IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – BHISHO

REPOTABLE/NOT REPORTABLE

Case No: 755/2021

In the matter between:

BUKIWE EUDORIA GQOKOMA Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCIAL GOVERNMENT First Respondent

MARIA BESTER Second Respondent

JUDGMENT

DA SILVA AJ:

A. **Relief sought**

[1] In this application, the applicant seeks an order, *inter alia*:

1.1 declaring invalid the recommendation dated 25 November 2019 of the chairperson of the interview panel for the appointment of the second respondent to the position of Deputy Principal: Bhisho Primary School;

1.2 declaring the applicant as a successful candidate to the position of Deputy Principal: Bhisho Primary School;

1.3 directing the first respondent (the MEC for Education: Eastern Cape ("the MEC") to do all things necessary to implement the recommendations of the interview panel for the appointment of the applicant to the position of Deputy Principal: Bhisho Primary School; and

1.4 an order of costs.

B. **Applicant's case**

[2] In support of the application, the applicant has averred that she was a master teacher at Bhisho Primary School. Before 11 October 2019, she applied for the advertised post of Deputy Principal: Bhisho Primary School. The applicant was shortlisted and attended the interview together with the other candidates who had been shortlisted. The applicant alleges that she was the highest scoring candidate. The panellists recommended that the applicant be appointed to the position of Deputy Principal: Bhisho Primary School.

[3] However, the Principal of the school, who was not to be involved in the selection process, and the chairperson of the interview panel favoured the second respondent, who obtained lesser points than the applicant. This culminated in the chairperson of the interview panel signing a different recommendation letter, recommending that the second respondent be appointed.

[4] The applicant contends that the chairperson's recommendation of the second respondent is without a legal or sound basis, is fraudulent and thus unlawful and illegal. According to the applicant, the chairperson did not have the power to unilaterally veto the majority decision of the panel and substitute same with his own.

[5] The court asked Mr *Poswa*, who appeared for the applicant, to identify the cause of action in seeking the declarator. Mr *Poswa's* response was that the applicant's cause of action was based on section 33 of the Constitution and not the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) (PAJA). This much is also evident from paragraph 10 of the replying affidavit where the applicant avers as follows:

> ". . . The cause of action is premised on an allegation of a violation or threatened violation of my right to just administrative action as entrenched in section 33 of the Constitutional of the Republic of South Africa, Act No. 108 0f 1996".

[6] The applicant, in reply, further contends that the recommendation of the chairperson, as adumbrated above, amounts to administrative action that is unlawful, unreasonable and procedurally unfair.

C. **<u>First Respondent's grounds of opposition</u>**

[7] Mr *Malunga*, who appeared for the first respondent, has raised various points *in limine,* namely:

7.1 non-compliance with section 2 of the State Liability Act, 2011 (Act 14 of 2011), in that the applicant ought to have cited the head of the Department of Education: Eastern Cape as he has the power to appoint an educator in terms of the Employment of Educators Act 1998 (Act 76 of 1998; and

7.2 lack of jurisdiction in that the applicant's cause of action is premised on an unfair labour practice.

[8] On the merits, the first respondent contends that during the deliberation from the recruitment process various irregularities arose which culminated in the abandonment of the process without a candidate being embarked for the position. The nature of the irregularity is that the panellists could not agree on the suitable candidate to be appointed.

D. **Application of the law to the facts**

[9] In this matter, I deem it not necessary to deal with the first point *in limine,* i.e. non joinder of the HOD, especially if regard is had to the nature of this judgment. It is trite law that the applicant must stand and fall by her cause of action as articulated in her founding papers. The applicant avers that her cause of action is section 33 of the Constitution. Section 33 provides:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by an administrative action has the right to be given written reasons".

[10] The national legislation that has been enacted to give effect to section 33 of the Constitution is the PAJA. Section 1 of the PAJA defines an administrative decision to mean any decision or any failure to take a decision by an organ of state, when exercising a power in terms of the constitution or exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect.

[11] Thus, in so far as the applicant has premised her cause of action on section 33 of the constitution, the question to be answered is whether the conduct complained of by the applicant was an administrative action.

[12] In *Gcaba v Minister for Safety and Security & Others*[1] Van der Westhuizen, writing for the majority stated:

"64. Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct

[1] [2009] 12 BLLR 1145 (CC), para [64].

implications or consequences for other citizens, it does not constitute administrative action.

65. In this regard the reasoning of Murphy AJ in *SAPU* is persuasive. The distinction drawn in that decision in relation to tender contracting processes and employment seems correct. For purposes of constitutional interpretation, there are material differences between tender processes and employment. One is that the Constitution regulates the employment relationship expressly in section 23, which is does not do for procurement (although section 217(1) of the Constitution does provide that procurement must be fair, equitable, transparent, competitive and cost-effective). Another is that the employment relationship is different from the contractual relationships which underpin procurement. The court concluded that the employment decision at issue in *SAPU* was not administrative action. This does not mean that employees have no protection. Employment is not a bargain of equals, but a relationship of demand. Since the 1980s in South Africa, the Legislature has realised that leaving the regulation of employment purely within the realm of contract law could foster injustice; therefore the relationship is regulated carefully through the LRA. Section 23 is an express constitutional recognition of the special status of employment relationships and the need for legal regulation outside the law of contract.

66. In *Chirwa* Ngcobo J found that the decision to dismiss Ms *Chirwa* did not amount to administrative action. He held that whether an employer is regarded as "public" or "private" cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr *Gcaba* appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr *Gcaba* and has little or no direct consequence for any other citizens.

67. This view is consistent with the judgment of Skweyiya J in *Chirwa,* who did not decide this issue, but indicated a leaning in this direction. It furthermore does not contradict the unanimous judgment of this Court in *Fredericks,* which left the issue open. There was no dispute about whether the decision at the centre of the dispute was administrative action.

68. Accordingly, the failure to promote and appoint the applicant was not administrative action. If his case proceeded in the High Court, he would have been destined to fail for not making out the case with which he approached this Court, namely an application to review what he regarded as administrative action."[2]

[13] In light of the *Gcaba* judgment the decision not to recommend and appoint the applicant, is not an administrative decision. The decision is a quintessential labour related issue that has few or no direct consequences for citizens apart from the applicant herself.

[14] On the issue of jurisdiction, Van der Westhuizen had this to say:

"75. Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, *supra* 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 established 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

[2] See also *NDPP & Another v Tshavhungwa & Another; Tshavhungwa v NDPP* (2010) ILJ 81 (SCA).

> only in another court. If however the pleadings, properly interpreted, established 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".

[15] In view of the above, the applicant has failed to establish that the decisions complained of are "administrative actions". That having been said, the decision not to appoint the applicant is more of a labour related issue which is founded on the provisions of section 185 read with section 186(2)(a) of the Labour Relations Act, 1995 (Act 66 of 1995).[3]

[16] The following order is thus made:

"The application is dismissed with costs".

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AM DA SILVA
Acting Judge of the High Court

Appearances:

Counsel for Applicant:	*Adv SG Poswa* *East London*
Instructed by:	*Messrs Bacela Bukula & Assoc.* *King Williams Town*
Counsel for First Respondent:	*Adv SY Malunga* *East London*
Instructed by:	*Messrs State Attorneys* *c/o Shared Legal Services* *Office of the Premier* *King Williams Town*

[3] "Promotion" was defined in *Mashegoane v University of the North* [1998] 1 BLLR 73 (LC) as being elevated or appointed to a position that carries greater authority and status that the current position an employee is in.

Date heard:	*18 August 2022*
Date delivered:	*27 September 2022*