IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D723/2023
Not Reportable

In the matter between:

ASIPHEPHE PRIMARY SCHOOL — First Applicant

SCHOOL GOVERNING BODY:
ASIPHEPHE PRIMARY SCHOOL — Second Applicant

and

HEAD OF DEPARTMENT:
DEPARTMENT OF EDUCATION KZN — First Respondent

SIBUSISO L.N. KHESWA — Second Respondent

MR K. NAIDOO — Third Respondent

CHAIRPERSON OF PINETOWN DISTRICT
GRIEVANCE COMMITTEE: MR Z. GAGAI — Fourth Respondent

Heard: 26 April 2024 and 10 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 9 December 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The application, initiated in terms of s158(1)(h) of the LRA, was first enrolled on 26 April 2024 at which time this court expressed certain concerns. In the circumstances the application was adjourned to 10 May 2024, with the applicants having been requested to deliver heads of argument on the issues which had then been raised.

[2] The applicants sought orders in the following terms,

'1. That the first respondent's conduct of failing to take a decision to appoint in post number 1596 of HRM Circular No. 17 of 2022 (post for principalship of Asiphephe Primary School) in accordance with the School Governing Body's recommendation of 31 May 2023, is hereby declared wrongful.

2. That the first respondent's conduct of failing to take a decision to appoint in post number 1596 of HRM Circular No. 17 of 2022 (post for principalship of Asiphephe Primary School) in accordance with the School Governing Body's recommendation of 31 May 2023, is hereby reviewed and set aside.

3. That the first respondent is hereby directed to appoint in post number 1596 of HRM Circular No 17 of 2022 in accordance with the recommendation of the School Governing Body, dated 31 May 2023.

4. That the appointment be effective from 1 July 2023 with the commensurate benefits.

4.[sic] That the second, third and fourth respondents' conduct in failing to facilitate the expeditious appointment in post number 1596 of HRM Circular No 17 of 2022 is hereby declared unfair and wrongful.

5. That the first, second and third respondents are directed to pay the costs hereof at a scale as between attorney and client, jointly and severally, with the one paying and the others to be absolved.'

[3] The respondents did not oppose the application.

Background

[4] The applicants' claim was premised on failure on the part of the first respondent (referred to herein as 'the Department') to have acted in terms of s6(3)(d) read with s6(3)(a), (b), (c) and (l) of the Employment of Educators Act, 1998 ('the EEA') as well as s20(1)(i) of the Schools Act, 1996.

[5] The Department published HRM Circular No 5 of 2022 on or about 8 February 2022 in which it evinced its intention to advertise a number of school based vacant posts and, to this end, set out the procedure it intended to follow in the subsequent process of selection and appointment. Pursuant to it having come to the Department's attention that certain posts had been erroneously advertised and others had been erroneously omitted, it published an addendum, HRM Circular No 17 of 2022, by which it effected the necessary corrections to HRM Circular No 5 of 2022. Included in the final list was a Principalship post at the first applicant.

[6] In apparent compliance with the Management Plan which had been stipulated by the Department for process to be followed in the selection of an incumbent for the position, the second applicant appointed an Interview Committee which subsequently interviewed four candidates for the Principalship position on 31 May 2023. Having done so, the Interview Committee placed its recommendation before the second applicant for ratification. Pursuant to having considered such recommendation, the second applicant concurred with the Interview Committee and itself recommended the appointment of the first ranked candidate to the Department.

[7] A grievance submitted by a disgruntled, unsuccessful applicant for the Principalship position caused a delay until 27 July 2023, on which date the grievance was dismissed.

[8] Having thereafter awaited notification of the appointment the deponent to the founding affidavit, Ms Nhlanhla Mthembu, a member of the second applicant, received a letter from one Mr Mathe, an employee of the Department, which letter was said to have been authored by the second respondent. The contents of the letter dated 4 October 2023 read,

> *'1. The filling of the abovementioned post has reference.*
> *2. Please be informed that the names of the recommended candidates [EHR 11] dated 5 June 2023 for the filling of the abovementioned post was submitted to Head of Department for approval.*
> *3. The Head of Department has decided that as there are allegations and counter-allegations of post fixing of the post, the post will be subjected to an investigation before a decision is taken to fill the post.*
> *4. Further enquiries regarding this matter must be directed to Mr K Naidoo, Telephone 033 8465344.*
> *5. Your patience is appreciated.'*

[9] The second respondent admitted to Ms Mthembu that he had signed the letter, but claimed to have done so upon instruction by the third respondent. The third respondent, when questioned, informed her that he had been instructed by the South African Democratic Teacher's Union not to effect the appointment. She subsequent met with the union's provincial secretary who denied that such an instruction had been given by it.

[10] Having reached a stage at which it was believed that legal intervention was necessary, the second applicant took a resolution to obtain legal advice and, to this end, to appoint an attorney. This was done and a letter of demand was transmitted to the relevant functionaries responsible for the appointment, such letter having concluded,

'In the circumstances, we demand that the HOD effects appointment as per the SGB's recommendations that he received on 5 June 2023 within 08 calendar days from the date hereof but not later than 17 November 2023, failing which we hold instructions to approach the Court for an appropriate relief and costs at a punitive scale as between attorney and own client.'

[11] No response having been received from the Department, the applicants initiated the present application.

Analysis

[12] When the application first came before this court it expressed certain reservations concerning the applicability of s158(1)(h) of the LRA to the issue in dispute. Ancillary to this, it expressed its concerns that the recommended candidate, sought by the applicants to be appointed by way of an order of this court who could accordingly be said to have a direct and substantial interest in the proceedings, had not been joined as a party thereto.

[13] Insofar as the first issue was concerned, in the heads of argument which were subsequently delivered the applicants' argument was confined to the question of the Department's action (in the form of an omission) having constituted administrative action. This court's concerns regarding the applicants' reliance on s158(1)(h) did not, however, relate to that issue. For the purposes of that which is stated hereunder, this court accepts that the action (in the form of an omission) complained of constitutes administrative action, and is accordingly capable of review. Whilst this court clearly has jurisdiction to determine claims initiated under s158(1)(h), its concerns related specifically to the capacity in which the Department had acted in relation to the impugned action, and whether it could be said that the Department, when having failed to effect the appointment, had taken action *'in its capacity as employer'.*

[14] S158(1)(h) of the LRA provides that 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.'

[15] The nature, purpose and ambit of s158(1)(h) has been the subject of considerable judicial scrutiny. The resultant decisions have, in the main, concerned four issues: whether employees in the public sector enjoy a right to challenge State action in terms of s158(1)(h) in circumstances in which privately employed employees are limited in similar circumstances to litigation under the dispute resolution mechanisms provided for in the LRA; what type of action taken by the State may be subjected to review under s158(1)(h); the standard of review applicable in applications brought in terms of s158(1)(h); and whether the State itself may have recourse to s158(1)(h) when seeking to review and set aside its own actions or decisions.

[16] The issue in the present matter concerns the limitations inherent in s158(1)(h), articulated by Grogan as follows,

> *'One thing is clear, however: the Labour Court may entertain applications under s158(1)(h) only when the state has acted as an employer. For example, the court dismissed an application by employees who were seeking to halt the authorities from terminating their leases for state-owned housing, which they claimed was a condition of their employment. The court held that since the decision was not taken by the state in its capacity of employer, s158(1)(h) of the LRA did not apply. The applicants had approached the court in their capacity as lessees, not as employees, and could not expect assistance from the Labour Court. The application was dismissed.'*[1]

[17] Evident from the facts of the case, the conduct complained of concerns the Department's omission to have appointed an individual to a post. *Vis-à-vis* the individual who has not been appointed, the Department can undoubtedly be said to have acted 'as employer'. It is not, however, the individual who was recommended for appointment who seeks to challenge the Department's failure to have done so; the application has been brought by the potential beneficiary of the services which would be rendered by the proposed appointee.

[1] Grogan J, Labour Litigation and Dispute Resolution, 3rd Edition, page 335

[18] The applicants' claim is, in essence, that the Department, as the employer of the proposed incumbent to the position of Principal of the first applicant, was under an obligation to effect the appointment of the duly recommended candidate in terms of the Employment of Educators Act, 1998 ('the EEA'). In breach of its obligations in this regard, it has failed to do so. Its failure constitutes a reviewable irregularity in terms of the Promotion of Administrative Justice Act, 2000 ('the PAJA'), which has led to the education of the children enrolled at the first applicant being undermined.

[19] The obligations cast upon the Department were said to have arisen out of sections 6(3)(a), (b), (c), (d) and (l) of the EEA and section 20(1)(i) of the Schools Act, 1996. S20(1)(i) of the Schools Act provides that subject to its own provisions, the governing body of a public school must recommend to the Head of Department the appointment of educators at the school, subject to the EEA and the LRA. The relevant provisions of s6(3) of the EEA provide as follows,

> *'(a) Subject to paragraph (m), any appointment, promotion, or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.*
>
> *(b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to-*
>
> *(i) – (v) …*
>
> *(c) The governing body must submit, in order of preference ot the Head of Department, a list of –*
>
> *(i) at least three names of recommended candidates; or*
>
> *(ii) fewer than three candidates in consultation with the Head of Department.*

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which the governing body was requested to make a recommendation, failing which the Head of Department may, subject to paragraph (g), made an appointment without such recommendation.'

[20] In challenging the Department's failure, the applicants placed express reliance on the PAJA,

'Further, the grounds I rely upon for the order prayed are permissible in law in that the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA") defines an administrative action as any decision taken or failure to take a decision by an organ of state when 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 and external legal effect.'

[21] The applicants' reliance on s158(1)(h) was premised on the first respondent, as a Head of Department and Accounting Officer being the defined employer of all the personnel employed in the Department of Education KZN, whether in terms of the EEA or the Public Service Act, 1994. As the defined employer, the first respondent is the functionary responsible to effect the appointment. The issue of the non-appointment of the candidate recommended by the second applicant, on the face of it, accordingly appears to conform with the requirement embodied in s158(1)(h), that the decision sought to be impugned constitutes action taken by the State in its capacity as employer. However, consideration of the purpose for which the LRA was enacted, as well as the circumstances which led to the inclusion of s158(1)(h) in the LRA reveals that the ambit of its application is curtailed by further considerations.

[22] The LRA was enacted to give effect to the rights guaranteed in s23 of the Constitution concerning labour relations. These Constitutional guarantees include the right to fair labour practices, as well as certain rights assured to

workers, employers and trade unions. This much is reflected in the introduction to the LRA, with s1 expressly articulating its purpose,

'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy.

(d) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision making in the workplace; and

(iv) the effective resolution of labour disputes.'

[23] The rationale for the inclusion of s158(1)(h) in the LRA was explained by the Constitutional Court in Chirwa v Transnet Ltd and Others 2008 (4) SA 367 CC,

'Consistently with this objective the LRA brings all employees, whether employed in the public sector or private sector under it, except hose specifically excluded. The powers given to the Labour Court under s158(1)(h) to review the executive or administrative acts of the State as an employer give effect to the intention to bring public sector employees under one comprehensive framework of law governing all employees.'[2]

[24] This was elaborated upon by the Labour Appeal Court in Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another (JA91/09) [2012] ZALAC 14,

[2] At paragraph 102

'The review powers entrusted to the Labour Court in terms of s158(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.

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.'[3]

[25] That s158(1)(h) was intended to afford a remedy to public servants was reiterated by this court in Gcani v Minister of Justice and Correctional Services and Others (PR170/16) ZALCPE 24,

'This provision, as read with section 195 of the Constitution, would then appear to constitute a proper avenue open to an employee in the public service to challenge decisions made by responsible functionaries, that may have a detrimental effect of such an employee.'

[26] S158(1)(h) has been found to have been of application, *inter alia*, to challenges by employees to decisions taken by the State not to uphold their appeals against deemed dismissals in terms of s14 of the EEA and s17 of the Public Service Act, 1994;[4] and where the State itself has sought to review the decisions of its own functionaries.[5] In SAPU v National Commissioner of the South African Police Service and Another (2005) 26 ILJ 2403 (LC), this court expressed the view that s158(1)(h) could be utilized to challenge the administrative acts of the State such as,

[3] At paragraphs 26 - 27

[4] See, for example, MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA obo Mangena (2014) 35 ILJ 2131 (LAC), Ramonetha v Department of Roads and Transport, Limpopo and Another (2018) 39 ILJ 384 (LAC), and Van Wyk v Acting Superintendent General Department of Education, North West and Others (JR325/14) [2018] ZALCJHB

[5] See, for example, Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal (2014) 35 ILJ 613 (CC), Ntshangase v MEC: Finance KwaZulu-Natal and Another (2009) 30 ILJ 2653 (SCA), and Overstrand Municipality v Magerman N.O. and Another (2014) 35 ILJ 1366 (LC)

'… the collection and payment of PAYE and SITE taxes; the appointment of employer representatives to the board of an occupational pension fund; the distribution of a pension or group life benefits to the dependants or beneficiaries of deceased employees; the administrative functions associated with unemployment and occupational disease and injury social insurance schemes; and so on.'[6]

[27] Conversely, s158(1)(h) has found not to have been available, for example, to public sector employees in circumstances in which their causes of action have been capable of arbitration or adjudication under the other, statutorily prescribed dispute resolution procedures established in terms of the LRA.[7]

[28] With specific consideration to the limitation contained in s158(1)(h) that the action or decision sought to be reviewed must be that of the State *'in its capacity as employer'*, this court concluded in POPCRU obo Mahlangu v Premier, Gauteng and Another (JR510/10) [2011] ZALCJHB 172[8] that the applicant employees were precluded from relying on 158(1)(h). The decision which had been sought to be reviewed concerned a contractual issue relating to rental payments in terms of lease agreements. As the decision had been unrelated to the rights of the applicants as employees and was extraneous their employment relationship with their employer, the State's decision had been taken in its capacity as lessor, not as employer.

[29] Our law recognises a divide between labour practices and administrative action. The Constitutional Court explained this distinction in Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC),

'However, another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in

[6] At paragraph 62
[7] See, for example, Public Servants Association obo De Bruyn v Minister of Safety and Security and Another (2012) 33 ILJ 1822 (LAC), South African Police Union and Another v National Commissioner of the South African Police Service and Another (2005) 26 ILJ 2403 (LC), Hayes v National Minister of Police N.O and Others (C190/2020) [2023] ZALCCT 23
[8] See footnote 1 supra

different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). 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.'[9]

[30] It went on to explain that the specialised structures created in terms of the LRA were created for the specific purpose of adjudicating labour disputes,

'As found in Chirwa, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA and not, for example, applications for administrative review.'[10]

[31] The decision in Gcaba endorsed the view previously expressed by this court in SAPU,

'Allowing that such a distinction may be seen by some to be a fine one, even strained or artificial, it must be kept in mind that our Constitution draws an explicit distinction between administrative action and fair labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement.'[11]

[32] The purpose of the LRA is primarily to protect the rights of employees, employers and their bargaining representatives. S158(1)(h) was enacted to afford the remedy of review to public sector employees (and by extension the State itself) in circumstances in which the actions and decisions of the State in relation to its own employees are not consonant with the principles of legality, or are otherwise susceptible to challenge. Where State action or its decisions fall outside this realm no resort may be had to s158(1)(h) for the purposes of review.

[33] In the present matter, the applicants are neither public sector employees nor the State itself; they are a school and its governing body. Nor is the State their employer. Given the historical basis for the inclusion of s158(1)(h) in the LRA, it

[9] At paragraph 56
[10] At paragraph 69
[11] At paragraph 54

is doubtful that they have the requisite standing to rely on its provisions. Be that as it may, whilst the proposed appointment concerns an employee of the State, the applicants do not seek to enforce any right arising out of such employment relationship specifically, nor arising from labour relations generally. Albeit sought indirectly by way of the proposed appointment, the applicants seek to advance and protect the rights of the first respondent, as well as the rights of the children enrolled at the first respondent to the education to which they are indisputably entitled. This being the case, and in light of this court's conclusions concerning the ambit and purpose of s158(1)(h), the failure on the part of the Department to appoint the recommended candidate to the position of Principal is not action of the type that is susceptible to challenge in terms thereof.

[34] Whilst the application will be dismissed, it must be understood that such dismissal is solely for the reasons which have been expressed herein concerning the limitations inherent in s158(1)(h), and has no bearing on the merits of the application itself.

Costs

[35] The application was not opposed and accordingly the issue of costs does not arise.

Order

1. The application is dismissed.

2. There is no order as to costs.

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K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicants:

Mr C M Kulati, instructed by Sandile Khumalo Inc Attorneys

Respondents:

No appearance