REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JA91/09

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA obo P W J DE BRUYN	**Appellant**
and	
MINISTER OF SAFETY AND SECURITY	**First Respondent**
NATIONAL COMMISSIONER SOUTH AFRICAN POLICE SERVICE	**Second Respondent**

Heard: **11 November 2010**

Decided: **15 May 2012**

Summary: **The labour court will not entertain an application, in terms of s 158(1)(h) of the LRA, to review "any act performed by the State in its capacity as employer" as a matter of course. Other elements of the system of dispute resolution which the LRA has put in place may restrict or limit recourse to review and also other applicable statutes. Section 157(5) of the LRA is**

applicable to a dispute about incapacity leave and such a dispute must be resolved through arbitration.

JUDGMENT

THE COURT

Introduction

[1] This is an appeal against the judgment and order of the Labour Court (Molahlehi, J) which dismissed the review application brought by the appellant for lack of jurisdiction on the part of the Labour Court.

The parties

[2] The appellant, ("PSA"), acts on behalf of its member PWJ de Bruyn ("De Bruyn").

[3] The respondents are the Minister of Safety and Security of the Republic of South Africa and the National Commissioner of the South African Police Service ("SAPS") respectively.

Factual Background

[5] De Bruyn has been employed by SAPS since 18 April 1980. At all material times he was employed as a senior superintendent in the Polokwane area, Limpopo Province. He was at the relevant time the section head in personnel services.

[6] He was booked off sick from 19 July 2004 on the grounds of major depression. Pursuant to an instruction contained in a letter dated 3 March 2006 from the SAPS Divisional Commissioner Personnel: Service terminations and behaviour management, he resumed duties on 20 March 2006 as Section Head: In-service Training: Skills Development Facilitator and Administration.

[7] On 28 February 2005, De Bruyn submitted an application for retirement on the grounds of ill health together with supporting documents. He had also submitted applications for temporary incapacity leave for various periods from September to December 2004 and from January to May and August to November 2005. According to the appellant, De Bruyn submitted further applications for incapacity leave after August 2005.

[8] With regard to the ill-health retirement application, De Bruyn was advised by SAPS in a letter dated 3 March 2006, *inter alia*, that:

> '[t]he findings and recommendations of the Health Risk Manager as well as reports from the treating doctor have been considered. It was decided that the employee must resume duties in an alternative post on or before 2006-03-13 which is supportive and best suit his health status.'

and that

> '[t]he period of absence, if any, as well as the determination thereof will be dealt with by Head Office: Leave Management.'

[9] Further, in a letter dated 24 March 2006, the Divisional Commissioner Personnel Service: Service Terminations and Behaviour Management advised that after consideration of the minutes of a board of inquiry, dated 31 March 2005, as well as available information and medical evidence, it was decided that the illness (Post Traumatic Stress Disorder, Major Depression, Acute Stress and Depression) was not regarded as 'an illness: in the performance of his official duties, due to the fact that incidents such as work pressure, personal conflicts between colleagues or between the commander and the subordinate is not regarded as an incident arising from the performance of official duties. The employee must be exposed to an extreme traumatic event or stressor.' The question of the period of leave of absence was to be dealt with by Head office: Leave Management.

[10] In respect of his application for temporary incapacity leave, De Bruyn was advised by the head of personnel services in the Limpopo province in a letter, dated 5 June 2006 that the period 9 September 2004 to 24 February 2005, was approved and the period 25 February 2005 to 19 March 2006

disapproved. According to the respondents, the decision to approve/disapprove the application for temporary incapacity leave was taken on 15 May 2006. It is this decision that forms the subject matter of the dispute between the parties.

[11] On 13 June 2006, De Bruyn addressed a letter to the second respondent in terms of which he sought clarity regarding the approval/disapproval of the application for temporary incapacity leave. He expressed dissatisfaction with the decision.

[12] As the matter remained unresolved, the Head of Personnel Services: Limpopo Province referred the grievance to SAPS head office in Pretoria. The office of Divisional Commissioner Personnel Services handled the matter. A letter, dated 1 August 2006 signed by the Head of the Sub-section: Absenteeism Management, indicated that the second respondent stands by his decision. Further that the period was not approved due to the fact that it was a labour related matter.

[13] De Bruyn was not satisfied with the outcome. He requested that the grievance be referred to internal mediation. It appears that mediation was attempted on 15 September 2006 under Superintendent Mamosebo, the mediator. The outcome was that the second respondent stood by his decision to disapprove the application for temporary incapacity leave for the period 25 February 2005 to 19 March 2006.

[14] De Bruyn was dissatisfied with the outcome. On 12 October, De Bruyn referred the dispute regarding the disapproval of his application for temporary incapacity leave, for the disputed period, to the Safety and Security Sectoral Bargaining Council ("SSSBC"). He characterised the dispute as an unfair labour practice. However, the dispute was not pursued and consequently remained unresolved.

The Review Application

[15] The appellant approached the Labour Court for the review and setting aside of the Commissioner's decision to disapprove the application by De Bruyn for

temporary incapacity leave and the decision to grant him unpaid leave. The appellant also sought an order for costs.

[16] The appellant contends, in its founding affidavit, that De Bruyn is being prejudiced:

> 'because of the period of approximately 1 year between the ill health retirement application and disapproval thereof, which is submitted constituted an unreasonable delay;
>
> by the decision that temporary incapacity leave had been granted for the period 6 September 2004 to 24 February 2005 but not for the period 25 February 2005 to 19 March 2006; and
>
> by the period of approximately 1 year between the medical board decision that his illness was not work related and the communication of that decision to De Bruyn, which is submitted constituted unreasonable delay.'

The appellant also complains that "there is no fair and valid reason for disapproving a portion of the temporary incapacity leave but approving another portion thereof." The appellant characterises the delay as grossly unreasonable, alternatively arbitrary and alternatively unjustifiable.

[17] It submits that the decision to disapprove temporary leave for the period 25 February 2005 to 19 March 2006 and to grant 180 days unpaid leave retrospectively should be reviewed and set aside on the grounds that:

> 'the action was procedurally unfair;
>
> in taking the decision irrelevant considerations were taken into account or relevant considerations were ignored;
>
> the action/decision was taken arbitrarily or capriciously;
>
> the decision was grossly unreasonable; and/or
>
> the decision is unconstitutional in that it constitutes an unfair labour practice.'

[18] The respondents, in opposing the application, raised two points *in limine,* i.e. that the Labour Court *a quo* did not have jurisdiction to hear the matter in

terms of section 24 of the Labour Relation Act 66 of 1995 (the LRA); and that the application was premature as the statutory and agreed remedies had not been exhausted. In its replying affidavit the appellant denied that the Labour Court did not have the necessary jurisdiction to hear the matter. It contended that the matter did not concern the interpretation or application of a collective agreement; that the matter was not based on an alleged entitlement to a period of temporary incapacity leave but that the dispute related to administrative action that is unreasonable or otherwise unlawful. The appellant accepts that the respondents have a measure of discretion, because the collective agreement states that paid temporary disability leave 'may be granted'. But, it contended that 'in taking the decision to the detriment of De Bruyn the respondents took unreasonably long and acted procedurally unfairly'. Further, that the application was based on administrative review as contemplated in section 158(1)(h) of the LRA.

The Labour Court decision

[20] After analysing the evidence placed before it and considering the relevant authorities, the Labour Court upheld the jurisdictional point and dismissed the application. The court concluded:

> 'In the light of the above discussion, in my view, leave, including incapacity and temporary incapacity leave at the respondents' workplace is governed by the provisions of resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement.
>
> The appropriate forum to challenge the decision of the second respondent refusing the employee special paid leave or temporary incapacity leave is not administrative action or the exercise of a public power as contemplated PAJA. In refusing to grant the employee special leave or temporary incapacity leave the [second] respondent was exercising a discretion provided for and governed by resolution 5 of the PSCBC. It is therefore my view that the cause of action for the applicant rests in the application and/or interpretation of the provisions of the PSCBC resolution. The appropriate forum for that is the PSCBC, through its dispute resolution mechanisms. Thus the employee's application stands to be dismissed for that reason.'

The Appeal

[21] It was argued on behalf of the appellant that the Labour Court has jurisdiction to hear the matter by virtue of the provisions of section 158(1)(h). Counsel for the appellant took issue with the Labour Court's reasoning and the conclusion that the appellant's cause of action rests in the provisions of the PSCBC resolution. He submitted that the collective agreement does not provide a remedy and that even if it is accepted that it does, it does not affect or exclude the jurisdiction of the Labour Court in that the appellant is not pursuing the claim in terms of the collective agreement but via a review based on section 158(1)(h) of the LRA.

[22] It was argued further that an employee is entitled to fair labour practices as set out in section 23 of the Constitution of the Republic of South Africa Act of 1996 ("the Constitution"), that the right to fair labour practices is enforceable under the provisions of section 158(1)(h), and that the claim is not based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Nor, so it is contended, is the relief claimed premised on the provisions of PAJA and is in that sense distinguishable and further that the rule that an applicant in a review should first exhaust his internal remedies does not apply as the appellant has a choice between remedies as in the present matter, on the assumption that the collective agreement provides a remedy. Reliance was placed, *inter alia,* on the decision in *Makhanya v The University of Zululand.*[1]

[23] Counsel for the respondents submitted that the conclusion by the Labour Court, regarding its lack of jurisdiction, was correct, having regard to the cause of action and that the grounds of review set out in the founding affidavit are premised on the provisions of section 6 of PAJA. It was further argued that in view of the fact that the decision under consideration is not administrative action as envisaged in PAJA the Labour Court was not clothed with the necessary jurisdiction to hear the review application. Counsel relied,

[1] 2010 (1) SA 62 SCA.

inter alia, on the decisions in *Chirwa v Transnet Ltd*[2] and *Gcaba v Minister for Safety and Security and Others*.[3]

Evaluation

[24] The crux of the appeal before us is whether section 158(1)(h) of the LRA confers jurisdiction on the Labour Court to hear an application for the review of the decision of the second respondent not to grant De Bruyn temporary incapacity leave for the disputed period.

[25] Section 158(1)(h) provides:

> '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.
>
> ...'

[26] The review powers entrusted to the Labour Court in terms of section 158(1)(h) must be understood in the context when this section (indeed the entire LRA) was enacted. At that time, the employment of public servants was regulated by the common law contract of employment, the unfair labour practice jurisdiction of the industrial court in terms of the Labour Relations Act 28 of 1956, other statutes and by means of common law judicial review.

[27] Public servants were in a privileged position with regard to other employees as their choice of remedies extended to judicial review. Section 158(1)(h) was intended to preserve the common law judicial review remedy of public servants. The permissible grounds of common law review are well known.

[28] The supposition, that public servants had an extra string to their bow in the form of judicial review of administrative action i.e. acts and omissions by the state *vis-à-vis* public servants, evaporated when the Constitutional Court in

[2] 2008 (4) SA 367 CC.
[3] 2010 (1) SA 238 CC.

Chirwa v Transnet Ltd and Others,[4] held that the dismissal of a public servant was not 'an administrative act' as defined in PAJA and therefore not capable of judicial review in terms of that Act.[5] Any uncertainty regarding the interpretation of the *Chirwa* judgment was removed in the subsequent decision in *Gcaba v Minister for Safety and Security and Others*.[6] The result is that a public servant is confined to the other remedies available to him or her.

[29] One of the effects of *Chirwa* is that a dismissal is not to be regarded as an 'administrative act' by the State but merely as the act of the State in its capacity as an employer. This decision brought us to the situation where the pre-*Chirwa* substratum of section 158(1)(h) fell away, although there may conceivably still be employer acts which are almost indistinguishable from administrative acts. The post-*Chirwa* meaning of section 158(1)(h) has received the attention of the Labour Court in *De Villiers v Head of Department: Education, Western Cape Province*,[7] *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others,*[8] (and *National Commissioner of Police and Another v Harri NO and Others*.[9]

[30] But it does not follow that because the remedy of judicial review may still exist for public servants that the labour court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course. Recourse to review proceedings, in terms of section 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place and also other applicable statutes.

[31] One limitation or restriction is relevant to the case at hand. The LRA may oust the section 158(1)(h) review jurisdiction of the Labour Court. Section 157(5) of the LRA, as the court *a quo* appreciated, provides that if the LRA requires an unresolved dispute to be resolved through arbitration, the Labour Court does not have jurisdiction to adjudicate the dispute. Notwithstanding this, the

[4] (2008) 29 ILJ 73 (CC).
[5] *Chirwa* at para 73.
[6] (2010) 31 ILJ 296 (CC) at paras 67 and 68.
[7] (2010) 31 ILJ 1377 (LC).
[8] 2010) 31 ILJ 1238 (LC).
[9] [2010] ZALC 176 (LC) (19 November 2010).

Labour Court could acquire jurisdiction in terms of section 158(2) of the LRA but such a situation does not arise in this case.

[32] On a careful analysis of the facts in the present case the appellant's claim, to the effect that an employee's right to a fair labour practice was allegedly infringed by the second respondent's conduct in refusing to grant De Bruyn temporary incapacity leave for the contended period is derived from the LRA. It asserts that in terms of section 158(1)(h) of the LRA the Labour Court may review such decision, or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. This is the case that the court *a quo* had to deal with it.

[33] The appellant's complaint clearly concerns the denial of incapacity leave. The alleged right the appellant seeks to assert derives from the provisions of the PSCBC resolution as the Labour Court, correctly in our view, found. The resolution deals with leave of absence and what steps an employee should take in case of a dispute arising regarding attendant matters. There is no doubt that the aspect of leave of absence is an issue falling squarely under the PSCBC resolution. In deciding whether the relief sought ought to be granted the court *a quo* had to have regard to the provisions of the resolution.

[34] Therefore, the court *a quo* (although of the opinion that the application before it was in terms of section 158(1)(g) of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organisation, is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution.

[35] The LRA regulates and provides the regime as well as the mechanism to deal with disputes of this nature. Section 24(1) and (2) of the Act provides that:

'(1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c) must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation and application of a collective agreement any party to the dispute may refer the dispute in writing to the Commission if—

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.'

[36] It follows therefore that where an employee, such as De Bruyn, is dissatisfied with a decision by the employer with regard to the issue of leave of absence, as is the case *in casu*, his remedy lies in the provisions of the resolution.[10] It follows that the appellant is confined to its remedy in terms of section 24 of the LRA and it may not, instead, seek to review the respondent's decision in the Labour Court in terms of section 158(1)(h).[11] It may also be stated that once the dispute resolution mechanisms in terms of the resolution were initiated, as was the case in this matter, the dispute was effectively committed for resolution in terms of section 24 of the LRA. The result is that the abandonment of that process in favour of the review based on section 158(1)(h) was ill conceived and, as we hold in this matter, was also ill fated.

[10] See *Oelofsen and Another v SA Police Service* (2006) 27 ILJ 639 BCA (PSCB Arb).
[11] See: *Chirwa's* case, *supra*; and *Gcaba's* case, *supra*.

Conclusion

[37] In the circumstances, the appeal cannot be upheld.

[38] There is no reason, in our opinion, why the costs should not follow the event.

Order

[39] Accordingly, the appeal is dismissed with costs.

THE COURT

APPEARANCES:

FOR THE APPELLANT: Adv H van der Merwe

Instructed by Martins Weir-smith Inc

FOR THE RESPONDENT: Adv N H Maenetja

Instructed by Bowman Gilfillian Inc