IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, MTHATHA)

CASE NO: 1481/07

"REPORTABLE"

Date Heard: 25 May 2008
Date Delivered: 23 September 2011

In the matter between:

NONKOSI NGIDI **APPLICANT**

and

MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

TSHEKEDI DISEKO *N.O.* **SECOND RESPONDENT**

APPEALS AUTHORITY-HOME AFFAIRS **THIRD RESPONDENT**

JUDGMENT

***Makaula J*:**

[1] It is most important that I should mention upfront that the delay and the inconvenience caused to the parties by delivering this judgment so late is regretted.

[2] The applicant brought an application seeking the following order:

> "1. Rescinding and setting aside the decisions of Second and Third Respondents that the Applicant was guilty of misconduct.
>
> 2. Rescinding and setting aside the decision of the first Respondent to terminate the services of the Applicant as an employee of the First Respondent.
>
> 3. An order directing the First Respondent to re-instate the Applicant forthwith on terms and conditions not less favourable to those which existed prior to the purported dismissal.
>
> 4. Directing the First Respondent to pay the Applicant the salaries, salary bonuses and other benefits which the Applicant should have been entitled to, but for the purported dismissal.
>
> 5. Directing the First Respondent to pay costs and the Second and Third Respondents to pay costs only in the event of opposing this application.
>
> 6. Granting other alternative relief."

[3] The respondents opposed this application.

A. ***Background:***

[4] The applicant before she was dismissed was in the employ of the first respondent having been employed as a Book Binder in the erstwhile government print in **Mthatha**. Due to rationalization, she was deployed on 5 March 2001 in the **Department of Home Affairs** in **Durban** as a Senior Administrative Clerk, a post she held until her dismissal. The applicant was dismissed subsequent to a disciplinary hearing. She appealed to the appeals authority within the Department. Her appeal was dismissed hence the present application seeking the review of the decision of the first respondent who acted on the recommendations of the second and third respondents.

B. ***Facts:***

[5] The facts leading to the dismissal may be summarized as follows. The applicant while on duty accepted a gift of a cool drink from a customer in contravention of the regulations of first respondent. She was confronted by her senior at work. She admitted having received a tin of cool drink from a customer. She did so by penning a letter to the first respondent a copy of which was annexed to the founding papers. It is not necessary to deal with its contents. This culminated in a disciplinary action against her. A date was set for the hearing and she was represented by a member of **Nehawu** which was her union.

[6] At the hearing through her representative, the applicant pleaded guilty to the charge as it stood. She was convicted and the sanction was her dismissal from the employ of the first respondent. The applicant lodged what she termed a *"domestic appeal"* to the third respondent. The appeal was dismissed and her dismissal was upheld. The applicant then approached this court for an order in terms of paragraph 2 hereof.

[7] The applicant seeks the review on the basis that there were many irregularities in the impugned proceedings, namely:

7.1 She was refused legal representation.

7.2 The presiding officer failed to inform her of the provisions of clause 4.5.3 of the staff code which did not make it an offence to accept a gift which is less than **R350.00**. She was dismissed for having accepted a tin of cool drink which was far less in value.

7.3 The presiding officer further failed to confirm with her the plea of guilty tendered by her union representative.

7.4 The applicant further attacks the decision of the third respondent on the basis that she did not understand that an appeal is only dealt

within the four corners of the record and there is not a need to call further evidence on appeal.

7.5 The third respondent did not deal with the grounds of appeal at all.

7.6 Applicant further bases her application on the provisions of the **Promotion of Administrative Justice Act 3 of 2000** *(PAJA).*

She avers that these factors prejudiced her in the proceedings and resulted in her dismissal.

[8] All the respondents filed a notice to oppose the application though it appears from the affidavit deposed to on behalf of first respondent that second and third respondent do not wish to defend the matter. No notice of withdrawal was subsequently filed by them as promised in the answering affidavit filed on behalf of the first respondent.

[9] The first respondent contends that **PAJA** is not applicable here. The first respondent contends that this is a purely labour dispute between an employer and employee where the latter was attacking the procedural and substantive fairness of the decision of the former. That it is so, so argues the first respondent, means it should be covered by the provisions of the **Sections 188 (1) and 191 of the Labour Relations Act 66 of 1995**. The first respondent further avers that in

terms of certain resolutions between the applicant and it, the matter should have been referred for conciliation and not the route followed by the applicant. Since that was not done by the applicant, this court therefore, lacks jurisdiction to hear the matter.

[10] The respondent refers to the following resolutions which govern the relationship between the applicant and itself.

10.1 Resolution 1/2003: Disciplinary Code and Procedures for the Public Services;

10.2 Resolution 3/2001: Dispute proceedings of council;

10.3 Resolution 2: The Implementation of the Council;

10.4 Resolution 4 of 2004: Adoption of Rules for the Conduct of Proceedings before the General Public Services Sector Bargaining Council which includes the rules governing proceedings before the General Public Services Sector Bargaining Council (GPSSBC);

10.5 Public Services Regulations, 2001 published under Government Notice No. R.1 of 5 January 2001; and

10.6 Resolution No.3 of 1998.

The first respondent correctly argues that in terms of **Resolution 1 of 2003**, an employer or employee may be legally represented by a legal practitioner only if, the employee is a legal practitioner or the representative of the employer is a legal practitioner and a direct supervisor of the employee charged and when the hearing is chaired by an arbitrator. The first respondent submits that since the order sought stems from a pure labour dispute, the dispute should have been referred to the bargaining council for conciliation and arbitration and that the bargaining council which would have jurisdiction would be the **General Public Service Sectoral Bargaining Council** *(GPSSBC)*.

[11] The applicant vehemently denies that these resolutions are anything to go by in support of the contentions by the first respondent. The applicant contends none of the resolutions state that she was not entitled to legal representation and that she should approach the labour court instead of this court. Such an argument is fallacious if one has regard to **Resolution 1 of 2003**. The applicant further submits that the non-mentioning of the value of the drink she accepted and the amount of **R350.00** as a minimum amount which could lead to the contravention, prejudiced her. She argues further that the mere fact that this is a public sector dismissal did not make it to be in the exclusive domain of the labour court.

[12] What is of foremost importance is for me to determine whether this court has jurisdiction to review the decision of the first respondent. The determination of the grounds for review hinges on whether this court has jurisdiction. If it does, then I would have to consider the grounds advanced for reviewing the decision.

[13] I find the following facts not to be in dispute;

13.1 that the applicant was in the employ of the **Department of Home Affairs** *(Department)* and was a member of the **National Educators, Health and Allied Workers Union** *(Nehawu);*

13.2 that there has been a recognition agreement between **Nehawu** and the first respondent;

13.3 that in regulating their relationship, various resolutions were taken which affect the relationship between **Nehawu** and the first respondent. Such resolutions include the ones referred to in paragraph 8 above;

13.4 that the collective bargaining agreement between **Nehawu** and the first respondent is premised on the provisions of the **LRA**;

13.5 that the applicant as a member of **Nehawu** was represented at the hearing by a union representative from **Nehawu**;

13.6 that they were furnished with the charges and applicant pleaded guilty and was found guilty on her plea and a sanction of dismissal was returned by the presiding officer i.e. the second respondent. She appealed to the appeals authority and the appeal was dismissed;

[14] As alluded to, this matter is disposable by determining whether this court has jurisdiction or not. On this aspect, the respondent submitted that neither **Section 33 of the Constitution** nor **PAJA** clothe this court with jurisdiction. In the alternative, the first respondent argues that the dismissal of the applicant did not constitute an administrative act. That the first respondent, an organ of state, exercised a public power did not transform its conduct in dismissing the applicant into an administrative act, so contends the first respondent. According to the first respondent its actions are covered by **Section 23 of the LRA** and subsequently, by the resolutions referred to in paragraph 8.

[15] Applicant vigorously argues that this court has jurisdiction. In a nutshell applicant's reasoning is premised on the following submissions;

15.1 she denies that the *"so-called General Services Sector Bargaining Council (GSSBC)" (sic)* deal with the irregularities complained of;

15.2 that resolution 4 of 2004 did not oust the jurisdiction of this court;

15.3 that resolution 4 of 2004 had not been signed by **Nehawu**;

15.4 that part 2 and 3 of the rules of **GPSSBC** did not make it obligatory that this dispute should be referred for conciliation;

15.5 that the termination of her employment is a concern of labour and employment relationship only. In support thereof, applicant alleges that in the notice calling upon her to appear for the enquiry, the respondent acted *ultra vires* its powers when it refused her the right to legal representation;

15.6 that **PAJA** is applicable.

15.7 that the provisions of **Section 23 of the Constitution** do not deal comprehensively with the issues to be determined because they do not cover the issue of legal representation at the level of the hearing. It only deals with trade unions only.

[16] It is appropriate to refer to **Section 23 of the LRA** which provides;

> "23 Legal Effect of *Collective Agreement*
>
> (1) A collective agreement binds -
>
> (a) the parties to the *collective agreement*;
>
> (b) each party to the *collective agreement* and the members of every other party to the *collective agreement*, in so far as the provisions are applicable between them . . .;
>
> (c) . . ." (My emphasis)

[17] The provisions of the rest of the section are not pertinent to the matter at hand. As already stated in the preceding paragraphs, it is clear beyond doubt that the applicant is a member of **Nehawu** hence she was represented as such both at the hearing and on appeal. In fact it is not even her case that she is not. The collective bargaining agreement was signed and endorsed by **Nehawu** and the first respondent and was in force at the time of her dismissal. The collective bargaining agreement binds both the employer and trade unions and their members, which is the first respondent and the applicant herein. The agreement regulates their relationship and deal with the dispute resolution mechanisms and the conduct of disciplinary enquiries. In particular **Resolution 2 of 2000** provides as follows;

> "2. All disputes that arise in this sector:

2.1 between the trade unions and state *(sic)* as employer parties who fall within the registered scope of the GPSSBC; and

2.2 the employees and the state, as employer that fall within the registered scope of the GPSSBC shall be resolved in terms of the dispute resolution procedures set out in the constitution of the council." (My underlining)

[18] The agreement, contrary to what the applicant suggests in her founding affidavit, was signed by **Nehawu's** representative i.e. **Mr Monwabisi Jaxa** on 7 July 2000. **Resolution 4 of 2000** deals with the adoption of rules for the conduct of proceedings before the **GPSSBC**. This resolution was passed in fulfillment of paragraph **222 of the Constitution of Council** referred to in paragraph 2.2 of **Resolution 2 of 2000** referred to above. It gives credence to the reality that the **GPSSBC** is an accredited governing body of the **CCMA** to perform dispute resolution functions. **Part 2 and 3 of Resolution 4 of 2004** deals with the procedure to be followed when a dispute such as the present one arises between the parties. In terms thereof, the dispute has to be referred for conciliation and arbitration if it remains unresolved. The applicant admits, this, but insists that there is nothing that precludes her from bringing this application based on **PAJA** before this court. I disagree with her basing that on the provisions of the resolution as dealt with above.

[19] **Mr Noxaka**, for the applicant, correctly in my view, argued that this court has jurisdiction founded on **PAJA**. He based his argument in the decision in ***Fredericks & Others v MEC for Education & Training Eastern Cape &***

Others[1]***.*** The debate about concurrent jurisdiction between the Labour Court and the High Court has been settled. In ***Gcaba v Minister for Safety & Security***[2], **Van Der Westhuizen J** held as follows:

> "[71] Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Ch 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as employer and the application of any law for the administration of which the minister is responsible.[111] The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, s 157(2) has brought employment and labour-relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.[112]

[72] Therefore, s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s 157(2)*(a), (b)* and *(c).*

> [73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Courts, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If

[1] 2002 (2) BCLR 113 CC
[2] 2010 (1) SA 238 paras 71-73

> only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies."

[20] **Mr Noxaka** further argued that *"the complaint in this matter is not solely a labour matter because it also involves other questions."* He tabulated those to be the following:

19.1 The third respondent failed to consider the appeal that was placed before him;

20.2 Failure to allow her to have legal representation during the disciplinary hearing which is a right conferred by the constitution relying on paragraph 33 of the decision in ***Fredericks & Others*** referred to above.

20.3 **Mr Noxaka** submitted that the conduct of terminating the employment contract constitutes an administrative action and therefore it is reviewable in terms of **PAJA**.

[21] **Ms Da Silva,** counsel for first respondent, correctly submitted that **Section 33 of the Constitution** confers a right to administrative action that is lawful, reasonable and procedurally fair of which **PAJA** gives effect to.

[22] **Section 1 of PAJA** defines an administrative action as follows:

> '' **'administrative action'** means any decision taken, or any failure to take a decision, by –
>
> (a) an organ of state, when -
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect, . . ."

[23] It is common cause that the first respondent is an organ of state and that the second respondent was acting under the auspices of the first respondent. In the instant matter, the applicant and the first respondent entered into a contract of employment which is basically regulated by the **LRA** and mechanism provided therein such as the collective bargaining agreement referred to.

[24] It is apparent that when the first respondent exercised the power of terminating the employment contract basing its decision on the outcome of the misconduct enquiry, it was not exercising a power in terms of the Constitution or

a Provincial Constitution or public power or the performance of a public function in terms of any legislation as required by **PAJA**.

[25] **Section 33 (1) of the Constitution** concerns itself with the review of acts which are by nature administrative. I agree with the submission by **Ms Da Silva**, that the focus of the enquiry as to whether conduct constitutes administrative action, is not dependent on the position which the functionary occupies but rather on the nature of the power being exercised. In ***President of the RSA & Others v South African Rugby Football Union & Others***[3], the court held that:

> ". . . the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. *What matters is not so much the functionary as the function.* The question is whether the *task itself is administrative or not."*

[26] Reliance by **Mr Noxaka** on the ***Chirwa*** judgment in this aspect is misplaced. In ***J P Paul Kriel v The Legal Aid Board[4],*** **Mhlantla JA *et* Leach AJA,** as he then was, held as follows:

> "The question whether an unfair dismissal in the public sector amounts to administrative action has been settled by the Constitutional Court in *Chirwa v Transnet Ltd and others[4].* The Constitutional Court held that public servants now enjoy the same protection afforded employees in the private sector under the LRA. The court further held that a public service employee could not have two causes of action, one under the LRA and the other under PAJA, and that the decision of an organ of state to dismiss an employee is not an administrative act but involves the exercise of a contractual power."

[3] 2000 (1) SA 1 (CC) at para 141
[4] (138/08) [2009] ZASCA 76 (1 June 2009) para 13

[27] At paragraph 15 the learned Judge further held as follows;

> "The decision in *Chirwa* led to this court, in circumstances not dissimilar to the present, holding in *Transman (Pty) Ltd v Dick and Another*[7] that it could not review a termination of an employee's employment as it did not constitute administrative action. A similar conclusion was reached in *Makambi v MEC for Education, Eastern Cape.*[8]"

[28] In the matter of ***Transman (Pty) Ltd v Dick and Another***[5]**, Jafta JA,** as he then was, dealing with the same issue held as follows;

> "In *Chirwa v Transnet Ltd and Others*[6] the Constitutional Court held that public servants can no longer challenge their dismissals by invoking administrative review procedures because they now enjoy the same protection afforded employees in the private sector under the Labour Relations Act."

[29] The learned Judge dealing with whether the review application was competent or not, went on in paragraph 19 to hold that;

> "The answer to this question lies in whether the chairperson's verdict and the termination of employment constitute decisions which are reviewable in administrative law. On the authority in *Chirwa* we know that such decisions cannot be reviewed either under PAJA or s 33 of the Constitution."

[30] I further agree with the submissions made by **Ms Da Silva** that the subject matter of the power involved in this matter is the termination of the employment contract due to misconduct by the applicant based on the employment contract

[5] [2009] 3 ALLSA 183 (SCA) at para 17; 2009 (4) SA 22 (SCA) at para 17.

between her and the first respondent. The act complained of does not involve the implementation of legislation which constitutes an administrative action.

[31] The following passage by **Ngcobo J** in ***Chirwa v Transnet and Another***[6], succinctly deals with the issues at play in this matter;

> "[143] Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under section 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognizes that employment and labour relations and administrative action are two different areas of laws. It is true they may share some characteristics. Administrative law falls exclusively in the category of public law while labour law has elements of administrative law, procedural law, private and commercial law.
>
> [144] The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement. It deals with labour and employment relations separately. This is dealt with in section 23 under the heading "Labour Relations". In particular, section 23(1) guarantees to '[e]veryone . . . the right to fair labour practices." The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices. To this extent, section 23 of the Constitution guarantees the right of every employee and every employer to form and join a trade union or an employers' organization, as the case may be.
>
> [145] Nor is there anything, either in the language of section 23 or the context in which that section occurs, to support the proposition that the resolution of labour and employment disputes in the public sector should be regulated differently from disputes in the private sector. On the contrary, section 23 contemplates that employees regardless of the sector in

[6] *Supra* at para [143] – [150]

which they are employed will be governed by it. The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as in the private sector, namely, through collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action. It is apparent from the Public Administration provisions of the Constitution that employment relations in the public service are governed by fair employment practices.

[146] Section 195 which sets out the basic values and principles governing public administration, includes as part of those values and principles, "employment and personnel management practices based on . . . fairness". These provisions contemplate fair employment practices. In addition, one of the powers and functions of the Public Service Commission is "to give directions aimed at ensuring that personnel procedures relating to . . . dismissals comply with [fair employment practices]". This flows from the requirement that dismissals in the public service must comply with the values set out in section 195(1). These provisions echo the right to fair labour practices in section 23(1). And finally, section 197(2) provides that the terms and conditions of employment in the Public Service must be regulated by national legislation.

[147] These provisions must be understood in the light of section 23 of the Constitution which deals with labour relations, and in particular, section 23(1) which guarantees to everyone the right to fair labour practices. Section 197(2) does not detract from this. It must be read as complementing and supplementing section 23 in affording employees protection. Indeed, the LRA, which was enacted to give effect to section 23 of the Constitution, and the Public Service Act, 1994, which was enacted to give effect to section 197(2) of the Constitution, complement and supplement one another. By its own terms, the LRA governs all employees, including those in the public sector except those specifically excluded. For its part, the Public Service Act which governs, among other things, the "terms and conditions of employment" expressly provides that the power to discharge an officer or employee "shall be

exercised with due observance of the applicable provisions of the Labour Relations Act, 1995".

[148] As pointed out earlier, the line of cases which hold the power to dismiss amounts to administrative actions rely on *Zenzile.* This case and its progeny must be understood in the light of our history. Historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed. Since the advent of the new constitutional order, all that has changed. Section 23 of the Constitution guarantees to every employee, including public sector employees, the right to fair labour practices. The LRA, the Employment Equity Act, 1998, and the Basic Conditions of Employment Act, 1997, have codified labour and employment rights. The purpose of the LRA and the Basic Conditions of Employment Act is to give effect to and regulate the fundamental right to fair labour practices conferred by section 23 of the Constitution. Both the LRA and the Basic Conditions of Employment Act, were enacted to give effect to section 23, now govern the public sector employees, except those who are specifically excluded from its provisions. Labour and employment rights such as the right to a fair hearing, substantive fairness and remedies for non-compliance are now codified in the LRA. It is no longer necessary therefore to treat public sector employees differently and subject them to the protection of administrative law.

[149] In my judgment labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes

of action, one flowing from the LRA and another flowing from the Constitution and PAJA.

[150] I conclude that the decision by Transnet to terminate the applicant's contract of employment did not constitute administrative action under section 33 of the Constitution. This conclusion renders it unnecessary to decide whether PAJA applies."

Consequently I make the following order:

1. The application is dismissed with costs.

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M MAKAULA

JUDGE OF THE HIGH COURT

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