

REPUBLIC OF SOUTH AFRICA



Reportable

Of interest to other judges

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: JR 1122/09

In the matter between:

MARINDA ERASMUS

Applicant

and

**THE MINISTER OF SAFETY AND
SECURITY**

First Respondent

**COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICES**

Second Respondent

JUDGMENT

LAGRANGE, J:

Introduction

^{1]} The parties in this matter have agreed on the following summary as a

background to the application which appears in a pre-trial minute concluded in October 2010.

- 2] The applicant was formerly employed by the SAPS and dismissed on 19 January 1999 for alleged medical reasons.
- 3] The applicant lodged a review application against dismissal on grounds of the allegation that her dismissal was in conflict with the provisions of regulation 28 of the regulations published in government notice R203 in government Gazette 719 of 14 February 1974 in terms of the **SAPS act**, 7 of 1958 ("the regulations").
- 4] The application was instituted in the former Transvaal Provincial Division of the High Court of South Africa on the 7 May 2002 under case number 12195/02.
- 5] The application was referred to oral evidence on 30 August 2006 in terms of rule six (5) (g) of the uniform rules of the High Court. It was subsequently postponed on 15 May 2007 as it would have taken more than five days to complete. It came again before the same court on 25 March 2009 when the parties agreed that the high court does not have jurisdiction to hear the application on the basis of the judgement in **Chirwa v Transnet Ltd & Others 2008 (4) SA 367 (CC)**. Accordingly it was removed from the roll.
- 6]
- 7] On 23 July 2009 the applicant filed a review application in the Labour Court in terms of section 158 (1) (h) of the Labour relations act, 66 of

1995 ("the LRA"). In essence, the applicant seeks to pursue the review application which was previously pursued in the High Court in the Labour Court.

8] The applicant seeks the following relief:

"1. An order in terms of which condonation is granted in terms of rule 7 (1) of the Rules for the Conduct of Proceedings in the Labour Court ("the rules") for not following the provisions of rule 7A of the rules, more particularly the provisions of rule 7 A (2) (a) and (b), on grounds of the circumstances set out in paragraph 8 of the applicant's founding affidavit.

2. An order in terms of which the applicant is permitted to incorporate and attach the review application in the matter of Marinda Erasmus v Die Minister van Veiligheid en Sekuriteit en die Minister van die Suid-Afrikaanse Polisie in the Transvaal Provincial Division of the High Court of South Africa under case number 12195/02 into and to this application for the purpose of the hearing of this application.

3. An order in terms of which the issues of dispute determined by the Honourable Acting Justice Mills in his

judgement and they are case number 12195/02 (...) In the matter referred to in paragraph 2 above, be referred for oral evidence as contemplated in rule 7 (7) (b) of the Rules.

4. An order in terms of which it is declared that the second respondent's failure to take a decision (as contemplated in terms of the provisions of regulation 28 (5) of the regulations published in government notice R203 in government Gazette of 14 February 1964, as amended by government notice 1504 published in government Gazette 4004 24 August 1974 as contemplated in section 24 of the South African Police Act, 68 of 1995) whether the applicant had to be discharged from her employment or had to be medically re-examined or had to resume with her duties, constitutes a gross irregularity for the purpose of section 158 (1) (h) of the LRA.

5. An order in terms of which the second respondent is ordered to take a decision in respect of the applicant as contemplated in regulation 28 (5) of the Regulations within two months from the date of this order.

6. An order in terms of which the applicant is reinstated in her position as a senior superintendent with the SAPS which she had before 19 January 1999, alternatively one April 1999 with the retrospective payment of her salary and

allowances pending the second respondent's decision in terms of the said regulation 28 (5).

7. Alternatively to paragraphs 4 to 6:

7.1 an order in terms of which the written recommendation by the medical board (consisting of Dr B van Heerden adn Dr P J Retief) that the applicant be discharged from the SAPS as permanently unfit for further police service be reviewed and set aside; and

7.2 an order in terms of which the decision on behalf by the respondents, alternatively the second respondent, on or about 19 January 1999, alternatively any other date, that the applicant be discharged from the saps as permanently unfit for further police service be reviewed and set aside;

7.3 the order in terms of which the applicant is reinstated in the former position as senior superintendent which she held on 19 January 1999 together with the payment of her salary and other allowances retrospectively from one April 1999 until the date of her reinstatement;

7.4 further alternatively to paragraphs 7.3 (in the event of the applicant not being reinstated): an order in terms of which the respondents are ordered to pay the applicant's loss of income to the applicant from one April

1999 until the date on which she was supposed to retire, alternatively a date to be determined by the Honourable Court.

8. costs of the application.”

(my emphasis)

^{9]} The relief set out above is the relief sought in the original notice of motion dated 7 May 2002 as amended on 13 June 2006.

^{10]} To contextualise the dispute further it is useful to set out regulations 28 (4) and 28 (5) referred to above:

“(4) (a) The Commissioner may convene a medical board or may order such a board to be convened for the purpose of examining a member and determining whether or not he is fit to remain in Force.

(b) Such boards shall consist of one or more registered medical practitioners and, if necessary one or more persons registered to render medical auxiliary services.

(c) Medical reports or sheets which may have a bearing on the case as well as all relevant reports which the member concerned may wish to submit, shall be placed before the board for

consideration and shall be included in the proceedings. If such member so desires, he may at his own expense be represented in the proceedings of the board by his private registered medical practitioner.

(d) After examining the member concerned and considering the report or sheets referred to in paragraph (c), the board shall record its report, finding and recommendation on the prescribed form. The records of the board shall be signed by all the members thereof.

(e) Should the board recommend the member concerned be discharged from the force on account of ill-health, he shall be given the opportunity to make written representations to the Commissioner.

(f) The records and any representations referred to in paragraph (b), shall be forwarded to the Commissioner for consideration, who, if he deems it expedient, may consult the director-general for health or a medical officer authorised by him.

(5) (a) The Commissioner shall, with due observance of the provisions of subsection (1) of section three of the Act, decide whether the member concerned shall, in terms of paragraph (b) of sub regulation (1) of regulation 15, be discharged as medically unfit for further service in the force, whether he shall be granted

leave of absence, whether he shall again be examined or whether he shall be ordered to resume duty.

(b) Should it be decided to discharge the member concerned, the date of his discharge shall be determined by the Commissioner.”

¹¹]The respondents do not oppose the relief sought in prayers 1 to 3 of the notice of motion. In effect subject to the agreement of the court they are willing to allow the matter to proceed as if it had originally been referred on review to this court. In these proceedings, the parties only request the court to make a ruling on an *in limine* issue.

In limine issue

¹²]On 11 March 2011, the respondent gave notice of its intention to raise a jurisdictional challenge **to part of the relief** sought. The respondent contends that the act of making a written recommendation by a medical board for the applicants discharge from the SAPS and the decision to discharge her do not constitute administrative action and are therefore not capable of being reviewed by any court, including the labour court. The respondents allege that the applicant's complaint should have been addressed through the Safety and Security Services Bargaining Council.

^{13]}Analysing the relief sought by the applicant, the respondents submit that if she was merely seeking that the decision of the medical board which declared that she was medically unfit should be reviewed and set aside, it might well be argued that she was not seeking to review her dismissal by the SAPS. However, given that she is seeking reinstatement as well, the respondents say the application is tantamount to an application to review her dismissal.

^{14]}The respondents find further support for this in paragraphs 1.2 and 5.2 of the pre-trial minute of 19 October 2010 in which it is respectively recorded that the applicant lodged the review application against her dismissal on grounds of an allegation that “...*her dismissal was in conflict with the provisions of regulation 28...*” and that the court is required to decide, *inter alia*, “... *whether the applicant was lawfully dismissed for medical reasons as contemplated in regulation 28 of the Regulations.*”

^{15]}The respondents submit that on the authority of the Constitutional Court decisions in ***Chirwa v Transnet Ltd & others (2008) 29 ILJ 73 (CC)*** and ***Gcaba v Minister of Safety and Security & others (2009) 30 ILJ 2623 (CC)***, which respectively held that the dismissal of a public servant or the non-promotion of a public servant or not

regarded as administrative action for the purposes of the Promotion of Administrative Justice Act, the applicant is also effectively trying to review her dismissal, which similarly cannot be construed as administrative action. On this issue it is useful to repeat the much cited dictum from the decision in *Gcaba*:

“[64] *Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.*”¹

^{16]}The respondents further cite three decisions by Pillay J, namely ***Ngutshane v Arriviakom (Pty) Ltd t/a Arrivia.kom & others (2009)***

30 ILJ 2135 (LC), *SARS v CCMA* [2002] 3 BLLR 323 (LC) and *MEC Department of Education, Kwa Zulu-Natal v Khumalo* [2010] 11 BLLR 1174 (LC), in which the learned judge held that section 158 (1) (h) of the LRA was only available to an applicant if the LRA does not prescribe another channel for obtaining relief. By analogy, in this instance the applicant could have challenged her dismissal by referring a dispute over their alleged unfair dismissal for incapacity to the SSSBC for conciliation and ultimately arbitration.

^{17]}The respondent then argued, in the alternative, on the basis that the applicant is only seeking to review and set aside the recommendation of the medical board that she be dismissed on grounds of ill-health. On the basis of two decisions in cases of *Kotze v National Commissioner , SA Police Service & another* (2008) 29 ILJ 1875 (T) and *PSA obo de Bruyn v Minister of Safety and Security* , the respondents argue that such a recommendation also does not constitute administrative action, and where alternative mechanisms exist a review under section 158 (1) (h) is inappropriate. In *Kotze* the court held that as a collective agreement dealt with the issue a review in terms of section 158(1)(h) was inappropriate. The second case held that a decision not to medically board an employee was not administrative action and that adequate alternative mechanisms existed to deal with the applicant's

complaint. However, neither of those matters dealt with an attack on grounds of legality.

^{18]}The respondents further argue that, in any event, it is not competent for the labour court to make an order compelling the second respondent to make a decision in terms of regulation 28 (5), because section 158 of the LRA does not give the Court the jurisdiction to intervene in internal medical boards or ought to make orders in respect of the regulations.

The applicant's defence and analysis

^{19]}The first defence which the applicant raises to the respondent's arguments is that the respondents are precluded from objecting to this court when determining the lawfulness of her dismissal because the parties had agreed that the lawfulness of the applicant's dismissal was one of the matters which parties had agreed on in the pre-trial minute as a matter which the court had to determine. The pertinent paragraphs listed under paragraph 5 of the pre-trial minute read as follows:

"1.2 Whether the second respondent was entitled to dismiss the applicant from the services of the SAPS with

reference to the question whether:

1.2.1 The second respondent in fact took the decision that the applicant must be dismissed from service;

1.2.2 The applicant has submitted a representation against the findings and recommendations of the medical Council in accordance with the provisions of regulations 24 (4) (e); and

1.2.3 The second respondent had in fact followed the procedure laid down in regulation 28 in connection with the handling of the applicant's representation and further when he took a decision in respect of the applicant's representation in accordance with the provisions of regulation 28 (5) (a) and 28 (5) (b);...

5.2 The Honourable Court has to determine whether the applicant was lawfully dismissed for medical reasons as contemplated in regulation 28 of the Regulations.

5.3 The Honourable Court has to determine, in the event of a finding that the applicant was not lawfully dismissed, whether she is still in the employment of the SAPS."

^{20]}Even though it might be argued by the applicant that respondents

have waived their right to raise the *in limine* objection relating to this court's jurisdiction on the basis of what the parties agreed the court should determine in terms of the pre-trial minute, the parties cannot confer jurisdiction on the court which it does not already possess.² Conversely, the court cannot assume jurisdiction to determine issues merely because the parties have agreed to ask it to. Thus, despite the agreement between the parties on the issues the court should determine, even if the respondents had not raised their *in limine* objection, the court is bound to consider whether indeed it has the necessary jurisdiction to entertain them.

21] Thus, the jurisdictional point cannot simply be brushed aside on the basis of a consensus between the parties on what the court should determine.

22] Turning to the substance of the question of the court's jurisdiction, the applicant relies on section 157(1) as the jurisdictional platform for her application. Sub-sections 157(1) and 157(2) state:

“157(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

² See e.g., *Bargaining Council for Hairdressing & Cosmetology Trade (Pretoria) v Smit t/a Hair Mistique* [2002] 3 BLLR 218 (LC) at 218, [10].

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, 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.”

^{23]}The applicant relies on the decision in ***MEC Department of Education Kwazulu Natal v Khumalo & another* [2010] 11 BLLR 1174 (LC)** for its interpretation of the ambit of the court's jurisdiction in terms of section 157 (1) as one that extends to the power of review set out in section 158 (1) (h). That case concerned an application by the applicant employer to set aside the promotions of certain staff members after an investigation into irregularities connected with the promotions. The court found that it had jurisdiction to entertain the application on the following basis:

“[24] The Labour Court has exclusive jurisdiction in respect of all matters that the LRA empowers it to determine. It also has concurrent jurisdiction with the High Court in respect of any alleged violation of any fundamental right in [Chapter 2](#) of the Constitution, arising from employment and from labour relations, and in respect of any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as an employer.

[25] The MEC brought this application in terms of [section 158\(1\)\(h\)](#) of the LRA. [Section 158\(1\)\(h\)](#) empowers the Court to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

[26] [Section 158\(1\)\(h\)](#) is available when no other process is available or special circumstances exist to review an act of the State as employer. It is not a safety net to process disputes in public employment that should have been channelled through some other prescribed provision. Nor is it a licence to bypass the prescribed conciliation, arbitration and review procedures when an applicant has missed the time limits.

[27] The relief claimed, namely declarators, is not available through conciliation and arbitration, at least, not without the parties' consent. The Labour Court is empowered to grant declarators in terms of [sections 158\(1\)\(a\)](#), (iv).

[28] The MEC invoked the Constitution to substantiate the relief claimed. [Section 157\(2\)](#) of the LRA expressly confers jurisdiction in constitutional matters on the Labour Court. Furthermore, [section 158\(1\)\(a\)\(iii\)](#) empowers the Court to grant "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".

*[29] Accordingly, the Labour Court has jurisdiction to determine this application."*³

^{24]}By analogy, the applicant contends that in attacking the decision of the medical board, she is entitled to rely on the power of review contained in Section 158 (1) (h), which provides that:

"158(1)

The Labour Court may—

. . .

h) *review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;...*”

^{25]}Although section 158 (1) (h) is supposed to be a provision that identifies a power of the court which it can exercise in respect of matters within its jurisdiction, the *Khumalo* decision is support for the view that it should also be interpreted as describing a facet of the court's jurisdiction. Indeed, in referring to any permissible ground of review in law and any decision or act by the State as employer it is difficult to distinguish this provision from other provisions in the LRA providing for a matter to be determined by the Labour Court, and thereby implicating the court's jurisdiction.

^{26]}The applicant argues that the grounds of review which may be relied upon are not confined to the review of administrative acts alone, but because they include any grounds of review permissible in law, the failure of the medical board to follow the provisions of regulation 28 in arriving at its recommendation can be set aside on common law grounds. In elucidating the common law grounds relied on, the applicant cites as an example the dictum in ***African Realty Trust Ltd v Johannesburg Municipality* 1906 TH 179** at 182:

'If a public body . . . exceeds its powers, the court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not the one at which it would have itself arrived at.'

27] It is well established that judicial review is not confined to reviews of administrative action in terms of PAJA but also includes a review based on the principle of legality. The learned authors of The New Constitutional and Administrative Law summarise the basis of reviews in terms of this principle as follows:

"The principle is more general and probably far less searching than the rights to administrative justice in section

*33 of the Constitution, but it covers a lot of the same ground. Whatever else it may mean, we know it implies that those who hold public power must act within their powers, that they must act in good faith, that they must not misconstrue the powers, and they must not act arbitrarily. These are all long established principles of administrative law, and undoubtedly form part of the right to lawful administrative action in section 33 (1)."*⁴

^{28]} The requirement of legality applies to actions and decisions by functionaries. Moreover, if review based on the principle of legality were to be interpreted as excluded from the provisions of s 158(1)(h) then, in the light of the decisions in *Gcaba* and *Chirwa* which have already circumscribed the scope of review in public employment, s158(1)(h) would be rendered inoperable.

^{29]} The applicant argues that the bargaining Council has no jurisdiction to deal with a failure by the medical board to follow the prescribed procedures in regulation 28 and, in reliance on the approach in *Khumalo's* case, she maintains she should be allowed to challenge the lawfulness of the medical board's actions.

^{30]} The recommendation of the medical board which is convened at the

⁴ Hoexter C and Lyster R, *The New Constitutional and Administrative Law*, vol 2, (2002), 88

behest of the respondent is a necessary adjunct to the Commissioner's decision making process and its actions and recommendations are to all intents and purposes pre-requisites for that decision. If the Commissioner's decision to discharge the applicant on grounds of ill-health was based on a recommendation from its own board that might be set aside as null and void, the legal propriety of the Commissioner's decision is also implicated if the pre-requisites for his deliberations were not lawfully met.

^{31]}The respondents are right that the Commissioner's decision is part of the subject matter of the dispute. However, unless the decisions in *Chirwa* and *Gcaba* are read as also excluding a review attacking the legality of the acts of the state as employer, I do not understand them to preclude the applicant from seeking to set aside the employer's decision on this basis.

^{32]}Further, if the court has the power to review a decision or act of an employer on the basis of legality, it stands to reason that to give effect to that power it would need the ancillary power to make an appropriate order to give effect to any finding that an action or decision was taken in breach of the principle of legality. Consequently, If the court has the power to review a decision or act of an employer on the basis of legality, it stands to reason that to give

effect to that power it would need the ancillary power to make an appropriate order to give effect to any finding that an action or decision was taken in breach of the principle of legality.

33] If the outcome of the review is that the decision of the medical board to recommend the applicant's discharge on grounds of ill-health were to be set aside, then the court can make an appropriate order in keeping with the normal remedies which follow the setting aside of such acts. There is no reason why a mandamus compelling the board or the commissioner to perform their statutory duties might not be one form of relief which the court might order.

Conclusion

34] In the circumstances, I am satisfied that the applicant is entitled to review the medical board's actions in making a written recommendation for the applicants discharge from the SAPS and the decision of the Commissioner to discharge her on the principles of legality.

Order

35] Consequently, the *in limine* objection is dismissed with costs, and the matter may be set down for hearing oral evidence on the issues previously agreed upon by the parties.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 28 February 2011

Date of judgment: 7 December 2011

Appearances:

For the applicant: E van Graan, SC instructed by Motla Conradie Inc.

For the respondents: R Beaton, SC assisted by C Prinsloo instructed by the State Attorney, Pretoria