IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 11/2015

In the Matter between:

SIBONGILE ZUNGU **Appellant**

and

PREMIER, PROVINCE OF KWAZULU-NATAL **First Respondent**

MEC, DEPARTMENT OF HEALTH, KWAZULU-NATAL **Second Respondent**

Heard: **12 May 2016**

Delivered: **16 May 2017**

Summary: Unfair dismissal – reasonable expectation that a fixed term contract would be renewed - employee seeking to compel a renewal of her contract based on a legitimate expectation premised on a recommendation by a selection panel – employee contending that the refusal to heed to the recommendation of the selection panel amounts to illegality clothing the Labour Court with jurisdiction –

Held that this dispute is squarely within the realm of section 186 (1)(b) of the LRA - characterising the dispute as having other characteristics too, does not dispel the validity of the finding that it fell within the purview of section 186(1)(b) - where a clear characterisation is possible, it is not sensible to force a different characterisation to facilitate forum shopping - a claim that a fixed term contract be renewed on the grounds of a legitimate expectation is a species of

"dismissal", as defined in section 186 and is further regulated by section 191 of the LRA to be within the exclusive jurisdiction of the CCMA. Labour Court's judgment upheld and appeal dismissed with costs.

Coram: Tlaletsi AJP and Sutherland JA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This is an appeal against the order of the Labour Court given on 21 April 2015 dismissing the appellant's urgent application for a final interdict and ancillary relief.

[2] The applicant, Dr Sibongile Zungu, had been head of Department (HOD) of the Department of Health in KwaZulu-Natal (KZN) in terms of a fixed five-year contract from 1 August 2009 to 31 July 2014. Short-term extensions were made prolonging her term of office, the last of which was to expire on 31 March 2015. The day before, when it had become apparent to her there would be no further extension or renewal, the urgent application was launched, Indeed, on 1 April 2014, the Premier wrote to the appellant to say he would not renew it. The aim of the application was to compel a renewal.

[3] The order and the *ex tempore* judgment of the Labour court did not address the "substantive issues" raised in the application and the dismissal was premised on what may be called two "procedural grounds". First, in logical order, it was held that the Labour Court had no jurisdiction to hear the application because the nature of the dispute between the appellant and the respondents was such that adjudication about such a dispute was within the exclusive jurisdiction of the

Commission for Conciliation, Mediation and Arbitration (CCMA), and second, in any event, no case was made out for urgency nor was a case made out for final interdictory relief. Had the judgment been confined to urgency it could have been brought again and that aspect is now irrelevant.

[4] The two critical issues for decision on appeal can, therefore, be only (1) whether the Labour Court was wrong to hold it had no jurisdiction to entertain the application, and if it was wrong on that point, (2) was a proper case made out for an interdict.[1]

The Relief sought in the application

[5] The pertinent portion of the notice of motion read thus:

(i) That the respondents be interdicted from making any appointment of HOD for the department of Health, other than the appellant, including making any acting appointment in that position;

(ii) Directing the respondents to appoint the appellant as HOD of Transport (sic) in KZN pursuant to the recommendation of the independent selection panel recommending the appointment of the appellant as the HOD for the department of Health in KZN;

(iii) Declaring that the first respondent [ie, the Premier] is not entitled to take into account the provisional report prepared by the investigating team concerning the appellant.[2]

[6] In short, the appellant sought to be appointed as HOD to the exclusion of any other potential candidate. The prayer in (iii) is superfluous, as the other two prayers allow no room for any degree of discretion by the Premier. Nor is the case advanced that, in the alternative, were the Premier entitled to ignore the panel's recommendation, he would also be obliged to ignore the investigation

[1] The requirements are a clear right, imminent irreparable harm and no alternative effective remedy. Webster v Mitchell 1948(1) Sa 1186 (W).
[2] NEHAWU had lodged complaints against the appellant which the Premier referred for investigation.

report into allegations against the appellant. Although it became plain that the Premier was ostensibly swayed by the outcome of that investigation, that influence is irrelevant if he was under the obligation, as alleged.

[7] The legal foundation entitling the appellant to such relief is not expressed in the prayers themselves, and notably, no declarator is sought as to the appellant's rights or identifying exactly what those claimed rights might be. The allegations relied on to assert a right to a renewal of appointment were set out in her affidavits.

What is the right relied upon by the appellant?

[8] The applicant's "cause of action" (as persisted with in argument) can be summarised as follows:

8.1. A selection panel recommended her for a renewed appointment for five years which decision binds the premier.

8.2. The appellant has a legitimate expectation of a renewal of her appointment.

[9] It is not readily apparent from the founding affidavit whether the claim of legitimate expectation is premised on the selection panel's recommendation or is self-standing. If it were to be premised on the panel recommendation it would be superfluous. If it is self-standing, it would require substantiation. No apparent substantiation appears from the founding affidavit. Eventually, on appeal, the contentions of the appellant made it plain that the two notions were indeed conflated.

[10] In a supplementary founding affidavit, the appellant fleshed out the basis for the bald allegation in the founding affidavit that the Premier was bound by the selection panel's recommendation. She invoked regulation D5 – D8 of the Public Service Regulations; ie-

'D.5 The selection committee shall make a recommendation on the suitability of a candidate after considering only-

(a) Information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;

(b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;

(c) the needs of the department for developing human resources;

(d) the representativeness of the component where the post is located; and

(e) the department's affirmative action programme.

D.6 A selection committee shall record the reasons for its decision with reference to the criteria mentioned in regulation VII D.5.

D.7 When an executing authority does not approve a recommendation of a selection committee. She or he shall record the reasons for her or his decision in writing.

D.8 Before making a decision on an appointment or the filling of a post, an executing authority shall-

(a) satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims or his application for the post have been verified; and

(b) record in writing that verification.'[3]

[11] The appellant thereupon stated in paragraphs 17- 19 why she claims that her renewal is a *fait accompli* in which the Premier must acquiesce.

[3] The requirement to give reasons for not accepting a recommendation was met when on 8 April 2015, the Premier gave written reasons to the applicant. The intrinsic merits or demerits of the reasons are not pertinent to the appeal.

> '17. Moreover, it is now manifest that the Premier seeks to abandon the process of investigations subject to which my recommended appointment was premised.
>
> 18. Quite apart from the fact that the conditionality of my appointment was always unlawful as asserted in my previous founding affidavit, it has now become abundantly clear that the Premier places no great store thereupon.
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> 19. Accordingly, the Premier is acting unlawfully in breach of the regulations quoted above. But more importantly, his conduct is in any event susceptible to review by this Court under Promotion of Administrative Justice Act, 2000 ("PAJA"), in particular the provisions of Section 6(2)(d) in that his action is materially influenced by an error, *alternatively* Section 6(2)(e) in that his action was taken for a reason not authorised by the empowering provisions; *further alternatively,* Section 6(2)(e)(ii) in that his actions was influenced by an ulterior purpose or motive, *further alternatively* his action was taken in bad faith and/or arbitrarily and/or capriciously as envisaged in Section 6(2)(e)(v) and (vi) and *further alternatively* because his action is otherwise unlawful and unconstitutional as envisaged in Section 6(2)(i)."

[12] The cogency of these contentions as regards the idea that the Premier was bound by the recommendation is not apparent, but the merits of that controversy are not germane to the decision of the Labour Court.

[13] Lastly, in her replying affidavit, responding to the Premier's answering affidavit asserting that the Premier is vested with a discretion to adopt the selection panel's recommendations, and is not bound by them, the appellant repeats the proposition that the Premier's decision not to adopt the selection panel's recommendation was irrational and is susceptible to review in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[14] As is apparent from this traverse of the allegations, the appellant's case shifted over time.

[15] On appeal, the case advanced on behalf of the appellant as to why the Labour Court's judgment was in error was that the appellant's cause of action is the Premier's unlawful conduct and not, as found by the Labour Court, a dispute contemplated by Section 186(1)(b) of the Labour Relations Act 66 of 1995;[4] ie a refusal to renew a fixed term contract. In this regard, it was contended that the legitimate expectation of a renewal was indeed squarely based on the selection panel's recommendation which bound the Premier, whose decision to take into account the investigation report, which arose outside of the panel's assessments, was unlawful. This scenario, it is argued, cannot support the notion that there was a "dismissal" dispute reserved for the attention of the CCMA, rather it is all about "legality" of the Premier's conduct.

[16] The Respondents, on appeal, predictably, challenged the propriety of the elaborated case raised in the replying affidavit about the Premier's "irrational" decision, as the initial cause of action was different and that therefore these averments constituted a new case.[5] The objection is well founded. Further, it was argued that no case was made out to substantiate the contention that Premier was bound by a selection panel recommendation because the public service regulations properly interpreted do not support that notion, a conclusion, in my view, manifestly obvious from the text, but not a finding that it is necessary for this court to make. Lastly, it was argued that the requirements for a legitimate expectation were not demonstrated, again a point well taken.[6]

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[4] Section 186(1)(b) provides: (1) 'Dismissal' means that-

(a) ….

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

(i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

[5] See: eg, *Arrow Altech Distribution (Pty) Ltd v Byrne* (2008) 29 ILJ 1391 (D) at [50]'

[6] See: *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) at:

"[27] A legitimate expectation 'arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken'.

Evaluation of the arguments

[17] Perhaps the point of departure ought to be the question whether the Labour Court is required to assess what character the dispute manifests to determine its own jurisdiction. It is not argued that it may not do so, and the decision in *Gcaba v Minister of Safety and Security*[7] is dispositive of that proposition:

> 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While *the pleadings - including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is*, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the

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De Smith, Woolf and Jowell Judicial Review of Administrative Action 5th ed at 417, para 8-037. Such an expectation may arise, 'either from an express promise given on or behalf of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue'.
Council of Civil Service Unions v Minister for Civil Service [1985] AC 374 (HL) ([1984] 3 All ER 935) at 401B - C; *Administrator, Transvaal, and Others v Traub, and Others* 1989 (4) SA 731 (A) at 756I; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) in para [212].
[28] The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: Administrator, Transvaal v Traub (supra at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j. (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G."

[7] 2010 (1) SA 238 (CC) at para 75.

> pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.' (Emphasis supplied) [Footnote omitted]

[18] Accordingly, the first exercise in any proceedings is to read, as in this case, the allegations in the affidavits, and make the determination. It is not, primarily, the form of relief sought, but rather the necessary averments to demonstrate the "cause of action" that determines the "character" of the dispute, although the form of the relief, if it is consonant with the cause of action, will point in the same direction.

[19] In this case, the papers disclose that an employee whose term of employment was about to expire, sought to compel a renewal. The right to renewal was articulated as a legitimate expectation premised on a recommendation by a selection panel, allegedly binding upon the executive authority vested with the power to make the decision to appoint. In my view, this dispute is squarely within the realm of section 186 (1)(b) of the LRA, as a reading of that text plainly demonstrates.

[20] It is sophistry to try to conceptualise the dispute as something else. Even if it is possible to characterise the dispute as having other characteristics too, such additional attributes do not dispel the validity of the finding that it fell within the purview of section 186(1)(b). In a judicial system where jurisdiction over causes of action is divided among several fora, it is no surprise that the imposition of what is, for policy reasons, an artificial ring-fencing of types of disputes, will from time to time result in a rubbing-up against the edges. However, where a clear characterisation is possible, it is not sensible to force a different characterisation to facilitate forum shopping. There can be no serious doubt that the legislation contemplates and requires a claim that a fixed term contract be renewed on the grounds of a legitimate expectation is a species of "dismissal", as defined in

section 186 and is further regulated by section 191 of the LRA to be within the exclusive jurisdiction of the CCMA.

[21] As to the scattered contentions advanced on behalf of the appellant, it can be noted that (1) the argument about the applicability of PAJA is incorrect,[8] given the "pure" labour relations dimension of the dispute and (2) whether the Premier is indeed bound to the selection panel's recommendations, is not a point upon which this Court needs pronounce; a dispute about that issue being subsumed by the broader dispute about a non-renewal of a fixed term contract.

Conclusions

[22] Accordingly, the decision of the Labour Court to disavow jurisdiction was correct.[9] Moreover, it is manifest that proof of a clear right necessary for a final interdict is absent.

[23] The appeal must be dismissed. The Labour Court ordered costs against the appellant, and it is appropriate that the costs of appeal also be payable by the appellant.

The Delay in delivery of this Judgment

[24] This matter was heard on 12 May 2016 and judgment had been delayed for almost a year. This delay is regretted and has been occasioned by the ill health of Ndlovu JA who passed away before the judgment could be delivered. We apologise to the litigants for the delay.

The Order

The appeal is dismissed with costs.

[8] See: *Chirwa v Transnet* 2008 (4) SA 367 (CC).
[9] See: eg, *National Union of Metal workers of SA v Intervalve (Pty) Ltd and Others* [2015] 3 BLLR 305 (CC); *De Beer v Minister of Safety and Security and Another* (2013) 34 ILJ 3083 (LAC).

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Sutherland JA

Sutherland JA (with whom Tlaletsi AJP concurs)

APPEARANCES:

FOR THE APPELLANT:	Adv T G Madonsela SC
	Instructed by Strauss Daly.
FOR THE RESPONDENT:	Adv G O Van Niekerk SC, with him Adv I J Patel,
	Instructed by the State Attorney, Durban.