Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 710/17

In the matter between:

NANA ARCILIA MASITHELA **Applicant**

and

THABAZIMBI LOCAL MUNICIPALITY COUNCIL **First Respondent**

THE MAYOR **Second Respondent**

Heard: 11 May 2017

Delivered: 16 May 2017

Summary: (Urgent application – to review and set aside decision to re-advertise a post – applicant selected as one of two competent candidates for Municipal Manager after original recruitment process – council deciding to re-advertise – no appointment made – jurisdictional issue decisive)

JUDGMENT

LAGRANGE J

Background to the application

[1] An interim order in this matter was handed down on 28 March 2017 compelling the local authority to withdraw advertisement of the position of a municipal manager pending determination of relief sought in part B of the notice of motion. The order further directed the 1st respondent not to hold interviews and other ancillary relief.

[2] The final relief sought in this application is to review and set aside the decision of the respondent to re-advertise the vacancy of municipal manager and secondly, to appoint the applicant as the best qualified and competent candidate for the post of municipal manager. An amended notice of motion substituting the 2nd part of the relief sought was filed on 18 April in which the applicant simply requires an order that the respondent is to do everything necessary to appoint the applicant within 5 days of the date of the order as the municipal manager.

[3] The applicant had emerged from the selection process following the 1st advertisement for the post of municipal manager as one of two competent candidates. The applicant believed that a rival candidate had subsequently failed a security vetting test based principally on the fact of a media release from the Greater Tzaneen Local Municipality in February 2015, that he was dismissed as a municipal manager from that local authority. The respondent denies that the rival candidate failed any security vetting test. Consequently, the applicant believed that she was the only remaining candidate for the post who had passed successfully through the selection process and accordingly ought to have been employed.

[4] However, to her understandable disappointment, the respondent wrote to her on 16 March advising her that it had decided to re-advertise the post of municipal manager. This decision was taken at a special council meeting held on 14 March. The motivation for re-advertising the post was that, the poor financial state of the municipality needed a person with excellent financial experience and none of the candidates were financially competent in the assessment of the third party that had evaluated the competency of the candidates. In passing, I note that the assessment of the applicant's Financial Management competency, the concluding remark

was: “Financial management may therefore prove to be an important development area, given the level and nature of the role”, suggesting that this was something of a weak spot in the applicant’s skills set.

[5] The applicant did not accept this rationale for re-advertising the post and believed it was simply a ruse to avoid appointing her as the municipal manager after she believed she had emerged as the successful candidate in the initial recruitment process.

[6] Initially, when the applicant articulated her claim in her original founding affidavit she claimed that the decision to re-advertise her position amounted to unfair discrimination which was inconsistent with sections 5 and 6 of the Employment Equity Act and sections 9 and 195 of the Constitution. Alternatively, she claimed that the decision to re-advertise the post amounted to an unfair labour practice.

[7] After obtaining interim relief, the applicant filed an amended notice of motion in which she abandoned all claims under the Employment Equity Act and refashioned her claim as an administrative review under sections 33 (1)[1] and section 195[2] of the Constitution, without any reference to the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) as such.

[8] In essence, the applicant contends that the reasons provided in the minutes of the meeting, namely that the financial position of the municipality required someone with excellent financial experience and therefore the post should be re-advertised because none of the candidates were financially competent was a retrospective alteration of the minutes to rationalise the decision to re-advertise the post. In support of this contention, the applicant points out *inter alia* that the only new requirement introduced in the re-advertised position was that of “previous experience as a municipal manager will be added advantage”. The applicant contends that if the requirement been financial experience or competency it is incomprehensible that it would not have stated this.

[1] Viz ”(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

[2] S 195 Sets out the basic principles and values which public administration must adhere to.

[9] In summary, the specific grounds of review the applicant relies on are the following:

9.1 The decision to re-advertise the post was unfair, unreasonable, irrational and unjustifiable.

9.2 The respondent failed to apply its mind to the recommendations.

9.3 It acted mala fides.

9.4 It acted contrary to the requirements of fair administrative action.

9.5 The manner in which the decision was arrived at contradicts sections 33 (1) and 195 (1) of the Constitution.

Jurisdictional issue

[10] For the sake of considering whether the court has jurisdiction, I will assume that the applicant can rely directly on the constitution and the common law of review and that therefore, it was not necessary for the applicant to articulate her grounds of review under PAJA. The crisp jurisdictional question that needs to be determined is whether this court does have jurisdiction to review the respondent's decision to re-advertise the post of municipal manager.

[11] The respondent argues that the Labour Court's review jurisdiction is confined to the situations envisaged under sections 157 and 158 of the Labour Relations Act, 66 of 1995 ("the LRA").

[12] Initially, the applicant placed some reliance on the decision of the LAC in *Merafong City Local Municipality v SA Municipal Workers Union & another*[3] in support of her claim that that the Labour Court does have jurisdiction to hear her application. However, in argument, reliance on this case was abandoned. Nonetheless, that decision is important in delineating aspects of the court's jurisdiction and ought to be considered in order to deal with the other jurisdictional grounds advanced by the applicant. In the *Merafong* matter, the union had applied to review and set aside the decision of a municipality to appoint a particular individual as a municipal manger when evidence of financial mismanagement in a former

[3] (2016) 37 *ILJ* 1857 (LAC)

municipality where he was also employed as a municipal manager came to light. The LAC embarked on a detailed examination of the Labour Court's jurisdiction and powers and concluded that section 157 (1) confirmed those areas where the court has exclusive jurisdiction and where it would have concurrent jurisdiction with the High Court. However, contrary to previous interpretations in which section 158 was construed as dealing only with the powers that court exercises within its jurisdiction, the LAC pointed out that some of the provisions of section 158 in fact describe the type of matter referred to in section 157 (1) where the court has exclusive jurisdiction because they are matters "that elsewhere in terms of this Act are to be determined by the court."[4].

[13] The LAC went on to decide that one such subsection of section 158 which designates the court's jurisdiction and not merely its power is section 158 (1) (h) of the LRA, which states:

> "The Labour Court may –
>
> ...
>
> (h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law; ..."

(emphasis added)

The LAC concluded therefore:

> "[38] The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds 'permissible in law'. Permissible grounds in law would include the constitutional grounds of legality and rationality 19 and, if they constitute 'administrative action', on the grounds that are stipulated in PAJA, which is the legislation giving effect to the rights contained in s 33 of the Constitution. The appellant is an 'organ of state' as defined in s 239 of the Constitution and its powers and duties are of a public nature. The appointment of a municipal manager involves the exercise of public powers derived from the Systems Act and constitutes a decision, or decisions, or conduct, by the state in its capacity as employer.

[4] At 1866-7, paras [29]-[35]

> [39] In the circumstances, the Labour Court had jurisdiction to hear and determine the application for the review and setting aside of the appointment of Mr Mabaso as a municipal manager...."[5]

[14] In so far as the applicant sought to rely on this judgement as authority for the court's jurisdiction to review and set aside the decision to re-advertise the municipal manager's post, the facts of this matter are not on all fours with that in *Merafong* and the cases are distinguishable on that basis. In *Merafong*'s case, the applicant union was seeking to set aside an existing employment relationship which had been created when the municipal manager was appointed. In the applicant's case, the object of her review is aimed at creating an employment relationship which does not yet exist between herself and the respondent by means of setting aside the decision to re-advertise the post and to appoint her in the position of municipal manager by virtue of the initial recruitment process. I do not think a decision to re-advertise the post is a decision made by the Council in its capacity as an employer, because that necessarily implies the decision must have been one taken as an employer vis-a-vis one or more employees. If the decision had been one to revoke the appointment of the applicant and to re-advertise the post after she had been appointed, the position would probably be different, but in this case the applicant was only anticipating her appointment. The power conferred on the Labour Court by158 (1) (h) does not extend to decisions relating to potential employment relationships.

[15] The applicant cited three other cases in which courts had intervened in appointment processes. The first case is *Mlokoti V Amathole District Municipality & Another*.[6] The headnote to that High Court matter usefully summarises the facts as follows:

> "The applicant had applied for the advertised post of municipal manager of the first respondent municipality. After a shortlisting process, the applicant and Mr Z were the two outstanding candidates, and the other candidates were eliminated. In June 2008 the council of the municipality resolved to appoint Mr Z and notified the applicant that his application had been

[5] At 1867-8.

[6] (2009) 30 ILJ 517 (E)

unsuccessful. The applicant, aggrieved by the decision , sought, inter alia, to have the decision reviewed and set aside by the High Court."

[16] In that case, the court decided that the applicant as an external candidate for the post could not have relied on the Labour Relations Act and that the High Court had jurisdiction to hear the matter on the basis that in making the decision to appoint someone else as municipal manager of the local authority was performing an administrative act which could be reviewed and because the applicant did not have a remedy under the LRA, she was not obliged to rely on that act but could find relief under the concurrent jurisdiction of the High Court, following the court's interpretation of the principles enunciated in *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) [7]. Although the applicant rightly points out that the High Court was willing to interfere in the appointment process and appoint the applicant, who was an external candidate after setting aside the appointment of the successful candidate, that judgement does not assist the applicant in establishing this court's jurisdiction in her case. If anything, it suggests the contrary namely that she should have launched her application in the High Court.

[17] The applicant also refers to the SCA case of *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* [8] where the court reviewed and set aside the decision to appoint certain candidates for posts following a selection process and recommendations of a selection panel. In that case the court appointed the best qualified candidates to the posts as part of the relief ordered. Lastly, the applicant referred to the case of *Mahura v Greater Taung Local Municipality and Others* [9], a decision of the North West High Court. In that matter, the court found that the selection panel had no authority to lower the prescribed minimum selection criteria and accordingly the candidate chosen from the shortlisting process or never to have been shortlisted[10] and his appointment was set aside and the municipality was ordered to re-

[7] At 522D-523E.

[8] 2008 (5) SA 18 (SCA)

[9] (M83/2014) [2014] ZANWHC 58 (28 November 2014)

[10] At para [24].

advertise the position. Likely, other decisions cited, it confirms the competency of the High Court to intervene and set aside appointments in exercising its powers of administrative review. They do not assist in determining whether this court has jurisdiction.

[18] Another argument in support of this court's jurisdiction to hear the matter was advanced after applicant's counsel conceded that the *Merafong* case was indeed distinguishable from the applicant's case. As I understand it, the applicant contends that the court in the exercise of its concurrent jurisdiction with the High Court under section 157 (2) could address the alleged violation of her right to fair administrative action under the Constitution. The pertinent portion of s 157(2) states:

> "The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -
>
> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;..."

(emphasis added)

Indeed, there appears to be authority for interpreting s 157(2)(a) as conferring concurrent jurisdiction on the Labour Court to determine disputes concerning an infringement of the rights in the bill of rights in matters arising from employment and labour relations. Thus the Constitutional Court held in *Gcaba v Minister for Safety and Security & others*[11]

> [70] Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145.110Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and

[11] [2009] 12 BLLR 1145 (CC)

section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.

[71] Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible.111 The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, section 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.112

[72] Therefore, section 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by section 157(2)(a), (b) and (c).”[12]

(emphasis added)

[19] A very loose interpretation of the term ‘arising from employment and from labour relations’ might arguably stretch far enough to include a dispute arising between someone who is in the position of an external job applicant with no existing employment relationship with the other party to the dispute. However, I am not persuaded this was the intention of the legislature, given that the Labour Court is generally not able to entertain disputes between external job applicants and prospective employers

[12] At 1166.

except in very specific limited cases such as s 9 of the Employment Equity Act 55 of 1998, which expressly includes a job applicant in the definition of an employee for the purposes of claims under sections 6,7 and 9 of that Act. It also would render a provision like s 158(1)(h) effectively superfluous. If the Labour Court has unlimited concurrent jurisdiction to review decisions or conduct in any employment related issue, why would the legislature then narrowly express the scope of review in s 158(1)(h)?

[20] In light of the above, I am not persuaded the court has jurisdiction to entertain the applicant's review application.

Costs

[21] On the issue of costs, I believe that despite the applicant developing her case as it progressed, she originally launched the application in the belief that there was something untoward about the decision to re-advertise the matter. However, once the pleadings had closed in the second part of the urgent application, she should have taken stock of the position as it appeared once the founding papers were finalised. In my view, the application should have been withdrawn before it was argued on 11 May. Accordingly, I believe it is only fair and equitable that she should at the very least bear the respondent's costs of that day.

Order

[22] The application was heard as a matter of urgency and non-compliance with the requirements of the rules of the Labour Court relating to time limits and service is condoned.

[23] The application is dismissed for lack of jurisdiction.

[24] The applicant must pay the respondent's costs of appearance on 11 May 2017.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	Adv M. Phantsi instructed by Masike Attorneys
FOR THE RESPONDENTS:	Adv P. Kirstein instructed by JF Van Graan & Van Der Wateren Attoneys