IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

CASE NO: D720/15

In the matter between:

BHAVNA SINGH Applicant

and

MEC FOR THE DEPARTMENT OF HEALTH: KWAZULU-NATAL First Respondent

SIFISO MTSHALI Second Respondent

BONGANI SHEZI Third Respondent

LONDIWE BUTHELEZI Fourth Respondent

Heard: 12 October 2016
Delivered: 31 January 2017
Summary: Review application – employer in public sector - employment disputes in public sector - resolution of disputes in the public sector to be resolved through the same mechanisms and in accordance with the same values as in the private sector – failure to appoint trainee an unfair labour practice dispute to be referred to a bargaining council.

JUDGMENT

CELE J

Introduction

[1] This application in terms of section 158 (1) (h) of the Labour Relations Act[1] seeks to review and set aside the decision of the Third Respondent, acting in his capacity as the First Respondent's Deputy Director-General: Corporate Management Services, to appoint the Fourth Respondent to the training post of Registrar Dermatology under reference number M212/2015, ("the decision"). The Applicant seeks an Order appointing her to the contested post. All four respondents oppose the application and the first three raised a jurisdictional point *in limine*.

Factual Background

[2] The facts of this matter are by and large common cause and I am indebted to both parties for their succinct summary thereof. The Applicant was registered as a medical practitioner by the Health Professions Council of South Africa with effect from 1 January 2010. She has been employed by the First Respondent in the position of Medical Officer Grade 1 in the Department of Dermatology (the Department) since 13 June 2011. In 2015 the First Respondent advertised training posts of Registrars in various disciplines with the closing date of 8 May 2015. The advert stated that the Department was an equal opportunity, affirmative action employer, whose aim was to promote representivity in all levels of all occupational categories in the Department. The Applicant and other candidates applied for the advertised training post of Registrar within the Department of Dermatology. The post was allocated reference number

[1] Act Number 66 of 1995 hereafter referred to as the LRA.

M212/2015. The Applicant was one of the candidates shortlisted and interviewed for the post.

[3] At the interview held on 3 June 2015, the Applicant scored the highest with 82% and the interview panel recommended that she be appointed to the post. The interview panel further recommended that Dr N Moodley who scored 76% and Dr L N Buthelezi ("the Fourth Respondent") who scored 75% be appointed first and second alternatives respectively, in the event of the Applicant declining the post. The interview panel's recommendations served before the Registrar Programme Steering Committee on 22 June 2015.

[4] The recommendation in respect of the Applicant was upheld although the Programme Steering Committee effected changes to the recommendations made in respect of some of the other disciplines on the basis of *inter alia*, employment equity. It is apparent from the minutes that both the interview panel and Steering Committee had regard to the First Respondent's Employment Equity Plan and the Employment Equity Targets in making their recommendations. On 25 June 2015 and one day after the Steering Committee submitted its final recommendation, the Third Respondent as per the letter of even date, wrote to the Registrar Steering Committee referring to their meeting of 22 June 2015, notifying them that he could not approve their recommendation because it was contrary to the Employment Equity Targets of the Department. While pleadings have Employment Equity Targets of the Department for the level 12 doctors none were supplied for the Registrar Programme itself. The Third Respondent appointed the Fourth Respondent as the suitable candidate against that post. The change was recorded by way of manuscript notes made on the margin of the recommendation document. The Steering Committee made recommendations for appointments in other medical disciplines as follows:

- ❖ In the discipline of Anaesthetics Dr S Singaram, an Indian Female was recommended for the placement in circumstances in which one Dr T Gumede, an African Female has also been recommended;

- ❖ In the discipline of Cardiothorasic Surgery Dr D Sethurayer, an Indian Male, was recommended for placement when Dr N Xhakaza, an African Male had also been recommended;

- ❖ In the discipline of Internal Medicine Dr S Temmers, a Coloured Male was recommended for placement when Dr B Njiyela, an African Female had also been recommended;

- ❖ In the discipline of Occupational Medicine Dr R Omed, an Indian Male was recommended when Dr M Mandimika, an African Female had also been recommended;

- ❖ In the discipline of Public Health Medicine, Dr A Naidoo, an Indian Female was recommended when Dr N Zulu, an African Male had also been recommended;

- ❖ In the discipline of Radiology Dr C A Surridge, a White Female was recommended when Dr M Dias Dos Santos, an African Female had also been recommended.

[5] On 2 July 2015 the Applicant wrote to the First Respondent asking for reasons for non-appointment/ non-promotion and the Second Respondent replied on 7 July 2015 giving her reasons and the procedure that was followed in reaching the decision not to appoint /promote her and he confirmed that although the Steering

Committee did not make any changes to the recommendations of the interview panel,

> "in the final analysis, the overall equity target of the programme was utilized in appointing the candidate."

[6] The Applicant was not satisfied with the written reasons that she received as a response to her grievance to the First Respondent and she lodged the present application, with Ms L R Naidoo appearing for her. Mr C M Kulati appeared for the first three respondents and Mr U Jivan appeared for the Fourth Respondent. In the main the applicant contends that the Third Respondent failed to explain to her how she, out of five Indians who had been recommended for placement was chosen for a de-selection. This was in circumstances where African candidates were equally eligible for such appointment. She contends that in the absence of the Third Respondent being able to rationally and objectively justify excluding her, his decision was arbitrary. The Third Respondent said that he worked with Employment Equity Targets on a monthly basis and so it did not take him long to consider the recommendations of the Selection Panel and the ratification of the Steering Committee so as to make proper decision. The Applicant averred that the Third Respondent did not apply his mind to all the facts and he rendered a decision which was arbitrary and irrational. All Respondents were together in opposing this application.

[7] As at the close of pleadings about fourteen months have elapsed since the Fourth Respondent was appointed by the First respondent to the contested post. Mr Kulati raised a jurisdictional point which if sustained can dispose of this application. That point must therefore be considered first, before the grounds for review outlined by the Applicant.

In limine point

[8] Mr Kulati submitted that after receiving the reasons for her non-appointment/non-promotion the Applicant, if not satisfied, was supposed to have approached the Public Health and Social Development Sectorial Bargaining Council ("PHSDSBC"), hereinafter referred to as the "Bargaining Council" for a Section 186 (2) (a) dispute resolution, before approaching this Court on review in terms of Section 145 of the LRA. Instead the Applicant chose to bypass the LRA procedure and approached this Court in terms of Section 158(1) (h). He contended further that it is trite and settled law now that Section 158(1)(h) of the LRA can only be used to review a decision that is an administrative action, which falls within the confines of Section 33 of the Constitution[2] and Section 1 of the Promotion of Administrative Justice Act (PAJA),[3] and set it aside on the grounds that it was irrational and unreasonable, being the grounds of review of administrative action stipulated in Section 6(2)(f)(ii) and Section 6(2)(h) of PAJA respectively. There further submissions on the merits of the application.

[9] The Applicant submitted that the Third Respondent's decision to appoint the Fourth Respondent to the training post of Registrar Dermatology offends against the principle of legality.[4] In such a review challenge, Applicant contends, the sufficiency of the functionary's reasons and their connection with his decision is squarely in issue.[5] Further submissions of the Applicant are that:

1) The First Respondent has failed to produce a copy of the equity targets relating to the Registrar Training Programme. In the absence of producing the equity targets of the programme, the decision of the Third Respondent to

[2] The South African Constitution, 1996
[3] Act 3 of 2000
[4] See *De Villiers v Head of Department, Education, Western Cape Province* (2010) 31 ILJ 1377 (LC); *POPCRU v Minister of Correctional Services* [2011] 10 BLLR 996 (LC) at para [30]; and *Public Servants Association of SA v Minister of Labour* (2016) 37 ILJ 185 (LC) at paras [54] to [62]
[5] See *SA Police Service v Solidarity obo Barnard* (2014) ILJ 2981 at para [103]

substitute the Fourth Respondent for the Applicant is arbitrary and unjustifiable.

2) Notwithstanding the stated reason for the decision being premised on the "*equity target of the programme"*, the Third Respondent seeks to rely on the equity targets for the First Respondent's entire staff establishment. In particular, he contends that the appointment of the Fourth Respondent, who is an African female, was intended to address the over subscription of Indian females "*in the First Respondent's employ at salary level 12 which is the category of salary in which the Registrar Training Programme appointments fall.* The suggestion that the appointment of the Fourth Respondent in the Applicant's stead would have any effect on the equity targets for Indian and African females at salary level 12 is simply untenable and frankly, disingenuous.

3) The Third Respondent fails to disclose to Court that both the Fourth Respondent and the Applicant were already at salary level 12 prior to the former's appointment to the training post and that both remained on such salary level thereafter. Accordingly, a lateral transfer or either of them to a Registrar's post at the same level would have had no impact on the demographic profile of females at level 12. It would neither have reduced the number of Indian females nor increased the number of African females at that salary level.

4) In the circumstances, the equity targets, purportedly relied upon by the Third Respondent in effecting the change, are simply irrelevant. More importantly, they do not provide a lawful or rational basis for his decision.

Evaluation

[10] During the presentation of this matter Ms Naidoo for the Applicant denied that the appointment sought by the Applicant to the contested post has a promotional effect and that therefore section 186 (2) of the LRA applies. In her further supplementary affidavit the Applicant complained of her non- appointment and said:

> "On this occasion however, the reasons for de-listing me are so arbitrary and contrive that I can no longer passively sit by and allow my career progression to continue to stagnate."

[11] In her own words and understanding of the implications of the appointment, she would have a career progression if she appointed against the contested post. The appointment would entail a four year training of the candidates who, upon passing the final examination could then be appointed as Registrars, depending on the availability of posts. The undisputed evidence of the Applicant was that candidates for appointment into the registrar on training would retain their salary levels. The Applicant and the Fourth Respondent retained salary level 12. Clearly therefore, the appointment does not equate to a promotion but to a right to being trained as a Registrar. Promotion was defined in *Mashegoane v University of the North*[6] as being elevated or appointed to a position that carries greater authority and status than the current position an employee is in. This includes the non-appointment of employees to newly created posts, provided that appointment to such a new post would have elevated the employee status. The appointment sought by the Applicant would not immediately elevate or appoint her to a position that carried greater authority and status than her current position.

[6] [1998] 1 BLLR 73 (LC).

[12] Section 186 (2) (b) of the LRA to the extent relevant reads:

> "Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-
>
> a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee."

[13] In terms of section 186 (2) (b) of the LRA therefore, unfair labour practice means any unfair omission that arises between an employer and an employee involving unfair conduct by the employer relating to the training of an employee. This is precisely what the Applicant is complaining about. Over a period of years she has been left out of training towards being a Registrar. While she was the best candidate for a training post of Registrar: Dermatology, she was de-selected. Clearly therefore, her complaint is one of unfair labour practice relating to training.

[14] As correctly submitted by Mr Kulati, the Applicant was supposed to have approached the PHSDSBC for a Section 186 (2) (a) dispute resolution, before approaching this Court on review. She instead bypassed the LRA procedure and approached this Court in terms of Section 158(1) (h).

[15] The Applicant takes issue with the decision of the Third Respondent, being the Deputy Director-General: corporate Management Services, serving under the First Respondent. The decision assailed pertains to employment disputes in the public

sector. The law governing reviews in this field has become trite. In *Chirwa v Transnet Ltd & Others*[7] the Constitutional Court had the following to say:

> "Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under Section 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and the labour relations and administrative action are two different areas of laws … The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement … The Constitution contemplates that the labour relations will be regulated through collective bargaining and adjudication of unfair labour practices. … The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as in the private sector, namely, through the collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action".

[16] What is clear from the *Chirwa* judgment is that the resolution of employment disputes in the public sector has to be resolved through the same mechanisms and in accordance with the same values as in the private sector. That mechanism is through the collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action. Further, in *Gcaba v Minister of Safety and Security and Others*[8] which is a case that dealt with failure to appoint, the Constitutional Court, inter alia, held that:

> "Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. … Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. … Section 33 does not regulate the relationship

[7] [2008] (2) BLLR 97 (CC)
[8] [2009] 12 BLLR 1145 (CC)

> between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer, and it has few or no direct implications or consequences for other citizens it does not constitute administrative action …".In *Chirwa* Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as "public" or "private" cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens. Accordingly, the failure to promote and appoint the Applicant was not administrative action."

[17] As with the *Chirwa* decision, the failure to appoint the Applicant is labour related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. The remedy of the Applicant lay in referring her dispute to the relevant bargaining council and not straight to this Court.

[18] I accordingly issue the following order, having reflected on the costs implications and the on-going employer/employee relationship, bearing in mind that the Applicant has been waiting for years already for her chance to be trained:

18.1 The point in limine is upheld with the consequence that the review application is dismissed.

18.2 No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

ADDENDUM:

1. Yesterday, the 30th January 2017, I was informed for the first time by my Secretary that a Notice of withdrawal of the Review Application was filed with the Court on or about 14 December 2016.
2. This information was conveyed to me after I had finished the judgment and had given an instruction that parties be informed of the set down date for the handing down of the judgment.
3. Today, 31 January 2017, I proceeded to hand down the judgment. None of the parties were in Court attendance.
4. Depending on the terms of settlement of the matter between the parties, of importance to them is that after I had considered the application I decided that no costs order be issued.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Ms L R Naidoo

Instructed By Anand-Nepaul Attorneys

FOR THE FIRST TO THE THIRD RESPONDENT: Mr Kulati

Instructed By the State Attorneys, Durban

FOR THE FOURTH RESPONDENT: Mr Jivan

Instructed By Jivan and Company.