

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG
Case no: DA6/03

In the matter between:-

MEMBER OF THE EXECUTIVE COUNCIL

FOR TRANSPORT: KWAZULU-NATAL¹ 1ST APPELLANT

PREMIER OF THE PROVINCE OF

KWAZULU-NATAL 2ND APPELLANT

V. CUNLIFF 3RD APPELLANT

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING

COUNCIL 4TH APPELLANT

and

HARRY JELE

RESPONDENT

JUDGEMENT

ZONDO JP

Background

¹ The 1st appellant had been cited as Minister of Transport, Kwazulu-Natal. It was common cause that what was meant was the Member of the Executive Council for Transport, Kwazulu Natal. Constitutionally there is no functionary known as the Minister of Transport in a provincial government. Accordingly, the correct citation has been substituted.

[1] In May 2000 the Department of Transport in the Province of KwaZulu-Natal caused a post of Chief Director: Corporate Services to be advertised in the Sunday Times of 21 May 2000. The respondent, who, at the time, was employed as Deputy Director in the Department of Health, KwaZulu-Natal Provincial Government, applied for appointment to the post. The third appellant also applied for appointment to the same post. I am sure that there were other candidates besides the two who also applied.

[2] The respondent was not successful in his application. The third appellant was appointed to the post. The respondent was aggrieved by his not being appointed. He considered that the conduct of the first appellant, or, of his Department, not to appoint him constituted an unfair labour practice as defined at the time in item 2(1)(b) of schedule 7 to the Labour Relations Act, 1995 (Act 66 of 1995)(“**the Act**”). The provision of this item will be quoted shortly. The first appellant or the Department maintained that the decision was lawful, fair and justified.

[3] In due course the respondent referred an unfair labour practice dispute to the General Public Service Sectoral Bargaining Council, the fourth appellant, for initially conciliation and, when conciliation failed, for arbitration, by the bargaining council. The respondent based his claim on the provision of item 2(1)(b) of Schedule 7 to the Act. Item 2(1)(b) read thus at the time:

“For the purposes of this item an unfair labour practice means an unfair act or omission that arises between an employer and an employee involving –

- a) ...
- b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating

to the provision of benefits to an employee.”

In terms of item 2(3) and (4) of the same Schedule an unfair labour practice dispute falling within the ambit of par (b) of item 2(1) was required to be referred to arbitration if conciliation failed. Paragraph (a) dealt with an unfair labour practice dispute relating to appointment. The latter dispute was required to be referred to the Labour Court for adjudication if conciliation failed.

[4] In the bargaining council the point was taken on behalf of the first and second appellants that the bargaining council did not have jurisdiction in respect of the dispute. The basis advanced for this objection to the bargaining council’s jurisdiction was that item 2(1)(b) was not applicable to a dispute concerning the non-appointment of a candidate to a post but related to conduct concerning the promotion of a candidate to a higher post. It was argued that a candidate can only be promoted by its employer and not by someone who is not its employer.

[5] It was further contended that the respondent was not employed at the relevant time by the first appellant and, because of that, it could not be said that the dispute related to promotion as contemplated by item 2(1)(b). It was submitted that the dispute related to non-appointment which fell outside the jurisdiction of the bargaining council and fell within the jurisdiction of the Labour Court. The respondent disputed the correctness of the first and second appellant’s contention in this regard. He submitted that he was employed by the State in the public service and that, if he had been appointed to the post in question in the Department of Transport, KwaZulu – Natal, he would still have been employed by the State albeit in a different department and such appointment would have been a promotion for him. The bargaining council upheld the first and second appellants’ objection and held that it did not have

jurisdiction.

[6] The respondent brought an application in the Labour Court to review and set aside the decision of the arbitrator. The Labour Court granted that application. It held that the respondent's employer was the State and that his appointment to the post of Chief Director in the Department of Transport would have been a promotion for him and, that, for that reason, the provision of item 2 (1)(b) was available to him. Pursuant to an application for leave to appeal to this Court, the Court a quo granted the first and second appellants leave to appeal. This, then, is the appeal against the order of the Court a quo.

The appeal

[7] The only issue in this appeal relates to the identity of the respondent's employer at the time of the decision not to appoint him. On behalf of the first and second appellants it was submitted that the respondent's employer was the Member of the Executive Council for Health, KwaZulu – Natal or the Head of that Department and that there was no employment relationship between him and the first or second appellant and that, for that reason, item 2(1)(b) was not available to him and that the arbitrator had no jurisdiction to arbitrate the dispute. It was submitted that the Court a quo had erred in making the decision that it made in this regard. The respondent maintained that his employer was the State and not the Member of the Executive Council for Health but that the latter simply represented the State just as the first appellant also represented the State in relation to employees in the Department of Transport in the KwaZulu - Natal Provincial Government and that appointment to the post of Chief Director in the Department of Transport would have been a promotion for him. He submitted that, if he had been appointed to the post, this would not have meant a change of employers. He submitted that his employer would

have remained the same, namely, the State.

[8] There can be no doubt that in an unfair labour practice promotion dispute provided for in item 2 (1) (b) the applicant must be in the employ of the employer referred to in item 2(1)(b) before he can rely thereon. In other words there cannot be a dispute relating to promotion unless there is an employment relationship between the parties concerned. However, the question in this case is who the respondent's employer was at the time that the decision was taken not to appoint him to the post of Chief Director in the Department of Transport. If his employer before and after such decision would have been the same and was the State, the appeal must fail because then his appointment to the post in question would have constituted a promotion. If, however, his employer before the decision and his employer after a successful application for appointment to the post would have been different people or entities, the appeal must succeed.

[9] In support of his contention, Counsel for the first and second appellants referred to certain provisions of the Constitution as well as various provisions of certain statutes. I turn to deal with provisions the Constitution as well as those of various statutes. We were referred to some of the provisions that I shall deal with but there are also others that I deal with to which we were not referred but which, in my view, help to throw light on the issue at hand.

[10] Sec 1 of the Constitution of the Republic of South Africa NO 108 of 1996 ("the Constitution") reads in part: **"The Republic of South Africa is one, sovereign, democratic state founded on the following values ..."** (my emphasis). Sec 40 of the Constitution provides:-

"40. Government of the Republic, - (1)

In the Republic, government is constituted as national, provincial and

local spheres of government which are distinctive, interdependent and interrelated.

- 2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the Chapter provides.”**

The chapter referred to in sec 40 (2) deals with co-operative government.

[11] Sec 85 of the Constitution deals with the executive authority of the Republic. Sec 85(1) reads: **“The executive authority of the Republic is vested in the President”**. Sec 85(2)(c) gives the President the authority of **“co-ordinating the functions of state departments and administrations.”** Sec 103 of the Constitution gives a list of the provinces of the Republic. Sec 125 vests the executive authority of a province in the Premier of that province. Sec 132(2) provides: **“The Premier of a province appoints the members of the Executive Council, assigns their powers and functions and may dismiss them.”** Sec 133(1) provides that **“(m)embers of the Executive Council are responsible for the functions of the executive assigned to them by the Premier.”** Chapter 10 of the Constitution deals with public administration. Sec 195(1) provides that **“(P)ublic administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles”** and various principles are then set out. Subsection 2 then provides that those principles **“apply to**

- a) Administration in every sphere of government;**
- b) Organs of state**
- c) public enterprises.”**

[12] Sec 196(1) of the Constitution provides: **“There is a single Public**

Service Commission for the Republic.” Subsection (2) provides, among other things, that the Public Service Commission **“must exercise its powers and perform its functions ... in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.”** Sec 196(4) sets out powers and functions of the Public Service Commission. These include the power **“to propose measures to ensure effective and efficient performance within the public service;”, “to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195”, “to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies, and to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.”**

[13] Sec 197 of the Constitution deals with public service. It provides thus:.

“(1) Within public administration there is a public service for the Republic, which must function and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

3) Provincial governments are responsible for the

recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.”

[14] In sec 213 of the Act public service is defined as meaning **“the national departments, provincial administrations, provincial departments and organizational components contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994 but excluding**

- (a) the members of the South African National Defence Force**
- (b) the National Intelligence Agency; and**
- (c) the South African Secret Service.”**

Section 239 of the Constitution defines the phrase **“organ of state”** as meaning:

“(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

- a. exercising power or performing a function in terms of the Constitution or a provincial constitution;**
- b. exercising public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”**

[15] It is clear from sec 197(4) of the Constitution that employees employed

in the provincial governments are part of the public service particularly in the light of the definition of public service in the Act. It is clear from sec 197(3) of the Constitution that provincial governments have the authority or power to recruit, appoint, transfer, promote and dismiss members of the public service in their administrations. It is also clear from the definition of **“organ of state”** that a department in a provincial administration is an organ of the state.

[16] There is no definition of the word **“employer”** in the Act. However, there is one for the word **“employee”** in sec 213 of the Act and Counsel for the first and second appellants referred us to that definition. The word **“employee”** is defined in sec 213 of the Act as meaning –

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer,” and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee’.

[17] From the definition of the word **“employee”** in sec 213 of the Act, there can be no doubt that the State is an employer. The respondent was employed in a provincial government department. A provincial government is part of the State. Accordingly, unless there is a statutory provision which suggests strongly that there is another entity other than the State which was the respondent’s employer, it should be accepted, on the basis of the definition of **“employee”** in sec 213 of the Act and the fact that it is common cause that the respondent worked in a provincial government department, that his employer was the State and that, if he had been appointed to the post, his employer would have continued to be the State. Accordingly, the definition of the word **“employee”** does not assist Counsel for the first and second appellants.

[18] In support of his contention Counsel for the first and second appellants also referred to the definition of the word **“workplace”** in the Act as amended by the Labour Relations Amendment Act, 2002 (Act No 12 of 2002). In particular he referred to par (a)(ii) of that definition. It provides that the word **“workplace”** means **“(a) in relation to the public service-**

(i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or

(ii) for any other purpose, a national department, provincial administration, provincial department or organizational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation NO. 103 of 1994), or any other part of the public service that the Minister for Public Service Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace.”

(b) ...

(c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.”

[19] The definition of the word **“workplace”** does not in any way support the submission by Counsel for the first and second appellants in regard to the

identity of the respondent's employer. The fact that a provincial department may be a workplace on its own is neither here nor there. That cannot make it the employer nor is it a useful factor in the determination of the identity of the respondent's employer. Even in the private sector different branches of a company which operate in different places may be workplaces in their own right in terms of that part of the definition of the word **“workplace”** which applies to the private sector. In regard to the private sector that would not mean that each branch is the employer of the employees working in that branch. The company would still be the employer of all the employees in the various branches as well as those based at the headquarters of the company. (see par (c) of the definition of the word **“work place”** in sec 213 of the Act.)

[20] The provisions of sec 197(1), (2) and (4) of the Constitution have been quoted above. At this stage it is not necessary to quote them again. It is sufficient to simply make the points that:

(a) subsection (1) gives recognition to the existence of a public service for the country which, it says in part, must function and be structured in terms of national legislation and,

(b) subsection (2) provides that the terms and conditions of employment in the public service must be regulated by national legislation.

Subsection (4) clearly contemplates that employees employed in the provincial governments are part of the public service. It provides: **“Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their framework of uniform norms and standards applying to the public service.”**

[21] In terms of the preamble to the Public Service Act, 1994 (Act 103 of

1994) (“the PSA”) the purpose of that Act is **“to provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith.”** In sec 1 the term **“public service”** is defined as meaning **“the public service contemplated in section 8.”** Sec 8(1) sets out what the public service consists of. Sec 8(1)(a) reads thus:

“The public service shall consist of persons who –

a) hold posts on the fixed establishment –

- i) classified in the A division and the B division**
- ii) in the services;**
- iii) in the Academy, the Agency or the Service; and**
- iv) in the state educational institutions”:**

Fixed establishment as referred to in sec 8(1) (a) is defined in sec 1 as meaning **“the posts which have been created for the normal and regular requirements of a department.”** A **“department”** is defined as meaning **“a national department, a provincial administration or a provincial department.”** From the definition of **“fixed establishment”**, that of **“department”** and the provision of sec 8(1)(a), it is clear that employees in a provincial department are employed in the public service.

[22] The provisions of Sec 8(1)(b) and (c) provide, respectively, that, among persons in the public service are those who,

“8(1)(b) having ceased to hold posts on the fixed establishment contemplated in paragraph(a), and not having retired or having been

discharged, are employed additional to the fixed establishment or who are deemed to continue to hold posts under the circumstances contemplated in sub-section 3(c);

(ii) are appointed permanently additional to the fixed establishment;

(c) (i) hold posts on the fixed establishment other than posts referred to in paragraph (a);

(ii) are employed temporarily or under a special contract in a department, whether in a full-time or part-time capacity, additional to the fixed establishment or in vacant posts on the fixed establishment.”

[23] Sec 7(1) of the PSA provides that the public service established by sec 197(1) of the Constitution “**shall be structured and organized as provided for**” in national legislation. The PSA is, in my judgement, such national legislation. Sec 7(2) reads: “**For the purposes of the administration of the public service there shall be national departments and provincial administrations mentioned in the first column of Schedule 1, provincial departments mentioned in the first column of Schedule 2 and the organizational components mentioned in the first column of Schedule 3.**”

Sec 7(3)(a) provides that “**(e)ach department shall have a head of department who as an officer shall be the incumbent of the post on the fixed establishment bearing the designation mentioned in the second column of Schedule 1 or 2 opposite the name of the relevant department or the officer who is acting in that post.**” Sec 7(3)(b) provides that “**(s)ubject to par(c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and**

care of State property and he or she shall perform the functions that may be prescribed.”

[24] Sec 9(1) of the PSA gives the power to appoint, transfer or promote an officer or employee **“in the employ of a department”** to the relevant executing authority or an officer or officers to whom such authority has been delegated by the person who has such authority. Sec 9(2) requires that, subject to the provisions of chapter IV, appointments and promotions in, and transfers in or to, the public service be made in such manner and on such conditions as may be prescribed. Sec 14(1) provides that **“(s)ubject to the provisions of this Act every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department irrespective of whether such a post or position is in another division or is in a lower or higher grade or is within or outside the Republic”**. Sec 14(2) (b) provides that, when a transfer is from one department to another department, the approval of the persons who, in respect of each of those departments, have the power to transfer must first be obtained.

[25] Sec 30(a) reads: **“Unless it is otherwise provided for in his or her conditions of employment –**

(a) every officer and employee shall place the whole of his or her time at the disposal of the State;”

The word **“officer”** in sec1 of the PSA is defined as meaning **“a person who has been appointed permanently, notwithstanding that such appointment may be on probation, to a post contemplated in section 8 (1)(b) or 8 (3) (c).”** The word **“employee”** in the PSA is defined as meaning **“a person contemplated in section 8 (1) (c).”** It seems to me that, read with the

definitions of “**officer**” and “**employee**”, the provision of sec 30(a) is such that it covers every person employed within the public service as contemplated in sec 8 of the PSA. That being the case, the respondent must, no doubt, also have been a member of the public service in the position he held when he was unsuccessful in his application for appointment to the post in question. It also seems to me that, in the light of those definitions, if the respondent had been appointed to the post, he would have continued to be employed within the public service.

[26] The provision of sec 30 (a) of the PSA is a strong indication, if not a decisive factor, that, unless there is another statutory provision elsewhere specifying another person or entity as an employer for some officers or employees as defined in sec 1 of the PSA, the employer of every officer and every employee as contemplated in sec 30 (a) read with the definitions of the terms “**officer**” and “**employee**” in sec 1 of the PSA, is the State. It is also a strong indication that, if the definitions of the terms “**officer**” and “**employee**” in the PSA cover everyone employed in the public service as contemplated in sec 8 of the PSA, then the State is the employer of everyone in the public service contemplated by sec 8 of the PSA. Obviously, anyone in respect of whom there is a specific statutory provision specifying some or other entity or official or functionary as the employer is in law employed by that person, entity or official or functionary.

[27] In the case of educators it is to be noted that the Employment of Educators Act No 76 of 1998 makes a specific provision as to who the employer of educators is in certain circumstances or for certain purposes. The definition of the word “**employer**” in that Act means, in relation to any provision of Chapters 4, 5 or 7 which applies to, or, is connected with, an educator in the service of the national department of education, the Director–

General; in so far as such provision applies to, or, is connected with, an educator in the service of a provincial department of education, the word “**employer**” is defined as meaning the Head of Department. Section 3(1)(a) of that Act provides that, save as is otherwise provided for in that section, the Director –General shall be the employer of educators in the service of the Department of Education in the posts on the educator establishment of the said Department. Sec 3(1)(b) provides that, save as is otherwise provided for in that section, the Head of Department shall be the employer of educators in the service of the provincial department of education in the posts on the educator establishment of that department. Subsections 2, 3, 4 and 5 make other provisions relating to the identity of the employer of certain educators or of educators for certain purposes.

[28] I have said that the effect of sec 30 (a) is that all officers and employees in the public service as contemplated in sec 8 of the PSA are employed by the State and the State is their employer. I say this because the provision of sec 30 (a) is worded in a manner that is similar to saying that officers and employees make their capacity to produce over to the State. In my judgment that is what sec 30 (a) means. A person who makes his capacity to produce over to another is an employee of the other person (see Brassey: “**The Nature of Employment**” (1990) 11 ILJ 889 at 899 and 935 – 936 as approved in **Niselow v Liberty Life Association of Africa Ltd (1998) 19 ILJ 752 (SCA) at 753J – 754A**). Accordingly, officers and employees are employed by the State. I have no doubt that the respondent fell within one of these two terms in his position and would have continued to fall within one of these terms had he been appointed to the position for which he had applied.

[29] Sec 40 of the PSA deals with the limitation of State liability. It reads thus:

“Whenever any person is conveyed in or makes use of any vehicle, aircraft or vessel which is the property of the State, the State or a person in the service of the State shall not be liable to such person or his or her spouse, parent, child or other dependant for any loss or damage resulting from any bodily injury, loss of life or loss of or damage to property caused by or arising out of or in any way connected with the conveyance in or the use of such vehicle, aircraft or vessel, unless such person is so conveyed or makes use thereof in, or in the interest of, the performance of the functions of the State: Provided that the provisions of this section shall not affect the liability of a person in the service of the State who willfully causes the said loss or damage.”

Sections 30(a) and 40 of the PSA refer, quite clearly, to, among others, persons in the service of the State, once again emphasizing the notion of the State as an employer.

[30] In support of his contention Counsel for the first and second appellants also referred to the definition of the word **“employer”** in sec 1 of the Public Service Labour Relations Act, 1994 (the PSLRA”). Sec 1 (xiii) of the PSLRA defines the word **“employer”** as meaning **“the State as employer as represented-**

- (a) at central level, by representatives appointed for that purpose by the responsible Minister; and**
- (b) at departmental level, by representatives appointed for that purpose by head of department concerned”**

A department is defined in sec 1 (viii) as meaning **“a department as defined**

in section 1 (1) of the Public Service Act.” Sec 1 of the PSA defines a department as meaning **“a national department, a provincial administration or a provincial department.”** The word **“employee”** in the PSLRA is defined as meaning **“an officer or employee as defined in section 1(1) of the Public Service Act, and includes, for the purposes of section 18,22(2)(a), 23, 24 and 25, as well as section 22 in so far as it pertains to the said sections, a person who was such an officer or employee, but does not include-**

- (a) a person employed in terms of an Act other than the Public Service Act; and**
- (b) a person whose salary and conditions of employment are determined according to general education policy in terms of section 2(1) (b) and (2) of the National Policy for General Education Affairs Act, 1984 (Act NO 76 of 1984).”**

In this connection Counsel drew our attention to the fact that the PSLRA is one of the Acts which were repealed by sec 212 of the Act (see schedule 7 to the Act). He also drew our attention to the fact that item 15 of schedule 7 to the Act provides that, read with the changes required by the context, certain of the provisions of the PSLRA which include section 1, assumed when the Act come into operation, unless the context indicated otherwise, the status of provisions of a collective agreement **“binding on the State, the parties to the chambers of the Public Service Bargaining Council and all employees in the public service.”**

[31] Counsel also drew our attention to the provisions of sec 212(2) and (3) of the Act. Sec 212(2) reads: **“The repeal of [the laws mentioned in schedule 6 which include the Public Service Labour Relations Act, 1994] does not affect any transitional arrangements made in schedule 7.”** Sec 212(3) provides that the transitional arrangements in Schedule 7 of the Act must be

read and applied as substantive provisions of the Act. Sec 212(3) may be in conflict with the provision of item 15 to the extent that the last mentioned provision is to the effect that certain parts of the provisions of the PSLRA set out therein have the status of provisions of a collective agreement. Happily, it is not necessary for purposes of this judgement to decide whether, indeed, the two are in conflict with each other and, if so, what the legal effect thereof is.

[32] An observation needs to be made at this stage that item 15 of Schedule 7 expressly provides that the provisions of the PSLRA set out in that item are binding on, among others, **“the State, the parties to the Public Service Bargaining Council and all employees in the public service.”** (underlining supplied). Quite obviously the State is referred to in that item as the employer of persons employed in the public service because that is the capacity in which the provisions of the PSLRA refer to the State. (see the definition of **“employer”** in sec 1 of the PSLRA). Counsel for the first and second appellants also sought to rely on the reference to the **“parties to the Public Service Bargaining Council”** appearing in item 15 to support the contention that individually government departments are employers in their own rights. The argument seems to have been that government departments are employers who are also parties to the Public Service Bargaining Council or to its constituent Chambers. Along this submission Counsel for the first and second appellants submitted that the provisions of sec 5 of the PSLRA fortified the contention that provincial departments are employers in their own right and that, therefore, the respondent’s employer was the provincial department of Health or the Member of the Executive Council for Health and not the State.

[33] Sec 5(1) of the PSLRA reads: **“There is hereby established a Public Service Bargaining Council.”** Sec 5(2) reads: **“The Council [which in terms of the definition of the word “council” in section 1 of the PSLRA means**

the Public Service Bargaining Council] shall consist of a chamber at central level, a chamber for each department at departmental level, and the parties in the various chambers shall be the employer concerned and such employee organizations as are admitted to the relevant chamber in accordance with the provisions of this Act and the constitution of the relevant chamber of the Council” (underlining supplied). The definition of a department has already been given above. Accordingly, it is not necessary to repeat it. Sec 5(3) of the PSLRA goes on to provide that “(a) **party in a chamber of the Council shall be represented by a person authorized thereto by such party or by law.” Subsection (4) then reads: “**The employer’s power in regard to the subject to be negotiated, shall determine in which chamber of the Council negotiations shall take place, and shall also determine the representation of the employer as contemplated in the definition of employer.**”**

[34] It is clear that in each of the different chambers of the Public Service Bargaining Council there would be at least one employer party and one or more employee organisations which have been admitted to that chamber. However, that does not necessarily mean that each employer party is the employer in the true sense. It simply is a representative of the employer. This has to be so for at least two reasons. The one is that the definition of the word “**employer**” in sec 1 of the PSLRA gives only one legal entity as the employer and that is the State. That definition has already been given earlier in this judgment and need not be repeated. Accordingly, whenever the word “**employer**” is used anywhere in the PSLRA, it has to mean the State, which, as employer, may be represented by different representatives at different levels. Furthermore, the provision of ss(4) of sec 5 of the PSLRA makes it clear, after a reference to the idea that there are a number of chambers, that the

employer is the same and it is the State. Subsection (4) makes this clear when towards the end it says “... and shall also determine the representation of the employer as contemplated in the definition of employer.” (underlining supplied).

[35] In my judgement the clarification provided by sec 5(4) of the PSLRA that there is only one employer – who may be represented by different representatives at different levels in different chambers – demonstrates as clearly as it possibly can be demonstrated that there is absolutely no support in the provisions of the PSLRA for the submission made by Counsel for the first and second appellants that the respondent’s employer was the Health Department or the Member of the Executive Council for Health. As the PSLRA makes it clear that the State is the employer of employees in both national government departments as well as in provincial administrations and provincial departments, to the extent that any Act other than the Constitution may provide otherwise, the provisions of the PSLRA would prevail. This is so because in terms of ss(3) read with ss(1) and (2) of sec 212 of the Act the provisions of the PSLRA are to be read and applied as substantive provisions of the Act and this means that sec 210 of the Act applies to them. Sec 210 provides that in the event of a conflict between the provisions of the Act and any other law, excluding the Constitution or any Act expressly amending the Act, the provisions of the Act prevail.

[36] Counsel for the first appellant submitted that a conclusion that the State is the employer of any employee who works for a national or provincial department would create a number of “**insuperable**” difficulties. He submitted that the first one was that sec 2 of the Act provides that the Act does not apply to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service. He also referred to the definition

of “**public service**” in sec 213 of the Act which includes the national departments, provincial departments but also makes the same exclusions made in sec 2 of the Act. He also referred to the fact that item 1 of Schedule 7 of the Act excludes persons employed in the education sector from membership of the public service. He went on to point out that in setting out the composition of the public service, sec 8 of the PSA includes as part of the public service members of the National Defence Force, the National Intelligence Agency and the South African Secret Service. Counsel then submitted that such a conclusion would mean that the State is the employer of the members of the excluded entities and yet, unlike other employees of the State, such members would not be able to utilise item 2(1)(b) of Schedule 7 if they had a dispute relating to promotion. He submitted that that would be unfair discrimination against the employees of such entities which would be in breach of sec 9 of the Constitution. That is the equality provision.

[37] The answer to Counsel’s argument in this regard is that the exclusion of members of the National Defence Force, the National Intelligence Agency and the South African Secret Services is based upon sec 2 of the Act. Accordingly, when the State is defined in sec 213 of the Act as the employer in relation to the public service, this is a reference to the employer of those employees of the State who are not excluded from the application of the Act. The excluded employees may well be adequately provided for in another Act and, if that is so, they could not have any cause for complaint about unfair discrimination on the basis that they are excluded from using item 2(1)(b).

[38] Counsel for the first and second appellants referred to the fact that in 1997 the definition of the word “**employer**” in the PSA which meant “**employer**” as defined in the PSLRA was deleted by an amendment of the PSA. Counsel then submitted that this supported the contention that in the

public service there is a multiplicity of employers and the State is not the employer of employees in national and provincial departments. One answer to this is simply that the word “**employer**” with which this matter is concerned is in the Act and not the PSA and it is clear from both the Act and the PSLRA – the latter being said in terms of sec 212 of the Act to be substantive part of the Act – that the word “**employer**” in item 2(1)(b) of Schedule 7 of the Act means, in relation to the public service, the State as the employer and that in that capacity the State also employs employees such as the respondent who are employed in provincial departments.

[39] In these circumstances I conclude that the respondent’s employer for purposes of item 2(1)(b) was the State. That employer would have continued to be his employer even after appointment to the post of chief director in the Department of Transport if he had been appointed. The first appellant and the Member of the Executive Council for Health, KwaZulu-Natal, are simply representatives of the State.

[40] In the light of the conclusion that I have reached above, the appeal must fail. There is no reason why costs should not follow the result.

[41] In the premises I make the following order:

1. The appeal is dismissed.
2. The first appellant is ordered to pay the respondent’s costs.

Zondo JP

I agree.

Willis JA

I agree.

Davis AJA

Appearances:

For the respondent	:	Mr B. Purdon
Instructed by	:	Brett Purdon Attorneys
For the appellant	:	Adv V. Soni SC
Instructed by	:	The State Attorney
Date of judgement	:	9 September 2004