employ of the Department. Dingane not only approved the increase in salaries but made the said increases retrospective to 1 November 2001.

[3] The new salary structures were implemented in December 2002 alternatively June 2003, when in addition to receiving the new scale salary in accordance with the upgraded job descriptions, affected employees including the applicants were paid the lump sum payment due to them for the period 1 November 2001 to December 2002, colloquially known in

the Department as “back pay”.

- [4] As is customary, a standard letter informing the applicants of the upgrading and the relevant accompanying increase in salary in each case was sent to each of them on 6 December 2002 by the Department. In the letter their attention was drawn to the fact that it was possible that mistakes could have been made in the upgrading of posts and in the event that this was discovered to be the case, the Department would rectify those mistakes and recover any excess amounts which may have been paid to the applicants. These facts were supported in evidence by way of a copy of that letter annexed to the papers as “NMP1”.
- [5] In 2003, during an audit proceeding of the Department’s accounts by the Auditor General for the 2002/2003 financial year, it was discovered that the retrospective payments of the salary increases made to the applicants as part of the general body of those employees affected by the upgrading process, had been made in contravention of the relevant

Public Service Regulations. Pursuant to this discovery in October 2003 a request was made to the National Minister of Public Service and Administration, Mrs. Fraser-Moleketi, for authority to condone the breach of the said regulations. She however declined to do so in a written response dated 15 September 2004 and instructed the Department to reverse the retrospective payments and reclaim monies already paid to affected employees including the applicants in terms of the provisions of section 38 of the Public Service Act 1994 (Proclamation 103/94) which provides the legal machinery for the recovery by State Departments of wrongly paid remuneration.

- [6] On the papers before me all of the above was common cause as too was the fact that the Promotion of Administrative Justice Act (PAJA) 2000 (Act 3 of 2000) obliged the Department as an organ of State, to ensure that the implementation of the decision to recover the said remuneration was effected in a manner which was procedurally fair namely since such a decision affected the

interests of the applicants adversely, they would have to be given a hearing before the salary overpayments were recovered by the Department. To that end they were invited by the Department to make representations by way of a General Circular (Circular 49 dated 25 October 2005) which was annexed to the papers as exhibit "NPM3". Subsequently various letters were exchanged between the applicants and the Department and discussions were held by representatives of both parties. The applicants also consulted their union and meetings between the union representatives and representatives of the Department took place during 2006. There are numerous disputes on the papers as to precisely what matters were discussed and agreed between the parties during those meetings and eventually, as a result of continuous deadlock, the Department addressed the applicants directly on 18 December 2006 calling upon each of them to make individual representations on the proposed salary deductions within 30 days of the date of that letter, failing which it would proceed to deduct on a monthly basis, at the rate of 25% per month,

the amount of the overpayment until the full amount due and owing to the Department had been settled in the case of each applicant (annexure “J” and “NMP8”).

- [7] During January 2007 the applicants each addressed a letter to the Department denying liability for the debt and alleging that the overpayment was made as a result of a decision approved by the Department (through Dingane) and accordingly they do not consent to any deductions being made off their monthly salary in reduction of such overpayment. On 29 March 2007, the Department by way of letter to each of the applicants, informed them of its decision to deduct an amount of R200,00 per month in reduction of the debt from their monthly salary, commencing 15 April 2007.

The applicants thereafter lodged an application in this court on 13 April 2007 for a declaratory order interdicting the Department from utilising the provisions of section 38 of the Public Servants Act 1994 to deduct the amount allegedly wrongly paid to the applicants. Although the application was initially brought on an urgent basis I was asked not to adjudicate the question of urgency in the interest of finality of this matter and in view of its importance to State Departments. I shall accordingly confine myself in this

judgment to the issues on the merits.

[8] THE PRINCIPLE OF LEGALITY

8.1 There appears to be no serious dispute on the papers that Dingane in authorising and approving the new salary structures with retrospective effect was acting as a public functionary in exercising a public power or performing a public function. This is so despite obvious contradictory allegations in respondents' own answering papers, that, he was acting as a mere executing authority. No more need therefore be said about this and I have accepted that it is common cause between the parties that Dingane's actions fell foursquare within the ambit of the definition of administrative action in section 1(i) of PAJA which provides as follows:

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

- b) a natural or juristic person other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal affect.”

8.2 It is trite that a public authority taking administrative action must be authorised to do so. If there is no authorisation for the action in some or other way the action taken will be unlawful. In **FEDSURE LIFE ASSURANCE LTD AND OTHERS v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL AND OTHERS** 1998 (12) BCLR 1458 (Constitutional Court); 1999 (1) SA 374 (CC) the principle of legality was expressed as follows:

“It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle

that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then, the principle of legality is implied within the terms of the interim constitution.”

See also **PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SOUTH AFRICA AND ANOTHER IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2000 (3) BCLR 241 (CC).

Legislation is the most important source of authority. Section 6(2)(f)(i) of PAJA provides as follows:

“6 Judicial review of administrative action

- (2) A court or tribunal has the power to judicially review an administrative action if-
 - (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision;”

Consequently, not only must a functionary exercise powers/take administrative action which he is expressly authorised to take but he must also only take such action within the limits provided for in that source of authority.

8.3 Applying this principle of legality to the facts of the present case, Dingane, in approving the increase, was exercising powers he was authorised to exercise in terms of Regulation VC7 to the Public Service Act which provides:

“The absorption of the incumbent employee in the higher graded post as provided under regulation V.C.6 shall take effect on the first day of the month following during which the executing authority approves that absorption.”

This Dingane was clearly empowered to do. Unfortunately however in authorising the increases to operate with retrospective effect, he embarked on a course falling outside the boundaries prescribed by the said Regulations and his actions were clearly unlawful and invalid and fell foul of the constitutional requirement of just administrative action contained in section 33 of the Republic of South Africa Constitution Act 103 of 1996.

Against this background of unlawfulness and illegality the question which arises is whether Dingane's actions constitute grounds for review, as contended for by the applicants. The applicants have premised their quest for relief in these proceedings on three principal grounds:

- 9.1 that Dingane in approving the salary increases with retrospective effect became *functus officio* and therefore his actions could only be reversed on judicial review and not unilaterally by the Department invoking the provisions of section 38 of the Public Service Act of 1994;
- 9.2 that principles of fairness and equity dictated that the Department should not be allowed to reverse the benefit; and
- 9.3 that the Department's right to reclaim the benefit had, in any event, prescribed.

I propose to deal with these grounds *seriatim*.

AD 9.1 : THE QUESTION OF JUDICIAL REVIEW

As authority for the proposition that Dingane's invalid administrative act could only be set aside by a court of law in proceedings for judicial review as he was *functus officio*, Mr. Daffue who appeared for the applicants, referred me to the decision in **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA). It is necessary to give a synopsis of the facts of this case in order that they may be clearly distinguished from those of the present case. The issue in the **OUDEKRAAL**-case was whether and in what circumstances an unlawful administrative act might simply be ignored and on what basis the law might give recognition to such an act. This issue arose against the following factual background. The appellant was the owner of undeveloped land in respect of which the approval of the then Provincial Administrator was required to establish a township. Such approval was obtained and the appellant thereafter took steps to develop

the township. However certain other requirements in terms of the Townships Ordinance 33 of 34 relating to the lodging of a general plan of the proposed township for the approval of the Surveyor General and of the lodgement of the approved general plan with the Registrar of Deeds had not been complied with. This had to be done within a prescribed period. Extensions of time were granted by the Administrator only after the expiry of the prescribed period. On this basis the Cape Town Metropolitan Council contended that the Administrator's grant of permission for the laying out of the township had lapsed and any extensions of time for compliance by the Administrator outside of the prescribed period were *ultra vires* the Ordinance. On appeal, the court confined itself in deciding the issue to the question whether the administrator's permission for the establishment of the township was lawful. In deciding that his approval was unlawful and invalid at the outset for reasons not necessary to set out here, the court held that until such approval and any consequences flowing there from, was set aside by court in proceedings for judicial review, it existed in fact and it had

legally valid consequences which could not simply be overlooked and ignored. These would continue to operate as long as the unlawful and invalid act was not set aside.

In the present case there can be no debate about the fact that Dingane on making the salary increases retrospective in operation became *functus officio*. That is the reason why the Minister was approached to condone and authorise the deviation from the regulations which she declined to do and instructed that the monies be recovered using the provisions of section 38 of the Public Service Act 1994. The issue at hand is therefore a completely different one. It is whether the Department was entitled to use a lawful measure in the form of enacted legislation to recover monies incorrectly paid as a result of the functionary's unlawful and invalid act. This legislation was enacted to deal with precisely the kind of invalid administrative action complained of. Section 38 of the Public Service Act of 1994 provides as follows:

“Wrongly granted remunerations:-

- 1) If an incorrect salary or scale of salary on appointment, transfer or promotion, or an incorrect advancement of salary within the limits of the scale of salary applicable to his / her grading, was awarded or granted to an officer or employee, or was awarded or granted at the correct notch or scale but at the time when or in circumstances under which it should not have been awarded or granted to him / her, the Head of the Department in which that officer or employees is employed, shall correct his / her salary or scale of salary with effect from the date on which the incorrect salary, scale of salary advancement commenced, notwithstanding the provision of Section 14 (3) paragraph (a) and notwithstanding the fact that the officer or employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his / her scale of salary or salary.
- 2) If an officer or employee contemplated in subsection (1) has in respect of his / her salary, including any portion of any allowance or any other remuneration or any other benefits calculated on his / her basic salary or scale of salary or awarded to him / her by reason of his / her basic salary- ...
 - (b) been overpaid or received any such other benefits not due to him / her:-

- (i) an amount equal to the amount of the overpayment shall be recovered from him / her by way of the deduction from his / her salary of such instalments as the Head of the Department, with the approval of the Treasury, may determine if he / she is in the service of the State, or, if he / she is not in the service, by way of deducting any monies owing to him / her by the State, or by way of legal proceedings, or partly in the former manner or partly in the latter manner.”

One can only imagine the chaos which would result in the everyday discharge of duties in State Departments where quite naturally errors can and do occur with frequent regularity in regard to matters relating to salaries and scales of salaries payable to individual employees, if on each occasion the error could only be rectified by a court of law in review proceedings. In addition, if this was the case, the situation would reach untenable proportions for the State in the form of serious financial losses being incurred by the

fiscus as it is arguable that employees who benefited by incorrect salary payments would not be overzealous in approaching the courts in review proceedings. The State would have to embark on litigation in every single case claiming monies from employees who were unjustly and incorrectly enriched by State error. Undoubtedly this would mulct the *fiscus* in unnecessary costs and would not be a practical and sensible solution to the problem. It would effectively amount to being “penny wise and pound foolish”. The only possible solution to assist the State to guard itself against such financial losses would be to enact suitable and proper legislation. Section 38 of the Public Service Act of 1994 provides such a solution and to my mind there is no conceivable reason why its provisions should not be invoked in the present case nor have the applicants advanced any such reasons. The applicants have clearly misconceived the decision in **OUDEKRAAL** as authority for the proposition that every invalid administrative act can only be set aside in proceedings for judicial review. That is certainly not the ratio of that decision. In addition the applicants have not

advanced any other reasons grounded in law as to why the respondents should be prohibited from using the legal machinery available to them in the form of section 38 to recover the monies allegedly wrongly paid to them. In the circumstances the application cannot be sustained on this ground.

9.2 **AD : THE PRINCIPLE OF FAIRNESS AND EQUITY**

This ground is two pronged:

9.2.1 The applicant contends that to reverse the benefit would affect them adversely in the calculation of annual performance bonuses for the year 2001/2002. This appears to be short-sighted and without foundation. Mr. Modise, on behalf of the Department, informed the court that the Department has agreed not to interfere with or reduce any incremental benefits which applicants received as a result of their salaries being increased from 1 November 2001. Such benefits will not then be reclaimed and all deductions from the applicants' salaries will be applied only in reduction of

the lump sum “back pay”. I have no reason to doubt that this is in fact the case which therefore puts to rest Mr. Daffue’s submissions of unfairness in this regard.

9.2.2 The second prong of the fairness argument appears to raise questions surrounding the Doctrine of Legitimate Expectation. In this regard Mr. Daffue submitted to this court that, in view of the length of time which had elapsed, (five years) it would be unfair and inequitable for the Department to reclaim the overpayment as the applicants had relied on the representation that their salaries would be increased and that such increase would operate retrospectively and in so doing had harboured a legitimate expectation that the monies was theirs to spend and in fact did spend it. Two issues are raised by this submission. Firstly, does the doctrine apply in the circumstances of this case and secondly, can it be used to confer substantive protection or grant substantive relief?

AD 9.2.2 : THE DOCTRINE OF LEGITIMATE EXPECTATION

The doctrine of legitimate expectation derives from English law and was first introduced into South Africa in the case of **ADMINISTRATOR, TRANSVAAL, AND OTHERS v TRAUB AND OTHERS** 1989 (4) SA 731 (A).

It is now settled law in this country that “a legitimate expectation could relate to substantive benefits or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such a person without prior consultation or a prior hearing”. See **ADMINISTRATOR, TRANSVAAL, AND OTHERS v TRAUB AND OTHERS**, *supra*. In this case Corbett CJ held that it could also be described as an

“expectation to be accorded a hearing before some decision adverse to the interest of the person concerned is taken”.

A legitimate expectation is usually said to arise from an

express promise or undertaking on the part of a public authority or from a regular practice which the claimant can reasonably expect to continue. See **TETTEY AND**

ANOTHER v MINISTER OF HOME AFFAIRS AND

ANOTHER 1999 (1) BCLR 68 A - D;

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND

OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION

AND OTHERS 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059

(par. 229) (CC);

CLAUDE NEON LTD v GERMISTON CITY COUNCIL AND

ANOTHER 1995 (3) SA 710 (W).

In the circumstances of this case the applicants wish to employ the

doctrine in order to generate substantive rather than

procedural rights. This aspect of the doctrine appears not to

have found favour in South African law. See **SA**

VETERINARY COUNCIL AND ANOTHER v SZYMANSKI

2003 (4) BCLR 378 (SCA) at 382;

MEYER v ISCOR PENSION FUND 2003 (1) ALL SA at 40 (SCA).

But even if I were to assume for the purposes of this case in the applicants' favour that such substantive protection was available to them, the application must nevertheless fail as the requirements which have to be satisfied for the legitimacy of the so-called expectation have not been met. In **NATIONAL DIRECTOR PUBLIC PROSECUTIONS v PHILLIPS AND OTHERS** 2002 (1) BCLR 41 (W) Hehr J (as he then was) succinctly summarised the requirements which have to be satisfied before an expectation can be said to be legitimate. At p. 77 of the judgment par. 27 he states:

“A legitimate expectation:

arises ‘where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken’”.

And further down that such an expectation may arise

“... even from an express promise given on or behalf of a public authority or from the existence of a regular

practice which the claimants can reasonably expect to continue.”

At par. 28 of the judgment the following is said:

“The law does not protect every expectation but only those which are legitimate. The requirements for legitimacy of the expectation include the following:

- i) The representation underlying the expectation must be ‘clear, unambiguous and devoid of relevant qualification’. ... The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that the unwitting unambiguous statements may create legitimate expectations. It is also not fair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

- ii) The expectation must be reasonable.
- iii) The representation must have been induced by the decision maker; and
- iv) The representation must be one which was competent and lawful for the decisionmaker to make without which the reliance cannot be legitimate.”

The question then arises: Does the representation on which the applicants rely that their salary increases would operate retrospectively meet these requirements. Whilst in my view they do meet requirements 1 and 3, the representation falls far short of the fourth requirement, in that, the promise of retrospective payment was clearly beyond the scope and limit of the powers granted to Dingane in terms of Regulation VC7. That being so that promise/representation was incompetent and unlawful and invalid and that is the end of the applicants' case as their reliance upon that unlawful representation cannot be and was not legitimate. Consequently their expectation cannot be legitimate. It is no defence to this bar for the applicants to raise the argument

that they were not aware of the unlawfulness of the representation/promise. That argument is pertinent to the requirement of the reasonableness of the expectation and not to the legality of the representation and, in light of the view I have taken on the question of the legitimacy of the expectation it is not necessary to decide the question of the reasonableness thereof. The doctrine of legitimate expectation cannot be applied to prevent a public functionary from carrying out his public duties lawfully. To accept such an expectation as being legitimate would in effect amount to a reliance on the functionary's dereliction of duty as being legitimate. See **PHILLIPS**-case p. 78 at par. H.

Consequently on this ground too, that is on the principle of fairness and equity, the application cannot succeed.

AD 9.3 : HAVE THE RESPONDENTS' RIGHT TO RECLAIM THE BENEFIT PRESCRIBED?

The applicants contend that on the undisputed facts any right which the respondents may have had to revoke and reclaim

the benefit would have prescribed in November 2005, alternatively in June 2006, depending on whether the debt is taken to have fallen due at the time the decision to increase the salaries and make them retrospective was communicated to the applicants, that is December 2002 or as at July 2003 when the report of the Auditor General revealed for the first time the breach of Regulation CV7. However, this contention fails to take into account the audi principle, which is the applicants' rights to be heard which was accorded to them subsequent to these dates. It was only once it became clear that the process of peaceful resolution through representation had been investigated and completed and no out of court solution was possible did the Department acquire a complete cause of action. See **SANTAM LTD v ETHWAR** 1999 (2) SA 244 (SCA). The finalisation of the hearings only occurred in January 2007. The precise outcome of the hearings is not relevant for the purpose of deciding the issue of prescription. What is important is that the Department only acquired a complete cause of action in January 2007 when it became aware that

the applicants did not consent to the deductions being made off their salaries. That is when the debt to the Department became due. Consequently I hold that the Department's claim has not prescribed.

[10] The conclusion I have come to is that the applicants' case is unsustainable on all of the grounds they have raised. As the applicants are claiming final relief they must demonstrate that they have a clear right to the relief they seek. They have not done so. The application is accordingly dismissed with costs.

S. EBRAHIM, J

On behalf of applicants:

Adv. J.P. Daffue
Instructed by:
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On behalf of respondents:

Adv. Modise Khoza SC
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/sp