REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C450/2015

Reportable

In the matter between:

RUTH FARRE **Applicant**

and

THE MINISTER OF DEFENCE **First Respondent**

THE SECRETARY OF DEFENCE **Second Respondent**

THE CHIEF OF THE SOUTH AFRICAN NAVY **Third Respondent**

THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE **Fourth Respondent**

Heard: **May 5 2016**

Delivered: July 12 2016

Summary: Review application under section 158(1)(h); Public Servants Association of SA on behalf of de Bruyn v Minister of Safety & Security & another (2012) 33 ILJ 1822 (LAC) followed; labour court jurisdiction ousted where LRA requires dispute to be heard at arbitration.

JUDGMENT

RABKIN-NAICKER, J

[1] On submission before me, the following relief contained in the amended Notice of Motion is sought by the applicant:

> '1. Reviewing and setting aside the Respondents' decision to change the classification of the work the Applicant is employed to do;
>
> 2. Confirming that the Applicant is a Control Oceanographic Technicial and restoring the status quo ante as reflected in the Applicant's March 2015 Salary Advice (Post Class Code 052805, CORE description 'Eng Sup Personnel');
>
> 3. Reviewing and setting aside the Respondents decision to recover R178 888.98 from the Applicant;
>
> 4. Directing the Respondents to repay to the Applicant all such monies as will put her in the position she would have been in, but for the impugned decisions….'[1]

[1] The applicant did not pursue a prayer that section 138 of the PSA be declared inconsistent with the Constitution

[2] The applicant is a Physical Oceanographer and is employed by the Department of Defence as the Superintendent of Tidal Information. In this position she is responsible for surveying the oceans abutting the coastline of South Africa and Namibia.

[3] In October 2008 the Job Evaluation Committee of the South African Navy noted that the applicant's work was inappropriately classified as administrative and recommended that such classification be amended from administrative to scientific. At that time the change in classification had no financial implications, it remained a level 9 post.

[4] In July 2011, a collective agreement, "the Occupational Dispensation for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GISC Professionals and Scientists (OSD)" came into effect. The applicant's colleagues were translated to the OSD in July 2011. The applicant was translated in July 2014, and as a result, her salary increased and she became entitled to a housing allowance and medical aid subsidy. In July 2013, the applicant received notice of her registration as a Certified Natural Scientist with the South African Council for Natural Scientific Professions. . The translation of the applicant was backdated to 1 March 2014.

[5] The applicant filed a grievance requesting that her translation be backdated to July 2009 like that of her colleagues. It would appear that the grievance triggered the events giving rise to the application before me. On 13 April 2015 the applicant's salary advice revealed that she would receive zero take home pay. Her superiors enquired as to the reasons therefore. The decisions taken by the employer in considering her grievance regarding the backdating of her translation, which applicant refers to as the 'impugned decisions' were the following:

5.1 to restore the applicant's position to an Assistant Director Administration retrospective to 1 March 2014;

5.2 to recover from her an amount of R178 88.98 of 'overpaid' salary paid to her over the preceding 13 months; and

5.3 deduct this amount from her salary in 12 equal instalments.

[6] The decisions are explained in the following letter dated the 16 April 2015:

"Dear Ms RE Farre

GRIEVANCE WRT BENEFITS AND PAYMENTS

1. SA Navy Grievance Committee (SANGC) meeting held on 10 March 2015 refers.

2. Your concerns/dissatisfaction as addressed is hereby acknowledged, however, during the proceedings of the SANGC, your grievance was discussed thoroughly and the following is brought to your attention:

   a. According to an audit that was done by DHRSS wrt your translation to OSD with effect from 01 March 2014, you did not qualify to be appointed as a Control Scientific Technician, as you did not meet the appointment requirements as stipulated in the OSD.

   b. Furthermore, kindly be advised that the Specialist Artisan and Control Scientific Technician posts are regarded as newly created posts that must be advertised in terms of Public Service Regulations and interested employees must apply for these posts. It is regretted that you were erroneously translated into the OSD post without advertising the post.

3. The occurrence of the above resulted in you being overpaid to an amount of R178 888.98 over period.

4. In terms of Section 38 of the Public Service Act 1994 as amended by Section 34 of the Public Service Amendment Act 2007, the Department of Defence (DOD)reserves the right to rectify any error or recover any overpayment resulting from erroneous translation to a higher post level and receiving OSD allowance.

5. The SANGC sincerely regrets to inform you that DOD intends to recover the overpaid amount in twelve (12) equal installments, however, should you not be able to repay the amount within twelve equal installments, you must provide an Income and Expenditure Statement as well as documentary proof of all accounts with the outstanding balances to

Human Resource Division (D HR.CM) in order to determine the amount to be deducted from your salary.

6. The SANGC is of the opinion that the matter was adequately addressed and considers the matter as finalised. You are required to acknowledge and respond within five (5) working days after receipt of this letter.

Yours Faithfully

(R ADM (JG0 AE KUBU)

CHAIRPERSON OF THE SANGC: V ADM"

[7] The applicant approached this court on an urgent basis and an interim order was granted reinstating her 'administrative' position salary pending the hearing of this application.

[8] The answering papers are deposed to by an Assistant Director: Remuneration in the Human Resources Department of the Department of Defence. The respondents raise a jurisdictional point in limine. They submit that at issue in this application is a challenge to the employer's decision to place the applicant back into her Assistant-Director: Admin post and that underlying same is the question of whether she was correctly translated under the OSD. It was submitted on behalf of the respondents that applicant is asserting an interpretation and application of a collective agreement dispute which ultimately resolves into an unfair labour practice dispute relating to demotion. This dispute has never been addressed internally as is required by Regulation 17 of the Individual Grievance Regulations.

[9] The respondents further submit that Section 35(4) of the Public Service Act provides that an employee may only refer a dispute to the relevant bargaining council in the public service, or institute court proceedings, if she has lodged a grievance and the Department has not resolved the grievance to her satisfaction, as prescribed. Only after an employee has exhausted her internal remedies, is she able to refer this dispute to the GPSSBC in terms of clause 18 of the OSD, read with section 24(1) and (2) of the LRA.

[10] This court has to determine whether it has jurisdiction to hear this application on the basis of the pleadings before it as set out in **Gcaba v Minister for Safety and Security and Others** [2]:

> "[74] The specific term 'jurisdiction', which has resulted in some controversy, has been defined as the 'power or competence of a Court to hear and determine an issue between parties'. This court regularly has to decide whether it has jurisdiction over a matter, because it may decide only constitutional matters and issues connected with decisions on constitutional matters. If a litigant raises a constitutional issue, this court has jurisdiction, even though the issue may eventually be decided against the litigant.
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> [75] 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 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

[2] 2010(1) SA 238 (CC)

of administrative action that is cognisable by the High Court, should thus approach the Labour Court."

[11] In order to establish whether a proper interpretation of the pleadings establishes a claim that the LRA provides is to be dealt with in another forum, and not a claim justiciable in this court, i.e. the review and setting aside of two decisions of applicant's state employer in terms of section 158(1)(h) of the LRA,[3] I must consider, among others, the basis of applicants claim. The applicant submits that she brings a "legality review" but at the same time the submissions on her behalf are clearly based on the premise that the impugned decisions amounted to administrative action. Her founding papers stated that she was advised that "the Respondents' decisions to change my job classification is unlawful, invalid, and inconsistent with the Constitution, PAJA, the Public Service Act, 1994 and the regulations thereto". This 'catch-all' description of the nature of the review before court is not the most helpful.

[12] The law as set out in **Gcaba** which dealt with the two spheres of constitutional protection, the right to fair labour practices and the right to fair administrative action, gives guidance to this court. The Constitutional Court stated that:

"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized 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

[3] which provides that this 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;"

few or no direct implications or consequences for other citizens, it does not constitute administrative action."[4]

[13] In **Public Servants Association of SA on behalf of de Bruyn v Minister of Safety & Security & another**[5] the LAC per Mlambo JP (as he then was), had this to say:

> "[24] The review powers entrusted to the Labour Court in terms of s 158(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.
>
> [25] 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.
>
> [26] The supposition that public servants had an extra string to their bow in the form of judicial review of administrative action, ie acts and omissions by the state vis-à-vis public servants, evaporated when the Constitutional Court in Chirwa v Transnet Ltd & others, held that the dismissal of a public servant was not 'an administrative act' as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the Chirwa judgment was removed in the subsequent decision in Gcaba v Minister for Safety & Security & others. The result is that a public servant is confined to the other remedies available to him or her.

[4] At paragraph 64
[5] (2012) 33 ILJ 1822 (LAC)

[27] One of the effects of Chirwa is that a dismissal is not to be regarded as an 'administrative act' by the state but merely as the act of the state in its capacity as an employer. This decision brought us to the situation where the pre-Chirwa substratum of s 158(1)(h) fell away, although there may conceivably still be employer acts which are almost indistinguishable from administrative acts. The post-Chirwa meaning of s 158(1)(h) has received the attention of the Labour Court in De Villiers v Head of Department: Education, Western Cape Province, SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others, and National Commissioner of Police & another v Harri NO & others.

[28] But it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course. Recourse to review proceedings, in terms of s 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place and also other applicable statutes. (my emphasis)

[29] One limitation or restriction is relevant to the case at hand. The LRA may oust the s 158(1)(h) review jurisdiction of the Labour Court. Section 157(5) of the LRA, as the court a quo appreciated, provides that if the LRA requires an unresolved dispute to be resolved through arbitration, the Labour Court does not have jurisdiction to adjudicate the dispute. Notwithstanding this, the Labour Court could acquire jurisdiction in terms of s 158(2) of the LRA but such a situation does not arise in this case."

[14] In **De Villiers v Head of Department: Education, Western Cape Province** [6] this court per Van Niekerk J had considered the implications of a deemed dismissal and of the power given to a public functionary to reinstate an employee

[6] (2010) 31 ILJ 1377 (LC)

in terms of s 14 of the Employment of Educators Act 76 of 1998. He summed up the considerations relevant to determining whether a particular decision constitutes administrative action as follows:

> "In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following SARFU) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute ..., whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject-matter of the power). I venture to suggest that the existence of any alternative remedies may also be a relevant consideration — this was a matter that clearly weighed with the court in both Chirwa and Gcaba, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation.' [7]

Evaluation

[15] The applicant's version before me is that the decision-maker in this case, (based on the record provided by the respondents), was a functionary in the Human Resources Department and not the Minister of Defence, who she submits is the person authorised to 'classify jobs on the establishment'. The letter which set out the 'impugned decisions' referred to by the applicant in her pleadings is written

[7] At paragraph 17

on behalf of the Grievance Committee of the Department of Defence. It predicates its decisions on the allegation that the applicant was incorrectly translated in terms of the OSD in question. As a result it restores her to her pre-OSD position her and seeks to recover monies paid to her in terms of section 38 of the Public Service Act.

[16] In respect of the deductions that were made to her salary, the applicant pleads that section 38 of the PSA is not applicable because the payments made to her were not 'erroneous' and submits that she was properly and not erroneously paid in accordance with the applicable provisions of the OSD. Further reference is made to the provisions of section 34 of the BCEA dealing with constraints on the ability of an employer to deduct remuneration from an employee. In my view, the essence of the case as pleaded concerns the interpretation and application of a collective agreement to an individual employee.

[17] Taking the approach as set out in the **de Bruyn** judgment, there is merit in the respondents' stance on the jurisdiction of this court. This is not a case which is an exception to the general rule set out in **Gcaba.**[8] On the basis of applicant's pleadings properly construed, I am of the view that the section 158(1)(h) jurisdiction in regard to this dispute is ousted by the provisions of the LRA which require the real dispute between the parties, the interpretation and application of the OSD to the applicant, to be arbitrated. In addition, the conduct of the employer in relation to the alleged demotion of the applicant may also fall to be dealt with by an arbitrator.

[18] It is clearly in the interests of justice that the matter be dealt with expeditiously by the parties. Given that the facts in dispute have been crystallised in these proceedings, I will order that this matter proceed expeditiously. The interim order made by this court, that the applicant be paid her administrative salary, should remain in place until the finalisation of arbitration proceedings at the Bargaining

[8] This distinguishes it from the exceptional facts and circumstances before the courts in Public Servants Association of SA & another v Minister of Labour & another (2016) 37 ILJ 185 (LC) and Hendricks v Overstrand Municipality & another (2015) 36 ILJ 163 (LAC)

Council. I do not consider that a cost order is apposite in respect of these proceedings. I make the following order:

Order

1. The application is dismissed for want of jurisdiction.

2. The parties are ordered to finalise the internal grievance process in terms of Regulation 17 by no later than 8 August 2016.

3. The respondents are directed to continue to remunerate the Applicant in accordance with the order of this court dated 5 June 2015, pending the outcome of the proceedings at the GPSSBC or a settlement of the dispute, whichever is the earliest.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: S. Harvey instructed by Guy & Associates

Respondents: B. Joseph instructed by the State Attorney