REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11208/2014

DELETE WHICHEVER IS NOT APPLICABLE
1. REPORTABLE: ~~YES~~/NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED

DATE: 13/3/19 SIGNATURE

In the matter between:

PROFESSOR JOZANA KA MAHWANQA Applicant

and

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION Respondent

JUDGMENT

WEINER, J

Introduction

[1] The applicant, Jozana Ka Mahwanqa, seeks to review the decision of The South African Human Rights Commission (SAHRC), the respondent. It is common

cause that the applicant applied for several positions advertised by the respondent and that he was not shortlisted for any of the positions. The applicant states that, through its officials, the respondent failed to invite him for an interview and thus deprived him of the opportunity to be appointed as either a Head of Research or a Provincial Manager. He contends that he was fully qualified and experienced for the positions and that he was discriminated against unfairly, most probably due to ageism.

[2] The relief the applicant seeks is to review and set aside or correct the illegal and irregular decisions or actions of the officials of the respondent who, in their capacity as employees of the respondent (and while on duty) failed or deliberately ignored to recommend the applicant for an interview in respect of the vacant positions he had applied for. He further seeks an order that the decision of the respondent was a violation of the right to legal due process; the right to be heard by the panel; the right to equal treatment; and the right against unfair discrimination. The applicant therefore seeks constitutional damages in terms of section 33, section 9(1) and 9(2) of the Constitution and section 5 of the Employment Equity Act 55 of 1998 (EEA). Section 5 of the EEA provides that *'[E]very employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice.'*

Jurisdiction

[3] The respondent has raised a point *in limine*. It contends that this Court has no jurisdiction to entertain the matter as the applicable section of the Constitution is section 23, which regulates the employment relationship and guarantees the right to fair labour practices. The applicant, in alleging that the respondent committed reviewable irregularities, bases his cause of action on section 33 of the Constitution read together with the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Legislative Framework

[4] The right to fair labour practices is enshrined in section 23 of the Constitution. Section 23(1) provides as follows: 'Everyone has the right to fair labour practices.' The Labour Relations Act 66 of 1995 (the LRA) was promulgated pursuant to section 23 of the Constitution to provide detail to section 23.

[5] Section 33 of the Constitution provides that:

'***Just administrative action***

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

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by the court or, where appropriate, an independent and impartial Tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

[6] The LRA created procedures to deal with labour disputes. Section 157 of the LRA provides for the jurisdiction of the Labour Court as follows:

'(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) 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; and

(c) the application of any law for the administration of which the Minister is responsible.'

[7] Section 191 of the LRA provides for the procedure dealing with unfair dismissals and unfair labour practices. In terms of section 191, if there is a dispute about an unfair labour practice, the employee alleging the unfair labour practice must follow the procedures set out therein. Such disputes fall within the domain of labour law and the LRA.

[8] The jurisdiction of the High Courts is dealt with in section 169 of the Constitution which states:

'*A High Court may decide –*

(a) any constitutional matter except a matter that:

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament.'

[9] The respondent contends that section 33 deals with the relationship between the State (as a bureaucracy) and the citizens, and guarantees the right to lawful, reasonable and procedurally fair administrative action. On the other hand, section 23 of the Constitution regulates the employment relationship, and guarantees the right to fair labour practices.

[10] In *Gcaba v Minister of Safety and Security*,[1] the Constitutional Court dealt with the conflicting decisions that had arisen in several of the High Courts, particularly in relation to whether or not PAJA applies to employment relationships. The Court was dealing with the decisions in the cases of *Fredericks v MEC for Education and Training Eastern Cape*[2] and *Chirwa v Transnet Limited*.[3] It also dealt with the preceding jurisprudence of the Supreme Court of Appeal (SCA) and other courts. The Constitutional Court therefore sought to give clarity and a proper interpretation of the relevant provisions of the Constitution, the LRA and PAJA.

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[1] *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC).
[2] *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* 2002 (2) SA 693 (CC).
[3] *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC).

[11] *Gcaba* dealt with whether or not the High Court had jurisdiction to entertain an application to review and set aside the decision of the South African Police Services (SAPS) not to appoint Gcaba as the Station Commissioner in Grahamstown. The question to be decided was whether the decision not to appoint the applicant was administrative action and thus subject to administrative review under PAJA.

[12] I pause here to indicate that the applicant submits that this case is distinguishable from that of *Gcaba* on two grounds: firstly, that this is not an employment matter and therefore *Gcaba* is irrelevant, as it dealt with promotions and appointments within an organisation of already existing employees. It did not deal with the situation that pertains to this particular matter. Secondly, he referred to *NEHAWU v University of Cape Town*[4] in which the applicant submits the Constitutional Court held that the LRA was superseded by the Constitution, and if constitutional rights were involved, the High Court has jurisdiction.

[13] What is apparent from the *NEHAWU* case is that the matter began in the Labour Court and the Court specifically referred to the right to fair labour practices in terms of section 23(1) of the Constitution as a guarantee to workers and employees.

[14] The fact that a constitutional issue may be raised does not necessarily oust the provisions of section 23(1) of the Constitution. However, the pivotal question is whether or not PAJA is applicable to the present situation, on the basis that the decision of the respondent constitutes administrative action.

[15] In *Gcaba*, Van der Westhuizen J held as follows:

'*The determination of this question will be informed by the answers to questions such as whether the decision not to appoint the applicant was administrative action and thus subject to administrative review. Whether an applicant whose claim is based on a labour matter may approach a High Court or has to follow the channels provided for by the LRA and whether this decisions in* Fredericks *and* Chirwa *can be reconciled.*'[5]

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[4] *NEHAWU v University of Cape Town and Others* 2003 (3) SA 1 (CC).

[5] *Gcaba* (note 1 above) para 5. In the High Court in *Gcaba*, Erasmus J held that the High Court lacked jurisdiction as it related to an employment matter.

[16] In *Fredericks*, the High Court held that, on a proper construction of the LRA, it did not have jurisdiction to consider the matter, whereas in *Chirwa* the High Court assumed that it did have jurisdiction to hear the matter. The Supreme Court of Appeal in *Chirwa* upheld the High Court's concurrent jurisdiction with the Labour Court to entertain the applicant's claim.[6]

[17] In *Fredericks*, the Constitutional Court held that the jurisdiction of the High Court was not ousted by section 157(1) of the LRA simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction would only be ousted in respect of matters that 'are to be determined' by the Labour Court in terms of the LRA. It further held that there was no express provision conferring exclusive jurisdiction on the Labour Court to determine disputes concerning alleged infringements of constitutional rights by the State acting in its capacity as an employer. It held that the section, in fact, affords concurrent jurisdiction to both the Labour Court and the High Court in the circumstances prescribed therein.[7] The conclusion was that the High Court was incorrect in holding that it lacked jurisdiction to entertain the matter.

[18] In *Chirwa*, Skweyiya J distinguished *Fredericks* from the matter before it. The Court in *Chirwa* held as follows:

'Fredericks *is distinguishable from the present case. Notably, the applicants in* Fredericks *expressly disavowed any reliance on section 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in* Fredericks *rely on the fair labour practice provisions of the LRA or any other provision of the LRA. The Court therefore did not consider, but left open, the question whether a dispute arising out the interpretation or application of a collective agreement can also give rise to a constitutional complaint as envisaged in section 157(2) of the LRA.*'[8] Skweyiya J went on to address the question as to whether employment contracts are subject to administrative law on a jurisdictional basis. He

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[6] See *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) paras 6-10.
[7] *Fredericks* (note 2 above) para 41.
[8] *Chirwa* (note 3 above) para 58.

found that '*labour issues are to be dealt with in the specialised fora and pursued through the purpose-built mechanisms established by the LRA.*'[9]

[19] The purpose of the LRA is to create a system under which all labour disputes can be resolved. Skweyiya J thus viewed the purpose of section 157(2) of the LRA as extending the jurisdiction of the Labour Court to employment matters that implicate constitutional rights. He stated further that the High Court's jurisdiction will only be ousted when matters are, according to section 157(1), to be determined by the Labour Court. This is implied by section 191 of the LRA, which confers unfair dismissal jurisdiction on the Labour Court and not on the High Court. Thus if section 157 is interpreted in the light of section 191, the High Court's jurisdiction is ousted by section 157(1).

[20] Although the applicant in the present case contends that he does not bring the application in terms of section 23 of the Constitution, in his founding affidavit he refers to the fact that he finds it strange that the respondent – which has a functional department or section of human resources which should be responsible for processing employment applications – should delegate those powers to other parties. He also relies upon the EEA which, he says, forbids unfair discrimination at the workplace and in the selection process. He refers to JV du Plessis & MA Fouché's 'A Practical Guide to Labour Law',[10] which deals with the EEA and the duty of employers to promote equal opportunity in the workplace and to eliminate unfair discrimination in employment policies and practices. Chapter II of the EEA, which prohibits unfair discrimination, applies to all employees and employers. In this regard 'employees' include potential or prospective employees. Du Plessis & Fouché state that '*Job applicants are, for the purposes of Chapter II, regarded as "employees" and can rely on the provisions of Chapter II if they allege that their non-appointment to a post was based on unfair discrimination.*'[11] Thus the EEA it is not, as the applicant submits, applicable only to employees who are already employed by an organisation and who are seeking promotion.

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[9] Ibid para 41. Quoting from *Gcaba* (note 1 above) para 29.
[10] JV Du Plessis & MA Fouché *A Practical Guide to Labour Law* (2015) 8 ed.
[11] Ibid at 90.

[21] The applicant also refers to section 10(1) of the EEA as one of the bases upon which he alleges he was unfairly discriminated against. He concedes that the term 'employee' also means prospective employees, or persons who apply for vacancies – but he still contends that it does not include an 'outside' applicant like him. He states that unfair discrimination based on section 6(1) of the EEA is, according to the LRA, automatically unfair. Section 6 of the EEA, titled 'Prohibition of unfair discrimination' provides as follows:

'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) ...'

[22] In the relief that the applicant seeks he refers to the LRA by stating that the respondent must comply with the democratic values and principles enshrined in the Constitution and labour law, and he refers to section 3 of the LRA[12] and section 5 of the EEA. Thus, the applicant's case is truly premised on the LRA and section 23 of the Constitution, as opposed to section 33 of the Constitution.

[23] The Constitutional Court in *Chirwa* held that Chirwa's claim of unfair dismissal was one envisaged by section 191 of the LRA, which provided a procedure for its resolution and by necessary implication fell within the exclusive jurisdiction of the Labour Court. The Court thus held that she should have first exhausted all remedies

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[12] Section 3 of the LRA:
'**Interpretation of this Act.**—Any person applying this Act must interpret its provisions—
(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic.'

and procedures provided in the LRA. The High Court therefore had no concurrent jurisdiction.

[24] Ngcobo J, in a separate judgment in *Chirwa*, emphasised that the manifest object of the LRA is to subject all employees, irrespective of whether the employer is in the public or private sector, to its provisions except those who are expressly excluded from its ambit.

[25] In *SANDU v Minister of Defence* the Constitutional Court held that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.[13]

[26] In *Chirwa,* Ngcobo J concluded that:

'*...The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2) ... What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of the right entrenched in the Constitution.*'[14]

[27] This is on all fours with the present case.

[28] In *Gcaba*, the applicant had contended that his claim was, from inception, couched in administrative law terms.[15] As a result it was clear that he was relying on the right to just administrative action as envisaged by PAJA, and any reliance on the right to fair to fair labour practices under the LRA constituted a subsidiary argument.

[29] The Constitutional Court set out some general principles and policy considerations in order to evaluate the divergent approaches to the interpretation of

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[13] *SANDU v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 53. Confirmed by Ngcobo J in *Chirwa* (note 3 above) at para 123.
[14] *Chirwa* (note 3 above) para 124.
[15] *Gcaba* (note 1 above).

sections 23 and 33 of the Constitution, as well as to section 157 of the LRA and the provisions related thereto. The Court found that it was correct that the same conduct may violate different constitutional rights and give rise to different causes of action. It stated as follows:

'*...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. ...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...*'[16]

[30] In dealing with whether the failure to appoint Gcaba was administrative action, and therefore subject to review, the Court held as follows:

'*Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised 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. Where 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.*'[17]

[31] The Court accordingly held that the failure to promote and appoint the applicant was not administrative action. It state that, '*[I]f the case had proceeded in the High Court, he would have been destined to fail for not making out a case with*

[16] Ibid para 56.
[17] Ibid para 64.

which he approached this Court, namely, an application to review what he regarded as administrative action.'[18]

[32] As held in *Chirwa*, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes grounded in the LRA.

[33] Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. The Court in *Gcaba* then held that section 157(1) should therefore be given expansive content to protect the special status of the Labour Court and section 157(2) should not be read as extending the High Court's jurisdiction over these matters. The Constitutional Court held as follows:

'*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. 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.*'[19]

[34] In order to determine the basis of the applicant's claim, the court must have regard to the pleadings, and in motion proceedings, the court must give regard to not only the terminology of the notice of motion but also to the supporting affidavits. These must all be analysed to establish what the legal basis of the applicant's claim

[18] Ibid para 68.
[19] Ibid para 71.

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. As stated in *Gcaba*, *'[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.'*[20] The Court therefore found that an applicant like Gcaba, who was unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should approach the Labour Court.

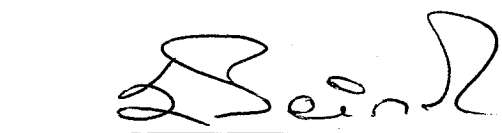
[35] The applicant has relied on the EEA to allege that he is being discriminated against in the recruitment and selection process. As set out above, section 6 of the EEA prohibits unfair discrimination on a number of grounds.

[36] Section 9 of the EEA provides that for the purposes of sections 6, 7 and 8 an 'employee' includes an applicant for employment.[21] Thus the applicant herein would fall within that definition.

[37] Accordingly this Court is of the view that it does not have jurisdiction in that the applicant has not pleaded facts that sustain a cause of administrative action that is cognisable by the High Court.

Accordingly the following order made:

1. The application is dismissed with costs.



S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNEBURG

[20] Ibid para 57.
[21] Sections 7 & 8 of the EEA relate to medical testing of employees and the psychological testing of employees respectively.

Date of hearing:	20 February 2019
Date of judgment:	21 February 2019

Appearances:

Counsel for the Applicant:	In person
Counsel for the Respondent:	Adv. E M Masombuka
Instructing Attorneys:	Ruth Edmonds Attorneys Inc.