**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA72/2022

In the matter between:

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| **EDUCATION LABOUR RELATIONS COUNCIL** | **Appellant** |
| and | |
| **DEPARTMENT EDUCATION: GAUTENG** | **First Respondent** |
| **SJOLUNDA N.O.** | **Second Respondent** |
| **BETANE L** | **Third Respondent** |

**Heard:** **23 May 2024**
**Delivered:** **12 June 2024**
**Coram:** **Musi, Sutherland JJA *et* Davis AJA**
**Summary:** **Jurisdiction - The Education Labour Relations Council has jurisdiction to arbitrate a dispute between an educator and the Department of Education.**

**JUDGMENT**

**MUSI, JA**

[1] This is an unopposed appeal against an order of the Labour Court in which it reviewed and set aside an arbitral award, made by a Commissioner, under the auspices of the Education Labour Relations Council (ELRC). The award was set aside pursuant to the Labour Court's finding that the Commissioner lacked jurisdiction to arbitrate the dispute. The appeal is with the leave of that Court.

[2] Mr Betane and Ms Motoma are educators at the Pholosho Secondary School (School). On 17 December 2015, the Department of Education (DoE) placed an advertisement for the filling of vacant posts in Gauteng Schools, including that of a Deputy Principal at the School. Both applied, were shortlisted and interviewed for the post. During the interview, Mr Betane and Ms Motoma scored 92 and 90 points respectively. The selection panel recommended to the School Governing Body (SGB) that Mr Betane be recommended for appointment by the DoE. The SGB ratified the decision, and, accordingly recommended Mr Betane for appointment to the post.

[3] The DoE decided not to follow the SGB's recommendation and appointed Ms Motoma. The primary reason for rejecting the SGB's recommendation was that it overlooked the gender imbalance at the school. Having considered the gender imbalance at the school it decided to appoint a female.

[4] Dissatisfied with the DoE's decision, Mr Betane referred an unfair labour practice dispute to the ELRC, in terms of section 186(2)(a) of the Labour Relations Act (LRA).[1] Conciliation was unsuccessful and he referred the dispute to arbitration.

[5] At the arbitration, the Commissioner found, for various reasons which are irrelevant for present purposes, that the conduct of the DoE constituted an unfair labour practice with regard to the promotion of Mr Betane. He ordered the DoE to appoint Mr Betane to the post, and, he resultantly set aside Ms Motoma's appointment.

[6] Aggrieved by the arbitral award, the DoE launched a review application in the Labour Court. The Labour Court found that the conduct of the DoE constituted

[1] Section 186(2)(a) of the Labour Relations Act, 66 of 1995, as amended (LRA) provides:

''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 dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee…'

administrative action as defined in s1 of the Promotion of Administrative Justice Act[2] (PAJA). It stated that administrative action may only be reviewed by a Court or tribunal, and, concluded that since the ELRC is neither a Court nor a tribunal, it had no jurisdiction to arbitrate the dispute.

[7] The Labour Court relied on *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others*[3] (*Point High School*) as authority for its conclusion. In *Point High School,* the SGB had launched an application to review and set aside the decision of the Education Department. The SGB instituted the review in terms of PAJA and it was adjudicated on that basis. This matter is on a different footing because the employee brought the review in terms of the LRA.

[8] The Labour Court unfortunately overlooked relevant decisions of the Constitutional Court. In *Chirwa v Transnet Ltd & Others*[4], Skweyiya J held that "*the LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the State and its organs as employers*".[5] Ngcobo J elaborated in a separate judgment and stated that:

> 'Consistently with this objective, the LRA brings all employees, whether employed in the public sector or private sector under it, except those specifically excluded. The powers given to the Labour Court under s 158 (1)(h) to review the executive or administrative acts of the state as an employer gives effect to the intention to bring public sector employees under

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[2] Act 3 of 2000. Section 1 defines 'administrative action' as: -

'any decision taken, or any failure to take a decision, by –

*(a)* an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect…'

[3] [2008] ZASCA 48; 2008 (5) SA 18 (SCA); [2008] 3 All SA 35 (SCA).

[4] [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); (2008) ILJ 73 (CC).

[5] At para 64.

> one comprehensive framework of law governing all employees. So too is the repeal of the legislation such as Public Service Labour Relations Act and the Education Labour Relations Act. One of the manifest objects of the LRA is therefore to subject all employees, whether in the public sector or in the private sector, to its provisions except those who are specifically excluded from its operation.'[6]

[9] In *Gcaba v Minister of Safety and Security and Others,*[7] Mr Gcaba, the Grahamstown station commissioner, applied, was shortlisted and interviewed for a promotion to the upgraded post of station commissioner. He was unsuccessful and a Mr Govender was appointed instead. Gcaba approached the High Court with an application to review and set aside the decision not to appoint him to the upgraded post. The High Court held that it was an employment matter and dismissed the application for want of jurisdiction. The Constitutional Court held that the failure to promote and appoint Mr Gcaba was a quintessential labour-related issue, based on the right to fair labour practices. It concluded that:

> 'The applicant's complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour practices. It was not based on administrative action.'[8]

[10] The ELRC is a bargaining council established in terms of the LRA for the education sector. In *Mthashana FET College v Education Labour Relations Council and Others*[9], this Court said:

> 'The primary function of bargaining councils is to regulate relations between management and labour in the sectors over which they have jurisdiction by concluding collective agreements. The bargaining councils are also entrusted with the responsibility to settle disputes between parties falling within their registered scope. A Constitution of a bargaining council should capture a set of fundamental principles which governs it. A bargaining council derives its

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[6] Ibid at para 102.

[7] [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC).

[8] Ibid at para 76.

[9] [2020] ZALAC 35; (2020) 41 ILJ 2594 (LAC); [2020] 11 BLLR 1116 (LAC).

jurisdictional mandate, to resolve and/or [determine] disputes referred to it, from its Constitution.'[10]

[11] In terms of the Constitution of the ELRC[11] 'employee' means an educator as defined in the Employment of Educators Act[12] (EoEA) and 'employer' means the State in its capacity as employer as defined in the EoEA. The EoEA defines 'educator' as "*any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act*". An employer in respect of an educator in the service of a Provincial Department of Education means the Head of Department (HoD).

[12] In terms of clause 7.3 read with clause 70.10 of the ELRC's Constitution, it may resolve disputes – in respect of matters that are assigned to the State as employer in the education sector - with regard to promotions insofar as it affects the right of educators to a fair labour practice, when the HoD has made a decision. It is, *inter alia*, for this reason that the ELRC adopted Collective Agreement 3 of 2016 (ELRC Guidelines: Promotion Arbitrations). This collective agreement specifically states that its purpose is to "*ensure that parties and panellists understand what is expected of them in relation to unfair labour practice disputes concerning promotions*". The parties to whom this agreement applies bestowed the power to determine promotion disputes in the education sector on the ELRC.[13]

[13] In my judgment, the ELRC had jurisdiction to arbitrate the dispute between Mr Betane and the Gauteng Provincial Education Department. The order of the Labour Court ought to be set aside and the matter referred back to that Court for the proper adjudication of the review application.

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[10] Ibid at para 14.

[11] Collective Agreement 6 of 2016 adopted on 23 August 2016.

[12] Act 76 of 1998.

[13] In terms of section 191(1)(a)(i) of the LRA an employee alleging an unfair labour practice may refer the dispute to a bargaining council if the parties fall within the registered scope of the bargaining council.

[14] I accordingly make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside and the matter is remitted to the Labour Court to adjudicate the review application.

CJ Musi JA

Sutherland JA *et* Davis AJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr L Bono

Instructed by YBI Attorneys

FOR THE RESPONDENTS:None