

SOUTH AFRICA / JUDGMENT

**Nutesa v Central University of
Technology, Free State (JR 2043/08) [2008]
ZALC 146; [2009] 4 BLLR 369 (LC) ; (2009)
30 ILJ 1620 (LC) (19 November 2008)
[2008] ZALC 146**

COURT

Labour Court

BEFORE

Molahlehi

CASE / FILE NUMBER

JR 2043/08

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**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG
CASE NO: JR 2043/08**

In the matter between:

NUTESA
APPLICANT
and
CENTRAL UNIVERSITY OF
TECHNOLOGY FREE
STATE RESPONDENT

JUDGMENT

molahlehi J

Introduction

This is an application in terms of which the applicant seeks to interdict and restrain the respondent from implementing a decision taken by the Council of the respondent on 12th September 2008, regarding the implementation of the employment structure of peromnes levels 4 to 7 pending the application to

review that decision. The applicant envisages, if it is successful in this application, bringing the review application within 30 days of the interdict.

The parties

The applicant is National Union of the Tertiary Employees of South Africa (NUTESA), a trade union incorporated and registered in terms of the Labour Relations Act 66 of 1995 (the LRA), whose relationship with the respondent is amongst others governed by the Constitution of the Labour Relations Forum (LRF) and the Relationship Agreement concluded between the parties.

The respondent is the Central University of Technology: Free State, a high education institution, established in terms of Chapter 3 of the Higher Education Act, 101 of 1997 (the HEA). The respondent performs its functions, duties and responsibilities within the framework of the HEA.

Background facts

It is common cause that the respondent embarked on a restructuring exercise of its internal functioning during 2005. It is also common cause that the respondent has also embarked on a section 189 of the Labour Relations Act 66 of 1995 (the LRA), concerning a possible retrenchments of the members of the applicant. The issue which the Court is currently enjoined to consider is unrelated to the section 189 process.

During April 2006, the applicant and the respondent concluded a relationship agreement which for all interns and purposes is a collective agreement in terms of the provisions of the LRA. The relevant parts of the relationship agreement reads as follows:

“ 2.1 The CUT recognises the Union as the collective bargaining representative of its members to negotiate and endeavour to reach agreement in good faith with the institution on behalf of such members in respect of conditions of employment both substantive and procedural, as regulated in this agreement and/or the Constitution of the Bargaining Forum.

2.2...

2.3 All negotiations and consultations between the CUT and Union and representations by the Union to the CUT shall take place in accordance with the provisions of this agreement and/or the Constitution of the Bargaining Forum and/or the Constitution of the Labour Relations Forum”.

The constitution further provides under clause 8.1 that:

“8.1 The parties agree that all consultation shall take place under the auspices of the Labour Relations Forum in terms of its constitution.

8.2 The parties agree all issues of negotiation shall be referred to CUT Bargaining Forum and all negotiations/bargaining shall be regulated by the constitution of the Bargaining Forum.”

And further on the constitution provides under clause 12 that:

“The parties agree that all dismissals based on operational requirements shall be dealt with in accordance with CUT policies and procedures, the Act, the other applicable legislation and relevant codes of good practice.”

Whenever consultation has to take place between the parties it has to be done under the auspices of the LRF in terms of the constitution. In this regard the relevant parts of the constitution reads as follows:

“4.5 The LRF will attempt to resolve all issues submitted primarily by consultation therefore discuss issues with the intention to hear and consider proposals and suggestions through consensus and to submit/present such proposals and suggestions to management for proposal where necessary or to refer the issue to another level/forum or to refer negotiable issues to the CUT Bargaining Forum.”

Further on the constitution reads;

“6.1 The parties shall consult on proposals concerning any of the matters:

6.1.1 Restructuring of the workplace, including the introduction of new technology and methodology, rationalisation or downsizing;

6.1.2 Changes in the organisation of work, or employment responsibilities of individuals or departs;

6.3 Before implementing a proposal in respect of any of the above matters the CUT shall consult with the Labour Relations Forum and endeavour to reach consensus.

7. The LRF will refer all matters for negotiation to the CUT Bargaining Forum to be dealt with in terms of the constitution of the Bargaining Forum.”

The case of the applicant

On the 7th May 2008, the respondent by notice in a letter dated 5th May 2008, convened the meeting of the LRF. It is apparent that the convenor of the meeting, the Assistant Director; Labour Relations,

received a document which was to serve as part of the items of the agenda of the meeting and concerned institutional restructuring. At this meeting the representative of the respondent, Professor Ralekhetho (Ralekhetho) had apparently on the 17th April 2008, mentioned that there would be restructuring which would affect certain peromnes levels.

Another meeting was held on the 11th June 2008, where Ralekhetho indicated that the purpose of the meeting was for him to present the work-in progress with regard to a proposed institutional structure which was as a result of a workshop held with MANCOM. The meeting noted the presentation by Ralekhetho and also that the final document would be drafted by the end of July 2008, to be presented at MANCOM after which it will serve at the Human Resources Committee (HRC).

In the founding affidavit the applicant contended that the first time that the issue regarding the proposed new structure with the peromnes was raised was on the 11th June 2008. The meeting of the 7th May 2008, did not according to the applicant discuss the issue of peromnes. Because Ralekhetho had indicated that this was work-in

progress and that a detailed discussion on the document would take place at the LRF, the applicant did not raise any issue as

concerning this matter.

On the 30th July 2008, Ralekhetho issued a memorandum in which it is inter alia stated:

“As a step in this direction, Management will be meeting with the Labour Relations Forum on the 4th August 2008 to discuss its proposals on the size and shape of the CUT staff establishment as outlined in the structures of the 4 major Divisions of the University; Academic Resources and Operations, Registry and Vice-Chancellor’s Office. This is only the second of a series or possible of consultations to explain our thinking behind the process and how it will unfold over the next three years, as agreed and guided by Council. The restructuring will, as intimated above be in three stages. The first stage is the restructuring of the middle management or peromnes level 4 to 7 including academic management. In order to facilitate this, the unit of Human Resources and Institutional Planning will be restructured first as strategic entities that must assist with the process. It hoped to complete this process this term and the rest of the middle management restructuring by the end of 2008.”

On the 29th July 2008, the Assistant Director; Labour Relations attached a document which she referred to as relevant for the meeting of the 1st August 2008. In this email, Professor Ralekhetho is said to have emphasized that:

“I need to emphasize that this is a working document until Council has finally ruled on the proposals contained in it. It is, therefore, strictly confidential and I hope the LRF understands that. The annexures also confidential as part of the primary document, consist of the summary of savings (dis-savings) from the old to the new structure and slides of the proposed structure.”

On the 4th August 2008, the applicant addressed a letter to the respondent wherein several issues were raised but most importantly:

“It is extremely important that at the meeting of the 4th August 2008 that NO structures be discussed but that the focus should be on the issues 1 and 2-rationale/reason/motive.”

The letter goes further to state that:

“There should be a clear and proper motivation as to why there is restructuring. The motivation needs to influence the process to be followed-eg when there is restructuring for operational requirements one look at advertising posts only internally or rather let management place staff in the posts. CUT has indicated to us that there are restructuring based on operational restructuring, hence my example above is relevant.”

At the meeting of the special LRF on the 4th August 2008, it was specifically noted that consensus was not reached on the continuation of the presentation to be made by Ralekhetho to Council and senate as applicant inter alia had requested that the respondent first had to respond to the memorandum presented above. The meeting was for this reason adjourned.

Ralekhetho responded to the above on the 6th August 2008, and stated therein the following:

“The consultation scheduled for the 4th August 2008 at 14h00 was aborted because you refused to engage on the documentation submitted to you until management responded to your memorandum in writing. Council has therefore decided that the restructuring must occur. We are now in implementation phase (sic) which began unlike earlier attempts with restructuring of the Executive Management”.

On the 8th August 2008, the Assistant Director: Labour Relations wrote to the applicant indicating that she was in a process of compiling a complete bundle of documents referred to in the letter of Ralekhetho including other documents that had already been submitted to the applicant.

On the 12th August 2008, the applicant addressed a letter to the respondent complaining that the documents they had received were not integrated

and essentially this meant that the whole situation regarding the proposed structure and restructuring and the documents provided were opened to different interpretations. The applicant contended that it required a summarised document relating to the motivation, rationale and reasons for restructuring in order to avoid any misinterpretation or confusion.

A special LRF meeting was again convened on 12th August 2008, where the applicant submitted a follow-up memorandum concerning the unanswered questions relating to the structure and restructuring. At this meeting 5 (five) further documents were submitted by the respondent that sought to explain the type of restructuring envisaged, reasons for restructuring including the report thereof. It was agreed that because of the need for time to properly consider the contents of these documents the applicant was given 3 (three) weeks to analyse and interpret them and to make submissions at the next LRF meeting.

The applicant contended that the first occasion where joint consensus seeking process could be regarded as having commenced was the date when all relevant documents were officially handed over to the applicant and explaining the manner, the rationale and the motivation for restructuring of the structure.

On the 12th August 2008, Ralekhetho wrote a letter to the applicant wherein he indicated that all that was needed at that stage, was that all members of the LRF to make inputs in relation to the document already given to them.

In answering the concerns raised in the above letter the respondent, responded as follows:

“1. The joint consensus seeking process” did not start on the 12th August 2008 as you claim. This process began on the 7th June 2008 when I was first invited to the full sitting of the LRF. The intention was to indicate to the LRF Management’s plans regarding restructuring, which were outlined in high level documents that had served MANCOM. We provided you with these documents after they had been presented to the Human Resource Committee of Council. May I also point out that I understand the LRF process to be a consultation after a decision of Council.

2. The next meeting, a special one, took place on the 11 June 2008 over a month after the first attempt to hold another meeting could not happen. My understanding is that the Unions were not too willing. You will recall that at that meeting I projected the current proposed structures that had been formulated at a workshop the Executive held on 28th May 2008. The purpose was to share, in good faith, with the LRF what management was proposing. You will also recall that at this very meeting the agreement was that what the meeting had seen would remain confidential until documentation had been provided. Soon thereafter I did provide the KNC and Management Reports that had served at Council.”

The applicant complained that it was denied audience with the senate. Ralekhetho’s view on this issue was that the business of the LRF was separate from that of the senate and the LRF did not have jurisdiction over the senate.

After analysing and interpreting the documents that had been presented to it on the 12th August 2008, the applicant prepared a presentation which sought to address the concern it had about the proposed structure.

The applicant further complains that it was not afforded an opportunity at the meeting of the 5th September 2008, to present its presentation which as stated earlier sought to address the issue of restructuring as raised in the number of documents which had been handed to it by the respondent. Thereafter, the applicant addressed several letters seeking to make its views known and requesting for an audience with the respondent.

The approval of the new structure by Council was announced in a communiqué dated 15th September 2008, by Ralekhetho.

The questions to be answered by this Court are set out in the applicant’s heads of arguments as follows:

“5.1 Whether or not the prima facie right asserted by the applicant is valid in law. In this regard:

5.1.1 The decision reached by the respondent regarding the structure of the peromnes levels an administrative action?

5.1.2 If so, is this Court entitled to eventually review this decision?

5.1.3 Even further so, was the decision by the respondent regarding this peromnes levels structure procedurally unfairly reached?

5.2 Has the applicant shown irreparable damage if the order is not granted?

5.3 Does the balance of convenience favours the applicant?

5.4 The absence of any satisfactory remedy at this stage for the applicant.”

The applicant contended that the decision taken by the respondent which is the subject matter of these proceedings was an administrative action in contravention of the provisions of Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that the decision was not taken with prior consultation with the applicant. Section 1 of PAJA defines administrative action as follows:

“Any decision taken or any failure to take a decision, by an organ of state when–

- (i) Exercising a power in terms of the Constitution or a Provincial Constitution;
- (ii) 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 effects.”

The respondent being an organ of state in terms of section 239 of the Constitution, according to the applicant, was required to comply with the provisions of section 1 of PAJA. The applicant contended that it was for this reason that it was entitled to the relief claimed. In other words the applicant’s contention is that the respondent is an organ of state in terms of section 239 of the Constitution. section 239 of the Constitution defines organ of state as follows:

“any ...functionary ...

- (i) Exercising a power or performing a function 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 but does not include a Court or a Judicial Officer.”

In support of its argument that the respondent was an organ of state the applicant argued that the respondent was a creature of statute, the HEA and accordingly the respondent derives its powers to appoint employees from the provisions of section 34 of the HEA.

The applicant further relied on Court decisions in support of its argument that the respondent was an organ of state. These decisions provide two tests for determining whether an institution is an organ of state. The first case the applicant relied on is *Baloro and Others v University of Bophuthatswana* 1995 (4) SA 197 (B), a decision taken prior to the enactment of section 239 of the Constitution, wherein the Court held that the university was an organ of state because it was a creature of statute and the state exercise control over it.

In *Toerien en n Ander v De Villiers en n Ander* 1995 (2) SA 879 (C) at 885F, the Court held that a university is public authority and accordingly its decision to terminate the services of an employee amounted to the exercise of the public power and therefore and in taking that decision the university was obliged to comply with the requirements

natural justice.

The applicant argued that in determining whether or not the respondent had complied with the requirements of natural justice, the Court should have regard to the provisions of the LRF constitution and the relationship agreement between the parties, both of which required the respondent to have consulted with the applicant before taking the decision as it did.

Whilst conceding that consultation took place during May 2008, regarding the structure, the applicant contended that the other meetings; for the 11th June 2008, related to a report on the working progress in as far as restructuring was concerned and that of the 4th August 2008, was regarded as “second of a series of possible consultations to explain” the consideration that informed the consultation process and how it would unfold.

The complaint of the applicant regarding lack of consultation is, as I understand it, that at the meeting of the 5th September 2008, it was not afforded the opportunity to discuss the draft submissions it had prepared and had done so within the limited time frame of 3 (three) weeks.

The applicant contended on the basis of the above that it had shown that the respondent has contravened its right to be consulted in terms of the provisions of the LRF and the relationship agreement.

As concerning the balance of convenience for granting the relief the applicant argued that there was no apparent reason why the restructuring of the peromnes levels in terms of the approved structure is urgent and that the respondent could hold back such implementation pending the outcome of the envisaged review of the decision.

The applicant further contended that it was entitled to the relief claimed because it had no alternative remedy and the HEA does not provide for an internal remedy to resort to in the situation it was faced with.

Evaluation

It seems to me, accepting that the respondent is an organ of state, the question to answer is whether or not the conduct complaint of arose from the employment relationship between the applicant and the respondent. If the answer is in the affirmative then the contention that the provisions of section 33 of the Constitution and section 1 of PAJA would fall away on the basis of the authorities discussed below.

Although the Constitutional Court in *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (3) BCLR 251 (CC), was faced with the issue concerning dismissal, the principle applied therein is apposite and directly applicable in the present instance in the determination of the nature of the decision taken by the respondent. The applicant who in that case had been dismissed by Transnet,

contended that her dismissal as an employee of an organ of state amounted to an administrative act as envisaged in the Constitution and section 1 of PAJA because it constituted the exercise of public power.

In the Supreme Court of Appeal, in *Chirwa*, Mthiyane JA concluded that the applicant had to fail because she had not established that her dismissal constituted an administrative

action as defined in section 1 of PAJA. He concluded in dismissing the applicant's case that Transnet was not exercising public power or performing a public function in dismissing her. Conrad JA in concurring with the decision of Mthiyane JA, held that because of the LRA, dismissals in public sector are no longer to be dealt with as administrative acts.

In answering the question as to whether the dismissal of the applicant in *Chirwa* was an administrative act Skweyiya, J held that:

"[72] Only acts of an administrative nature are subject to the administrative justice right in section 33(1) of the Constitution. The focus of the enquiry as to whether conduct constitutes administrative action is not on the position which the functionary occupies but rather on the nature of the power it exercise."

Earlier on at the end of paragraph [64] in his judgment the learned Judge says:

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

Ngcobo J, concurring with the decision of the majority but writing a separate judgment reasoned:

"[142] The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it is exercising its contractual powers. It does not involve the implementation of legislation which constitutes the administrative action. The conduct of Transnet in terminating the employment contract does not, in my view, constitute administrative action. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power 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."

The approach of drawing the distinction between employment related decisions by organs of the state and administrative decision is founded according to Skweyiya J, on the structure of the Constitution. In this regard the Learned Judge says:

“[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 practises”. The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practises. To this extent, section 23 of the Constitution guarantees the right of every employee and every employer to form and join a trade union and/or employer’s organisation as the case may be.”

Nugent JA in interpreting the decisions in *Chirwa and Fredericks & others v MEC for Education, Eastern Cape Province & others*

(2002) 23 ILJ 81 (CC), in *Makambi v MEC, Department of Education, Eastern Cape Province* (2008) 29 ILJ 2129 (SCA), held that:

“[37] I think a fair reading of the two judgments makes it clear that the majority was of the view that the objective of the Act was both to encompass employees in the public service and also to be exhaustive of their rights arising from their employment, notwithstanding that the legislature had expressed itself to the contrary in s 157 (2). With that as its starting-point the majority considered it to be desirable as a matter of policy that such employees should pursue complaints arising from their employment only through the mechanisms of the Labour Relations Act and to attain that objective it decided that the High Courts must not exercise their ordinary jurisdiction in such cases”.

See also *MEC, Department of Education, Eastern Cape Province & another v Bodlani in re Bodlani v MEC, Department of Education, Eastern Cape Province & another* (2008) 29 ILJ 2160 (TK).

Erasmus J in interpreting the decision in *Chirwa in Nonzamo Cleaning Services Co-Operative v Appie & Others* (2008) 29 ILJ 2168, says:

“[35] In summary, both Skweyiya J and Ngcobo J went to great lengths to emphasize that it is the purpose of the LRA to deal with all employment related matters involving allegations of unfairness and that the LRA mechanisms are best suited to deal with such disputes.”

In the present instance, the nature of the conduct complained of involves the allegations of failure to comply with the provisions of the constitution of the LRF and the relationship agreement. The existence of these documents (the LRF constitution and the relationship agreement), in my view, can only be located within the framework of the LRA. Failure to comply with the provisions of these documents does not in my view amount to administrative action as envisaged in section 33 of the Constitution or section 1 of PAJA. The decision in issue concerns collective bargaining issues and agreements which are governed by the provisions of the LRA.

The remedy sought by the applicant is that the Court should grant an interlocutory interdict pending the review application it wished to launch within 30 days of the interim order. The relief is based on the cause of action founded in the claim that the decision taken by the respondents was, as stated earlier, an administrative decision to be governed by both the provisions of section 33 of the Constitution and section 1 (1) of PAJA.

Thus the primary source of the right of the applicant would, if it exists at all, be located within the provisions of the LRA. The right would in the context exist by virtue of the provisions of LRF constitution and the relationship agreement, both of which fall within the framework of the LRA.

In my view, the case of the applicant stand to dismissed on the basis of the above discussion. It is also my view that the applicant would still fail even if its application was to be considered within the framework of the LRA.

In order to succeed with its application the applicant would have to satisfy the requirement of an interim interdict as set out *Setlogelo v Setlogelo*, 1914 AD 221 at 227, wherein Innes CJ set out the requirements as follows:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy...The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in van der Linden’s Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party.”

In *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382, Holmes J after quoting with approval the above passage from *Setlogelo* went further to say:

“It thus appears that where the applicant’s right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict.”

In the context of the LRA, the prima facie right or real right of the applicant would have arisen had the applicant been able to show that the respondent has taken a decision to retrench or reduce the members of the applicant as part of the workforce without consultation with the applicant in terms of section 189 of the LRA. In terms of section 189 of the LRA, the right of the applicant to be consulted would have arisen as soon as the respondent anticipated retrenching the applicant’s members. It is common cause that the process of consultation in terms of section 189 of the LRA is not an issue on this matter.

In my view, the applicant is not without an adequate ordinary remedy should the restructuring process lead to the dismissal of its members. The harm that the members of the applicant may suffer as a result of the dismissal, should it happen, cannot be

said to be irreparable in the light of the available remedies which the applicant may be able to obtain on behalf of its members through the various processes provided for under the LRA. To this extent, the balance of convenience does not favour the granting of the interim relief. The applicant has accordingly failed, in my view to satisfy the requirements for a temporary interdict.

There is no reason in both law and fairness why the costs should not follow the results.

In the premises the applicant's application is dismissed with costs.

Molahlehi J

Date of Hearing : 24th October 2008

Date of Judgment : 19th November 2008

Appearances

For the Applicant : Adv S Grobler

Instructed by : Horn & Van Rensburg Attorneys

For the Respondent: Adv N Snellenburg

Instructed by : Lovius Block Attorneys

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