



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other Judges

Case No: JR 864/15

In the matter between:

MAHLASE ISIAH MAGOSHI

Applicant

and

GAUTENG DEPARTMENT OF EDUCATION

First Respondent

COMMISSIONER THANDO NDLEBE M.O

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

T E NJOLI

Fourth Respondent

Heard: 14 March 2018

Delivered: 2 October 2018

JUDGMENT

TLHOTLHALEMAJE, J:

- [1] The applicant (Mahlase) is a former Principal at Etwatwa High School. In January 2014, he had responded to an advertisement issued by the first respondent (Department) for the position of Principal at Tsakane Ext 8 Secondary School. Mahlase and other candidates were shortlisted and interviewed. The fourth respondent (Njoli), was eventually the successful candidate.
- [2] It was common cause that Mahlase resigned from his position within the Department on 30 April 2014. The interviews for the position took place on

20 August 2014, and the decision to recommend Njoli was taken in the same month. Aggrieved at his non-appointment, Mahlase referred a dispute to the third respondent (ELRC) on 10 December 2014, classifying it as 'Appointment/Promotion'. A certificate of non-resolution was issued on 5 February 2015, characterising the dispute as 'unfair labour practice' and 'appointments and promotion'. The dispute came before the second respondent (Commissioner) for arbitration on 18 March 2015, who had issued his arbitration award on 5 April 2015 dismissing the referral.

- [3] Mahlase seeks to have that arbitration award reviewed and set aside on a variety of grounds. It was common cause that the record of arbitration proceedings was filed out of time. I had granted condonation in that regard.
- [4] Prior to dealing with the merits of the review application however, and to the extent that I may reach that point, it is significant to note that the Commissioner had in the award, and after having disposed of the merits commented that;

"[32] In the matter of **Department of Justice v CCMA (2004) 25 ILJ 248 (LAC)** it was held that "external candidates who apply for a higher position apply for appointment, whereas internal candidates who apply for a higher position apply for promotion. An applicant for a post with his own employer is entitled to a promotional dispute, whereas a failure to appoint an external candidate does not constitute a dispute concerning promotion, but a dispute concerning appointment". The Applicant in his evidence in chief testified that he was not an employee of the Respondent at the time he applied for the position in dispute. Furthermore, in the matter of **Phera v ELRC & Others (JR568/2009) [2009] ZALC** it was held that "an educator who does not have an existing employment relationship with the particular HOD of Department where is applying for a higher position has two remedies;

- He may approach the High Court in a review application in terms of the Promotion of Administration of Justice Act; or
- Provided he is already an Educator in public education who is protected by the ELRC Constitution, he may refer a dispute concerning the interpretation and application of ELRC Collective Agreement 5 of 1998 for

arbitration, if he can show that there was material non-compliance with this resolution during the selection process”¹(Sic)

- [5] The Commissioner’s award is clearly not a model of clarity. Despite raising the issue as indicated above, which by all accounts was important for the purposes of determining whether the ELRC had jurisdiction to determine the dispute or not, it is not clear from the award whether the Commissioner dismissed the referral on that ground or whether as appears from the analysis, it was dismissed on the merits. Be that as it may, it is trite that the ELRC, like the CCMA, cannot decide its own jurisdiction. In considering whether the ELRC had jurisdiction, this Court must decide the matter afresh on review and it is now settled that the *Sidumo* test does not apply².
- [6] If it is accepted for now that the issue before the Commissioner pertained to an alleged unfair labour practice arising out of the non-appointment of Mahlase, obviously there are hurdles. In his opening address at the arbitration proceedings, Mr Mathibe, representing Mahlase, had submitted that what was being challenged was the non-appointment of the latter on the grounds of it being procedurally and substantively unfair³. The issue is therefore whether objectively speaking, the facts which would give the ELRC jurisdiction to entertain the dispute existed. If such facts did not exist, the ELRC had no jurisdiction⁴. In a nutshell, the ELRC does not have a general unfairness jurisdiction, and a party referring any dispute in terms of the provisions of the Labour Relations Act (LRA)⁵ must demonstrate that the dispute is capable of being determined.
- [7] In its answering affidavit in respect of the review proceedings, the Department contended that because the dispute was referred to the ELRC subsequent to Mahlase’s resignation, it ought to have been dismissed for want of

¹ At page 46 of the Pleadings

² *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* [2008] 9 BLLR 845 (LAC) paragraphs [39] – [41]

³ Line 8 – 13 of the transcribed record at page 112

⁴ *SA Rugby Players Association ibid*

⁵ Act 66 of 1995 (as amended)

jurisdiction⁶. Mahlase did not file a replying affidavit and chose to stand by his founding affidavit, and thus failed to address this important issue.

- [8] The starting point is that section 185 of the LRA provides that every employee has the right not to be unfairly dismissed or be subjected to unfair labour practice. Similarly, and flowing from the provisions of section 186(2) of the LRA⁷, an unfair labour practice means any unfair conduct or omission that arises between an employer and an employee (My emphasis). These provisions obviously derive from the constitutional right to fair labour practices guaranteed to everyone under section 23 of the Constitution of the Republic. Significant with the provisions of section 186(2) of the LRA however is that no reference is made to 'a failure to appoint'.
- [9] Over the years, there have been divergent views as to whether it is permissible, once the employment relationship is terminated, for an ex-employee to refer a dispute to any forum in order to remedy a wrong or unfairness perpetrated by the ex-employer during the period of employment. In *Sithole v Nogwaza NO & others*⁸, it was held that the remedies provided in the LRA in respect of unfair labour practice disputes are available only for disputes which arise between employers and employees, in the sense that there existed an employment relationship at the time that the dispute is referred. This approach, as further supported by the authorities referred to by the Commissioner in the award, effectively closed the door on ex-employees who sought to claim relief in respect of any unfairness or wrong committed during the tenure of the employment relationship.

⁶ Paragraph 30 of the Answering Affidavit at page 291 of the Pleadings

⁷ Section 186(2)(a) of the LRA provides that:

(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 for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee

⁸ (1999) 20 ILJ 2710 (LC) at paras [44] to [45], where it was held that;

"The applicant attempted to argue that it qualified as a residual unfair labour practice in terms of schedule 7 item 2 (1) (b) because it related to a benefit. I do not accept this argument for two reasons.

Firstly, the remedies available in schedule 7 item 3 relative to the residual unfair labour practice listed in item 2(1), with the exception of item 2(1)(d), are available only for disputes which arise between employers and employees, that is where there is an existing employment relationship at the time the dispute is referred to the Commission..."

[10] Other approaches took a different view, being that the termination of an employment relationship was not a bar to an aggrieved party seeking to refer a dispute to the appropriate forum to remedy a wrong or unfairness perpetrated during the period of employment⁹. In *Malope v Crest Chemicals (Pty) Ltd*¹⁰, Van Niekerk J dealing with a similar conundrum held that;

“[5] The definition of employee contained in the EEA is similar to that contained in the Labour Relations Act. The definition expressly excludes independent contractors, and refers to persons who work for another person or for the state and who receives, or who is entitled to receive, any remuneration or any other person who in any manner assists in the carrying on conducting the business of an employer. It may well be that in a literal sense, a person whose employment is terminated on account of retirement is not a person who continues to work and who receives or remains entitled to receive remuneration.

[6] A literal interpretation of the definition, is contended for by the respondent, is at variance with an interpretation that promotes constitutional values and in particular, the right to equality in employment and the right to fair labour practices (see, for example *Wyeth SA (Pty) Ltd v*

⁹ See *MEC for Tourism, Environmental & Economic Affairs, Free State v Nondumo & Others* [2005] 10 BLLR 974 (LC); *NS v South African Mutual Life Assurance Society Ltd t/a Old Mutual & Others* [2001] 8 BLLR 935 (LC); See also *Velinov v University of KwaZulu-Natal and Others* [2006] 6 BLLR 607 (LC) where it was held that;

“[15] I now turn to consider the second point *in limine* which is to the effect that because Professor Velinov resigned, he could not avail himself of the unfair labour practice provisions contained in section 185. In this regard it must be borne in mind that after Professor Velinov’s resignation was accepted, he referred a dispute in terms of section 191 to the Commission which he characterised as an unfair labour practice. This dispute concerned his non-appointment to the vacant positions, the very reason he resigned from his employment. It was submitted on behalf of the University that although Professor Velinov’s resignation only became effective at the end of June 2004, he could nonetheless not avail himself of the provisions prohibiting unfair labour practices. It was submitted that these provisions are only intended for the benefit of employees who are engaged in ongoing relationships with employers. In support of this contention I was referred to *Sithole v Nogwaza N.O. & Others* [1999] 12 BLLR 1348 (LC), specifically at paragraphs 44 and 45.

[16] I do not accept that an employee whose employment has been terminated either by resignation or otherwise, but who continues to work out his or her notice period, does not enjoy the protection of the provisions of the LRA and particularly the unfair labour practice provisions contained in Chapter VIII. This would not only be contrary to section 186(2) which, in defining an “*unfair labour practice*”, does not distinguish between different categories of employees but it is also contrary to the definition of “*employee*” in section 213. It is also contrary to the principle that despite termination of employment, employees have rights in the wider “ongoing employment relationship” (see *National Automobile & Allied Workers’ Union v Borg-Warner SA (Pty) Ltd* 1994(3) SA 15 (A) at 25 E – I)”

¹⁰ (JS286/15) [2017] ZALCJHB 181 (20 February 2017)

Mangele [2003] 7 BLLR 734 (LAC)). It is not in dispute that the applicant was an employee during the period to which his equal pay claim relates. The fact that he was no longer an employee at the time the claim was referred, in my view, is not fatal. What matters is that he was employed by the respondent for the period during which he contends that other employees, similarly situated, were paid a premium solely on account of their race. The provisions of s 10 of the EEA sustain this view. What that section provides is that a party to dispute concerning chapter 6 may refer the dispute within six months after the act or omission that allegedly constitutes unfair discrimination. As I understand the applicant's claim, it is one that contemplates an act of ongoing discrimination that terminated only on the date of his retirement. I fail to appreciate on what basis the definition of 'employee' in the EEA precludes him from referring a claim in which he exercises the right under s 6, provided of course that the claim is made within the applicable time limit or any late referral is condoned."

- [11] The Constitutional Court dealt with a similar issue in *Pretorius and Another v Transport Pension Fund and Another*¹¹, and held that;

"[46] The third cause of action pleaded as flowing from the 1989 promise was that the failure to pay constituted an unfair labour practice in breach of section 23(1) of the Constitution. The High Court upheld the exception to this leg of the respondents application on the ground that it must be pleaded that there was and is an employer employee relationship between the applicants and the respondents and that they failed to do so.

[47] That appears to be unnecessarily restrictive. The section refers to "everyone" having the right and its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship. Labour law jurisprudence under the Labour Relations Act (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.

[48] Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the

¹¹ [2018] 7 BLLR 633 (CC); 2018 (7) BCLR 838 (CC); (2018) 39 ILJ 1937 (CC)

¹²“twilight zone” of employment as supposed “independent contractors” in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.” (Citations omitted)

- [12] To the extent that the decisions in *Velinov*, *Malope* and *Pretorius* confirm that on the less restrictive interpretation of the definition of ‘employees’, and the extension of the protections under section 23 of the Constitution, ex-employees are not barred from referring disputes, it is my view that this cannot be read to be open *sesame* for ex-employees to willy-nilly refer disputes. Implicit in these decisions and as can also be gleaned from the facts of those cases is that there is a qualification. Thus, the common trend in those cases was that the alleged wrong or unfairness complained of, took place *during* the course of employment and *before* termination of that employment.
- [13] By way of illustration, in *Velinov*, the refusal to appoint him to the vacant position of chair in computer science, had followed upon a process of recruitment and selection, prior to his resignation. He had resigned as a consequence of a refusal to promote him. As the Court held, while it was true that the it found that the Commission lacked jurisdiction to entertain disputes concerning alleged unfair conduct by an employer committed after termination of the employment relationship, in that case the employment relationship did not terminate until the end of the notice period on 30 June 2004, and Velinov remained an employee until that date, and was accordingly entitled to the protection against unfair labour practices contained in Chapter VIII of the LRA¹³.
- [14] In *Malope*, the claim was brought under s 6 of the Employment Equity Act (EEA) at the time he had retired from the respondent’s employ. The claim was

¹² *Supra* fn 10

¹³ At para 17

quantified on the basis of an income differential that Malope contended had existed between him and his comparators as at the date of his retirement, extrapolated over the 42 years of his employment. Part of the Court's rationale when coming to its conclusion was that it was not in dispute that Malope was an employee during the period to which his equal pay claim related, and he was employed by the respondent for the period during which he contends that other employees, similarly situated, were paid a premium solely on account of their race.

[15] In *Pretorius*, the Constitutional Court in specifically dealing with a claim related to an unfair labour practice, was confronted with a promise made to the employees in 1989 that the new Transnet Pension Fund would pay them the same pension benefits under the new management of those funds as they did under the then statutory state institution that employed them until then, namely the South African Transport Services (SATS) and its two pension funds (old pension funds). The Court appreciated that Labour law jurisprudence under the LRA recognised that unfair labour practices under the Act may extend beyond the termination of employment. It nonetheless held that the constitutional right to fair labour practices under section 23 referred to "everyone" having the right and its purpose was to protect persons from *unfair labour practices that originated in an employer-employee relationship*. On the facts of that case however, the Court held that these provided a compelling basis not to restrict the protection of section 23 to only those employees who had contracts of employment.

[16] In this case, the circumstances are quite distinguishable from those of the three above mentioned authorities. These facts do not indicate that the alleged wrong or unfairness took place during the tenure or before termination of the employment relationship. The post in contention was advertised in January 2014. When Mahlase submitted his application, he was still employed by the Department. In April 2014, he had resigned from his position. The process of interviews and the appointment of the successful candidate took place in August 2014, long after the applicant had resigned. Thus, even if Mahlase was entitled to pursue any claim of unfairness, subsequent to his

resignation, the impugned process of interviews and the decision to select and appoint Njoli, took place at the time when Mahlase was no longer an employee.

- [17] Even if it might be argued that that Mahlase had applied for the position when he was still an employee, this in my view is of no consequence. The submission of an application by an employee in response to an advertisement can hardly be construed as a right emanating from the employment relationship. Any rights to fair treatment in a selection process only arise once that process commences. Thus, central to any enquiry in this regard is the timing or origin of the impugned process or decision. At the time of Mahlase's employment or resignation, there was no process embarked upon or decision taken by the Department pertaining to his application for the post, which process can conceivably be deemed to have triggered any allegation of unfairness.
- [18] Other than the above, there is a further problem in that Mahlase, for the purposes of these proceedings, appreciated that he could only challenge his non-appointment. As can be extrapolated from *Department of Justice vs CCMA & Others*¹⁴, where an existing employee responds to an advertisement by his or her own employer, and is successful, this would constitute a promotion of that employee. If however unsuccessful, that employee is at liberty to refer an unfair labour practice dispute related to failure to promote, in accordance with the provisions of section 191(5)(a)(iv) of the LRA. Where however external candidates responded to the advertisement and were unsuccessful, their remedies lie in the provisions of section 6 of the Employment Equity Act and those of section 5 of the LRA (where applicable)¹⁵.
- [19] In this case, it follows that even on a less restrictive definition of an 'employee' or on the extension of a protection under section 23 of the Constitution, the provisions of section 186(2)(a) of the LRA, or those of the Collective Agreement (ELRC Resolution 2 of 2005: Recruitment and Placement of

¹⁴ (2004) 25 ILJ 248 (LAC)

¹⁵ At para 58

Educators (upon which the claim of unfairness was premised)), could not have been available to Mahlase. In the end, no objective facts existed to give the ELRC jurisdiction to entertain the dispute. I have further had regard to the requirements of law and fairness in regards to the issue of costs, and hold the view that a cost order is not warranted in this case.

[20] Accordingly, the following order is made;

Order:

1. The arbitration award of the Second Respondent is substituted with an order that the third respondent (ELRC) lacked the requisite jurisdiction to determine the dispute between the applicant and the first respondent.
2. There is no order as to costs

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

S Freese

Instructed by:

Mathibe Thabang Attorneys

For the 3rd Respondent:

A Mofokeng

Instructed by:

State Attorney

LABOUR COURT