

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no.: J 2656/09

In the matter between:

KENEILWE EMILY MODUTWANE

Applicant

and

CIVIL AVIATION AUTHORITY

Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an opposed application in which the applicant seeks an order, *inter alia* as follows:

"1. Directing the Respondent to furnish the Applicant with information requested in terms of Respondent's internal procedures in compliance with the Promotion of Access to Information Act, 2 of 2002".

Background facts

[2] The applicant is a medical practitioner employed by the respondent as Senior Medical Adviser. She applied for a position of Senior Manager : Aviation Medicine in February 2009. She was shortlisted and interviewed with two other candidates and

as a result of her non-appointment to the position she sought disclosure of information related to the interview, evaluation and appointment procedure.

[3] The applicant complied with the internal procedures applicable to her request for information but her request was refused. She lodged an appeal to the Chairperson of the Board who upheld her appeal and confirmed that she should be furnished with the requested information. She alleges that the Chief Executive Officer ("CEO") of the respondent, being its designated information officer, has refused and / or failed to furnish her with the requested information and in so doing disregarded the ruling of the Chairperson of the Board. In essence she seeks an order from this court compelling the CEO to provide the information.

Merits of the application

[4] Whilst the initial request was made in terms of the Promotion of Access to Information Act ("the PAIA"), the applicant now disavows reliance on PAIA and contends that she is entitled to the information in terms of a cause of action justiciable under the Labour Relations Act 66 of 1995 ("the LRA"). In this regard she relies on section 158 (1) (a) (iii) of the LRA to compel the respondent to comply with a Request for Access to Records in terms of section 18 (1) of the PAIA.

[5] The applicant asserts that she is entitled to seek access to the information in terms of the LRA and that this court was empowered to grant access thereto in terms of its powers under section 158(1)(a)(iii). She disputes that she is seeking relief premised on the PAIA. The respondent disputes that this court has jurisdiction in respect of the cause of action pleaded in the founding affidavit or that the LRA establishes jurisdiction in respect of the cause of action relied upon by the applicant.

[6] Section 157 (1) of the LRA provides that "*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*". The Labour Court would therefore have jurisdiction to determine a dispute emanating from another

statute, but the applicant disavows reliance on the PAIA and submits that it would be competent to grant relief arising from the LRA. Moreover, in terms of section 158 of the LRA the Labour court may only exercise its statutory powers where it has jurisdiction. Section 158(1)(a)(iii) provides that the Labour Court may :

(a) make any appropriate order, including –

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.

[7] The applicant submits that it is incorrect that her claim is, on a proper reading of the pleadings, premised on the PAIA, for the following reasons:

(a) the fact that she requested information in accordance with internal processes that are formulated in accordance with the PAIA does not automatically imply that the wrong she is seeking to have remedied is based on and governed by the PAIA;

(b) it is incorrect to submit that no cause of action has been made out as the wrong that is sought to be remedied emanates from the failure by the CEO as information officer to comply with the directive issued by the Chairperson of the Board which is the ultimate appeal forum of the respondent;

(c) it is incorrect for the respondent to submit that the applicant was dealt with fairly during the interview process whilst evading compliance with the request for information.

[8] The Constitutional Court has reiterated in *Gcaba v Minister of Safety and Security* (2009) 12 BLLR 1145 (CC) that it is for a court to determine whether it has jurisdiction in respect of the cause of action pleaded and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts. The applicant contends that her claim arises from the LRA and not the PAIA although the allegations made in her founding affidavit attest to the fact that relief is being pursued under the PAIA albeit through the Labour Court. In fact she persists in her reliance upon section 18(1) of PAIA.

[9] The Constitutional Court in *CUSA v Tao Ying Metal Industries & others* (2009) 1 BLLR 1 (CC) established that in employment related litigation a CCMA

Commissioner must determine the true nature of the dispute between the parties. The respondent submitted that this principle is equally applicable herein. The respondent submitted that it is clear from the pleadings that the true nature of the dispute between the parties arises from PAIA despite the applicant alleging otherwise. The applicant was advised as such in correspondence between the parties and despite this has persisted in bringing this application. Accordingly the respondent submitted that this court would be justified in granting punitive costs in its favour.

[10] It is trite that an applicant must set out sufficient facts to disclose a cause of action in the founding affidavit. No cause of action emanating from the LRA has been pleaded in the founding affidavit justifying relief in terms of section 158(1)(a)(iii). The facts pleaded are therefore insufficient to justify relief under the LRA. The only possible applicable provision of the LRA would be section 16 but this is not applicable to individual disputes and is in any event not relied upon by the applicant. Thus no cause of action has been made out in the founding affidavit for relief in terms of section 158(1)(a)(iii), and the application can be dismissed on the basis.

[11] This court has no jurisdiction in respect of the cause of action relied upon by the applicant. Therefore, I make the following order:

The application is dismissed with costs.

Bhoola J
Judge of the Labour Court of South Africa

Date of hearing : 26 November 2010
Date of judgment: 4 February 2011

Appearance:
For the Applicant : Mr G P Ngoepe, Ngoepe Attorneys
For the Respondent: Mr I I Mahomed, Eversheds