

SOUTH AFRICA / JUDGMENT

Baloyi v Officer of The Public Prosecutor and Others (84053/19) [2019] ZAGPPHC 993 (12 December 2019) [2019] ZAGPPHC 993

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

84053/19

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 84053/19

12/12/2019

In

the matter between:

LOUISAH

BASANI BALOYI

Applicant

and

THE

OFFICE OF THE PUBLIC PROSECUTOR

First Respondent

BUSISIWE

MKHWEBANE

Second Respondent

THE

CHIEF EXECUTIVE OFFICER

IN

THE OFFICE OF THE PUBLIC

PROTECTOR

OF SOUTH AFRICA

Third Respondent

VUSSY

MAHLANGU

Fourth Respondent

JUDGMENT

TEFFO, J:

Introduction

[1] The applicant brought an urgent application in terms of Rule 6(12) of the Uniform Rules of Court. She sought a declaratory order that the decision to terminate her employment contract is unconstitutional, unlawful, invalid and of no force or effect. She also sought an order directing that the decision to terminate her employment contract is set aside, that she be reinstated to the position of Chief Operations Officer ("COO") and that the Public Protector, the Chief Executive Officer ("CEO") or anyone acting under their authority be prohibited from unlawfully interfering with her duly assigned functions as the COO. She further

sought an order declaring that the second respondent has violated her constitutional obligations as envisaged in section 181(2) of the Constitution to act independently, impartially, and to exercise her powers and perform her functions without fear, favour or prejudice.

[2] The applicant is the erstwhile Chief Operations Officer ("the COO") in the office of the Public Protector of South Africa ("the PPSA").

[3] The first respondent is the PPSA.

[4] The second respondent is the current incumbent PPSA, Ms Busisiwe Mkhwebane who has been cited in her personal capacity.

[5] The third respondent is the CEO in the office of the PPSA.

[6] The fourth respondent is Mr Vussy Mahlangu, the current incumbent CEO in the office of the PPSA who is cited herein in his personal capacity.

[7] The application is opposed.

Background

[8] The applicant was employed as a COO in the office of the PPSA on a five year fixed-term contract. The contract was subject to a six months' probation period commencing on 1 February 2019 to 31 July 2019. The six months' probation period lapsed and the applicant heard nothing from the Public Protector's office. On 8 October 2019, Mr Mahlangu, the incumbent CEO in the office of the Public Protector, handed a letter to the applicant inviting her to make representations on confirmation of her employment contract. She responded to the letter on 15 October 2019.

- [9] On 21 October 2019 the applicant received a letter from the CEO stating that after careful consideration and objective assessment of her performance, the PPSA is of the view that she is not suitable for the role of COO taking into account her overall capability, skills, performance and general conduct in relation to the position. The letter further stated that the PPSA is accordingly unable to confirm her permanent employment. Her last working day with the PPSA was 31 October 2019. The letter informed her that she was, however, excused from presenting herself from active duty and from performing her ordinary responsibilities and functions as COO from the date of the letter until the date of termination.
- [10] A demand was made that the purported termination of the applicant's employment be retracted and that she be reinstated to her position.
- [11] In her letter dated 29 October 2019, the PPSA confirmed the decision to terminate the applicant's employment.
- [12] As a result, the applicant approached this Court for relief.

The applicant's case

- [13] She alleges in her founding affidavit that the Public Protector acting together with the CEO have unlawfully sought to terminate her contract of employment as COO.

The respondents' contentions

- [14] The respondents raised the following points in limine: (a) that the High Court does not have jurisdiction to entertain the matter; (b) that the matter is not urgent; (c) that there are foreseeable disputes of facts in the application which cannot be resolved on the papers: and (d) that certain paragraphs of the founding affidavit have to be struck out as they are scandalous and vexatious.

- [15] It is not my intention to deal with all the points in limine raised in that should I find that the High Court does not have jurisdiction to entertain the matter, that will be the end of the matter. Should I find that the High Court has jurisdiction to hear the matter, I should determine if the matter is urgent and depending on the outcome of the decision on urgency, I will then proceed to consider the other points in limine raised and ultimately the merits of the application.

Jurisdiction

- [16] The respondents contend that there can be little doubt that the so- called private application based on the allegedly unprocedural non-renewal and/or non-extension of the applicant's probation falls squarely within the jurisdiction of the dispute resolution mechanism provided in the Labour Relations Act ("the LRA"), namely the CCMA and/or the Labour Court.

The applicant's responses

- [17] She disagreed with the respondents' contentions and contended that she has pleaded a case based on contract, the Constitution and the Public Protector's public duties as an organ of state. She has not sought to rely on her rights under the LRA.
- [18] The applicant further contended that the claim by the respondents that there is no cause of action with regard to the various relief sought is a defence to the merits of the claim. It is not relevant to jurisdiction. Jurisdiction is determined on the basis of the pleadings and not on the merits.
- [19] With regard to the violation of her employment contract, it was contended that this Court has jurisdiction to determine contractual claims, including contractual claims relating to employment. Furthermore, it was contended that the High Court has jurisdiction to determine whether an organ of state has acted unlawfully, including whether it has acted with an ulterior motive or mala fide, and whether it has acted contrary to its policies. It was also contended that the High Court has jurisdiction to determine whether the Public Protector has violated her constitutional obligations. Further contentions made were that the removal of the applicant as COO in the office of the Public Protector's office, is an exercise of public power within the High Court's jurisdiction.

The issue

- [20] The issue for determination is whether the High Court has jurisdiction to entertain this matter.

The legal principles

- [21] Section 169 of the Constitution^[1] of the Republic of South Africa provides that the High Court of South Africa may decide -
- (a) any constitutional matter except a matter that -
 - (i) only the Constitutional Court may decide; or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
 - (b) any other matter not assigned to another court by an Act of Parliament.
- [22] Section 157 of the Labour Relations Act^[2] ("the LRA") reads:
- "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

- (a) employment and labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible."

[23] In *Fredericks & Others v MEG for Education & Training, Eastern Cape & Others*[3], the High Court refused to hear a review application related to a refusal by the Department of Education, Eastern Cape ("the Department") to approve severance packages of certain of its employees on the basis that their claim was a labour dispute and that it lacked jurisdiction. The Constitutional Court, on appeal, took a different view reasoning that the High Court had concurrent jurisdiction with the Labour Court in respect of the dispute[4]. The Constitutional Court arrived at its decision anchored by section 169 of the Constitution and held that since the CCMA is not a court in terms of section 169, the High Court's jurisdiction is only ousted where the matter is assigned to the Labour Court in terms of section 157(1). The court further held that it might be argued that section 158(1)(h) of the Act is broad enough to confer such a power on the Labour Court[5].

[24] Section 158(1)(h) reads:

"The Labour Court may review any decision taken or any act performed by the state in its capacity as employer on such grounds as are permissible in law."

[25] In *Chirwa v Transnet Ltd & Others*[6] the Constitutional Court repeatedly held that where legislation has been enacted to give effect to a constitutional right, a litigant should rely on that legislation to give effect to that right, or else challenge that legislation as being inconsistent with the Constitution. Chirwa referred a dismissal dispute for incapacity to the CCMA which proceedings she abandoned midstream and approached the High Court for a review of the decision[7] arguing that it constituted administrative action in terms of the Promotion of Administrative Justice Act[8] ("PAJA") since the decision violated the Code of Good Practice contained in Schedule 8 of the LRA[9]. The High Court held that it lacked jurisdiction to entertain the matter in that the dispute was a labour matter. Her appeal to the Supreme Court of Appeal was met with the same fate albeit by a narrow majority. Similarly, the Constitutional Court did likewise.

[26] The court in Chirwa[10] further held:

"It is apparent from the provisions of section 157(1) that it does not confer 'exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between the employer and the employee. It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the words of section 157(1) 'are to be determined by the Labour Court'. This is evident from section 157(2), which contemplates concurrent jurisdiction in constitutional

matters arising from employment and labour relations."

[27] In *Gcaba v Minister of Safety and Security and Others*[11], the Constitutional Court interpreted section 157(1) as follows:

"Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribed should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145."

[28] Section 157(2)(a) bestows on the Labour Court concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution, which arises from employment and labour relations. Accordingly, for a proper interpretation, the highlighted portions ought to be considered further[12].

[29] In the ordinary course, the concept of concurrent jurisdiction can be defined as follows:

"Overlapping jurisdiction; jurisdiction exercised by more than one court at the same time over the same subject matter and within the same territory, the litigant having the initial discretion of choosing the court that will adjudicate the matter[13]."

[30] In so far as the Labour Court is concerned, the above interpretation cannot co-exist with the clearly intended objectives of the LRA. In the case of *Chirwa*[14] the Constitutional Court further made the following observation:

"It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objectives of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA.. ."

[31] The court in *Manyathi v MEG for Transport, Kwazulu Natal, and Another*[15], found that the word concurrent jurisdiction in section 157(2) must be construed to mean "jurisdiction equivalent with" and for matters falling within paras (a), (b) and (c) of section 157(2). For matters in terms of section 157(1) the Labour Court has exclusive jurisdiction, and the High Court is excluded.

[32] In *Manyathi*[16], the court held as follows:

"The first enquiry in interpreting any legislation must be to ascertain the intention of the Legislature by reference to the language used. In doing so one has regard to the context of the legislation in question. In my view, the section, whether in its new or old form, sought to confer on the Labour Court a jurisdiction it did not already have, namely to enquire into, and decide upon certain constitutional matters which might arise in the consideration of the limited category of Labour disputes described in the section. The intention was not, as I read the section, to confer a jurisdiction on the High Court to try Labour disputes of which in terms of section 157(1) of the Act, the Labour Court was the arbiter. If that had been the intention of the Legislature, it would have done so directly and explicitly and not in such an oblique fashion. At

the very least there would have been some direct qualification of the exclusivity conferred upon the Labour Court in section 157(1) of the Act..."

[33] In Chirwa[17], the court said:

"[64] ... The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers."

[34] The court in Chirwa[18] held that the mere fact that Transnet is an organ of state which exercises public powers does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33.

[35] Applying the dicta in Chirwa[19], the court in Gcaba[20] said the following:

"[56] Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in Chirwa by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees ..."

[36] The Labour Appeal Court in *Hendricks v Overstrand Municipality & Another*[21] applied the above dicta set out in Chirwa and Gcaba and concluded as follows:

"[12] These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practice ... should ordinarily pursue the remedies available in ss 191 and 193 of the LRA, as mandated and circumscribed by s 23 of the Constitution."

"[30] ... If a cause of action meets the definitional requirements of unfair labour practice or unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution."

Discussion

[37] Relying on the Constitutional Court decisions of Chirwa and Gcaba counsel for the respondents submitted that the cause of action pleaded in the applicant's case meets the definitional requirements of an unfair dismissal or unfair labour practice and that the purported High Court based causes of action are contrived and simulated so as to avoid the exclusive jurisdiction of the Labour Court.

[38] Counsel argued that the LRA forms part of the governing framework of the Probation Policy and it is therefore inseparable and indivisible therefrom.

- [39] It was further pointed out that the allegation that the applicant's employment contract was terminated contrary to the disciplinary policy, demonstrates that the cause of action meets the definitional requirements of an unfair dismissal thus establishing a claim under the LRA.
- [40] A further submission that was made was that the employment contract relied upon by the applicant, further demonstrates that the applicant's cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal and therefore asserting a claim under the LRA.
- [41] On the other hand, counsel for the applicant disagreed with the sub- missions made on behalf of the respondents. Relying on the decisions of *Makhanya v University of Zululand*[22] and *Gcaba* to support his argument, he submitted that an applicant may have multiple claims that she can raise in different courts. It is up to her to decide which claim to pursue in which court. Counsel argued that the applicant's claim consists of three elements, namely,
- (a) the declaration that the Public Protector and the CEO have acted unconstitutionally; (b) the review of the decision by the Public Protector and the CEO to terminate the applicant's contract; and (c) the violation of the applicant's employment contract.
- [42] Counsel for the applicant pointed out that the declaration falls squarely within the jurisdiction of the High Court and has got nothing to do with labour law. With regard to the review, he submitted that it is also an issue that falls within the jurisdiction of the High Court as it concerns whether or not an organ of state has lawfully exercised public power.
- [43] Counsel further relied on the decision in *Fedlife Assurance Ltd v Wolfaardt*[23] and argued that the High Court has jurisdiction to determine the applicant's contractual claim.

Analysis

- [44] In essence, the applicant is seeking reinstatement of her employment contract which she alleges was unlawfully terminated by the CEO in the employ of the office of the PPSA. The employment contract was terminated while the applicant was still on (tacit extended) probation at the office of the PPSA. This is evident from the contents of the letter addressed to the applicant from the CEO wherein she was invited to make representations with regard to confirmation of her contract of employment. The letter stated that as from 1 August 2019, the applicant was no longer on probation under the first six months' period which commenced on 1 February 2019 to 31 July 2019, however, the PPSA required a further period to continue assessing her performance and suitability for the job.
- [45] The applicant specifically alleged in her founding affidavit that instead of following the procedures prescribed in her contract and in the binding policy documents of the Public Protector, the PPSA and the CEO sought to terminate her contract by refusing to extend it after the probation period had ended. She further averred that the purported termination of

her contract was unlawful and unconstitutional in that it was taken by an official without the necessary authority; it was inconsistent with her contract of employment; it was contrary to the Public Protector's Probation Policy and Disciplinary Policy, and it was motivated by ulterior motives.

- [46] Save for the allegation that the purported termination of the employment contract of the applicant was motivated by ulterior motives, the other allegations as pleaded are essentially labour disputes as envisaged in the LRA. They meet the definitional requirements of unfair labour practice or unfair dismissal. This is supported by the following clauses of the employment contract of the applicant:

Clause 5 of the employment contract of the applicant reads:

"At the end of the probationary period, the Employer may terminate the employment relationship in accordance with the requirements of the Labour Relations Act 66 of 1995 and the notice requirements of the Basic Conditions of Employment Act 75 of 1997."

Clause 2.4.4 further provides:

"this agreement shall mean the contract of employment, its annexures and any policies of the Public Protector SA and directives of the Public Protector that may apply in terms hereof; 'this contract' shall have the same meaning. Clause 4.4 of the contract stipulates that all policies, resolutions, regulations and pieces of legislation that apply to all PPSA employees are applicable even if such are not specifically mentioned.

- [54] Clause 11.3 of the Public Protector's Policy on Probation reads:

"Following the recommendation to annul the appointment, Human Resource Division should take the necessary steps as per the provisions of the Labour Relations Act (LRA)."

- [55] The procedures prescribed in the employment contract of the applicant and the policy documents of the Public Protector point to the LRA as the vehicle for vindicating the rights under it.

- [57] What is in essence a labour dispute as envisaged in the LRA, should not be labelled a violation of the constitutional rights in the Bill of Rights, simply because the issues raised could also support a conclusion that the conduct of the employer constitutes a violation of a right entrenched in the Constitution (see the case of Chirwa).

- [59] I have considered the cases referred to by the applicant's counsel which he submitted were heard by the High Court and the issue of jurisdiction did not arise. The cases are in my view distinguishable.

- [60] I have considered all the facts and applied the principles set out by the Constitutional court in the cases referred to above. I find that this Court does not have jurisdiction to hear this matter.

Costs

[61] Counsel for the respondents sought an order for costs on a punitive costs scale. Having considered the matter, I am not inclined to award costs on a punitive costs scale.

[62] In the result I make the following order:

1. The application is dismissed with costs.

M J TEFFO

JUDGE OF THE HIGH COURT

Appearances:

For the applicant

T Ngcukaitobi

Instructed by

Mabuza Attorneys

c/o Nkome Inc Attorneys

For the respondents

DC Mpofu SC

Instructed by

Seanego Attorneys

c/o S V Mahlangu Attorneys

Heard on

27 November 2019

Handed down on

12 December 2019

[1] Constitution of the Republic of South Africa, 1996

[2] Act 28 of 1956

[3]

[2001] ZACC 6; 2002 (2) SA 693 (CC); {2002} 23 IJL 81 (CC

[4] Ibid fn 4 at para 23

[5] Ibid fn 4 at para 23

- [6] 2008 (4) SA 367 (CC)
- [7] Ibid fn 7 at para 2
- [8] 3 of 2000
- [9] Ibid fn 7 at para 18
- [10] Ibid fn 6 at para 60
- [11] 2010 (1) SA 238 (CC) at para 70
- [12] Sihle Mdludla "Jurisdiction of the Labour Court - the Conundrum Continues" De Rebus October 2019
- [13] See Bryan A Garner A dictionary of modern legal usage 2ed (Oxford University Press 2011)
- [14] At para 124
- [15] 2002 (2) SA 262 (N)
- [16] Ibid fn 24 at 266g
- [17] Supra
- [18] Supra
- [19] Supra
- [20] Supra
- [21]
- (2015) 36 ILJ 163 (LAC) at para 12
- [22]
- [2009] ZASCA 69, 2010 (1) SA 62 (SCA) at para 27
- [23] 2002 (1) SA 49 (SCA) at paras 23-27. See also South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA)

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