IN THE LABOUR COURT

HELD AT DURBAN

CASE NO : D749/08

Reportable

Heard: 14 May 2010

Order granted: 20 May 2010

Reasons transcribed: 11 June 2010

Reasons delivered: 6 July 2010

MEC DEPARTMENT OF EDUCATION KWAZULU-NATAL

versus

N L KHUMALO **First Respondent**

KRISH RITCHIE **Second Respondent**

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

REASONS FOR JUDGMENT

PILLAY D, J

Introduction

1. In April 2004,[1] Mr N L Khumalo, the first respondent employee, was promoted to the position of Chief Personnel Officer without meeting all the minimum requirements for the job. On 11 July 2005,[2] Mr Krish Ritchie, the second respondent employee, was granted protected promotion to the same position without having been short-listed. The applicant, the Member of the Executive Council for Education,

[1] Page 233 of record para 5 of Khumalo's Affidavit
[2] Page 233 of record para 5 of Khumalo's Affidavit

KwaZulu-Natal (the MEC) became aware of these irregularities on 6 October 2005 when the third respondent trade union, the National Union of Public Sector and Allied Workers (NUPSAW), lodged a grievance on behalf of 11 members who also claimed promotion to the same post.[3] Faced with this onslaught, the MEC agreed at a meeting with NUPSAW to form a task team to investigate the irregularities. The task team reported to the MEC about 26 January 2007. Its findings did not support the promotions. On 17 October 2008 the MEC lodged this application to ask the Court to intervene to remedy the irregularities.

The Facts

2. The Department of Education (the Department) advertised the post of Chief Personnel Officer (CPO) for which the prerequisites included "extensive relevant experience, coupled with two or more years of supervisory experience at levels 6 or 7 within human resources".[4] Although Khumalo had acted in a supervisory position, he did so when he held a level 5 post, not a level 6 or 7 post.[5] Therefore, he did not meet the minimum requirements of the post. Khumalo should therefore not have been short-listed, much less promoted. Of the 11 NUPSAW grievants, eight already held level 7 posts and three held level 6 posts.

3. Alarmingly, the record of the proceedings that resulted in his appointment is missing. Apparently, no one can account for it.

4. However, on the undisputed facts alone, the MEC urges the Court to set aside Khumalo's promotion. She submits that the decision-makers, whom she does not identify, but who acted on her behalf, can offer no explanation that meets the constitutional test for just

[3] Page 25 of record, para 9 of founding affidavit, page 9 of record
[4] Page 33 of the record, annexure IC2 of the founding affidavit.
[5] Page 10, paragraph 14 of the Founding Affidavit; page 223 Ritchie's affidavit; page 240, paragraph 21.2 Khumalo's Affidavit.

administrative action to support Khumalo's appointment.[6]

5. Ritchie met the requirements of the post, but he was not short-listed. After Khumalo was appointed, Ritchie challenged Khumalo's non-appointment. Of the list of 11 grievants, all met the requirements for the post. Some were even short-listed, but not appointed.[7] At Ritchie's arbitration, officials could not justify Khumalo's appointment allegedly because the record of his appointment was missing. Ritchie did not disclose to them that he had not been short-listed. The MEC urges the Court to set aside Ritchie's promotion because no one had the power to settle the dispute by granting him protected promotion.

The Submissions

6. Mr Soni, who represented the MEC, submitted that the application is in terms of section 158(1)(h) of the Labour Relations Act, No 66 of 1995 (LRA) to review the administrative acts of the officials who had promoted Khumalo and Ritchie.

7. Khumalo's promotion should be set aside because, on the undisputed facts and in law, he did not qualify for promotion. Ritchie's protected promotion should be set aside because, although the officials had a mandate to settle, they did not have a mandate to settle on the terms that resulted in an illegality. They had no power to conclude and illegal agreement; accordingly they acted *ultra vires*.

8. *Ntshangase v MEC for Finance: KZN and MEC for Education: KZN* 402/08 (209 ZASCA 123 (28 September 2009)) confirmed that the MEC has *locus standi* to bring the application.[8] So too does *PEPCOR Retirement Fund v Financial Services Board* 2003(6) SA 38

[6] Page 262, paragraph 15 of the Replying Affidavit.

[7] Page 27, paragraph 13 of the Task Team's report.

[8] Page 10 of the Applicant's Heads of Argument.

(SCA) at 10.[9]

9. The application is the only way of undoing the illegality as the MEC is *functus officio*. Her officials exercised public power and their decisions constituted administrative action.[10] To be valid, the administrative action had to comply with section 33 of the Constitution of the Republic of South Africa Act, 108 of 1996.

10. She denies that in bringing this application, she is circumventing procedures prescribed in the LRA. The appointments were not made in terms of the LRA, but in terms of the Public Service Act, Proclamation 103 of 1994 (PSA). She claims no substantive relief under the LRA. In any case, the LRA does not provide to aggrieved employees the type of relief claimed in this application.[11] The LRA is relevant to found jurisdiction in terms of section 158(1)(g), (h) and (j).[12]

11. The MEC is *functus officio* in the absence of any power in the Public Service Act to set aside the two promotions.[13] Even if she is not *functus officio, Ntshangase* entitles her to approach the Court with this application.

12. Neither Khumalo nor Ritchie tender any explanation as to why they were entitled to be promoted. Neither can show that their promotions complied with section 33 of the Constitution. Khumalo himself speculates, but advances no reasons for his promotion.[14] During the attempts to resolve Ritchie's dispute, Khumalo had an opportunity to straighten the record. He failed to do so. Instead, his representative adopted an "obstructionist approach".[15]

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[9] Page 9A of the Applicant's Heads of Argument.
[10] *Ntshangase* read with section 33 of the Constitution, paragraph 32 of the Applicant's Heads of Argument.
[11] Paragraph 27 of the Applicant's Heads of Argument.
[12] Paragraph 28 of the Applicant's Heads of Argument.
[13] Paragraph 30 of the Applicant's Heads of Argument.
[14] Page 263 of the record, paragraph 16 of the Replying Affidavit.
[15] Page 261, paragraph 1.2 of the Replying Affidavit.

13. Admittedly, the MEC has delayed inordinately in lodging this application for which she has no explanation. However, applying a proportionality test, the benefit to the department and the public interest must be weighed against the prejudice to Khumalo and Ritchie.[16] Conversely, the harm that will ensue if the decision is allowed to stand must be weighed against the benefit to Khumalo and Ritchie.[17] Furthermore, if the State is guilty of "unconscionable conduct",[18] prescription should not apply.

14. The Court, as the ultimate defender of the Constitution, should welcome this application to uphold the principles of legality.[19]

15. Mr Blomkamp, who represented Khumalo and Ritchie, conceded at the hearing that following *Ntshangase*, the MEC had *locus standi*. Consequently, he abandoned his objection on this ground.

16. The main thrust of the employees' resistance to the application was that if the MEC had a claim, it prescribed three years after it arose in October 2005.[20] Even if the Prescription Act, No 68 of 1969 did not apply, the Labour Court, like the High Court, should dismiss applications that are launched after unreasonable delay. Furthermore, the employees had acquired vested rights that the MEC

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[16] *Sibiya and Others v The Director of Public Prosecutions and Others* Case CCT 45/04 dated 7 October 2005
[17] Paragraph 40 of the Applicant's Heads of Argument;
[18] *Njongi v MEC Department of Welfare Eastern Cape* 2008(4) SA 273 (CC)
[19] Paragraph 48 of the Applicant's Heads of Argument.

[20] Paragraph 4.2 to 4.3 of the respondents' heads of argument; *Mpanzama v Fidelity Guards Holdings (Pty) Limited* 2000 (12) BLLR 1459 (LC), *Njongi v MEC Welfare Eastern Cape* 2008(4) SA 237 (CC), *Ramden v Pillay and Others* 2008(3) SA 19 (AD), *Flogia Property Holdings (Pty) Limited v Boundary Financing Limited formerly known as International Bank of Southern Africa Limited and Others* 2008(3) SA 33 (C), *Banderker N.O. and Others v Gangrakar N.O. and Others* 2008(4) SA 269 (C), *Barnett and Others v Minister of Land Affairs and Others* 2007(6) SA 313 (SCA), *Electricity Supply Commission v Steward and Lloyd of South Africa (Pty) Limited* 1981(3) SA 340 (A), *Desai N.O. v Desai and Others* 1976(1) SA 141 (A), *Evans v Shield Insurance Company Limited* 1979(3) SA 1136 (W), *Cape Town Municipality and Another v Alliance Insurance Company Limited* 1990(1) SA 311 (C) and *CGU Insurance Limited v Ramdal Construction (Pty) Limited* 2004(2) SA 622 (SCA).

recognises cannot easily be taken away from them.[21]

17. The proper course to challenge a non-appointment should be arbitration in terms of section 186(2)(a) of the LRA,[22] not by way of this application to the Labour Court.

18. The employees deny that the MEC is *functus officio*. She should have retracted Khumalo's appointment as soon as she realised it was flawed. That would have "dealt with" Ritchie's complaint. If the promotions were illegal, the MEC could have corrected them "domestically" by simply retracting the appointment. That would not have been a situation where one administrator assumed powers of judicial review over another official.[23]

19. Provincial Departments of Education have withdrawn promotions in at least three reported cases.[24] If the MEC had retracted Khumalo's promotion, he might well have referred that as a dispute.[25]

20. As regards Ritchie, the agreement to settle the dispute ended the *lis* and the matter is *res judicata*.[26] Concluding a settlement agreement is not an administrative act, but a recording of the parties' consensus.[27] The MEC cannot challenge the settlement except on the grounds of fraud and *iustus error*, in which case she should have

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[21] Paragraph 4.12 to 4.13 of the respondents' heads of argument; *North West Department of Education v NESWISWI and Others* 2004 (8) BLLR 792 (Labour Court) at 797.
[22] Paragraph 6.3 to 6.5 of the Respondents' Heads of Argument.
[23] *Sachs v Donges* 1950(2) SA 265 (A).
[24] Paragraph 7.5 of the respondents' heads of argument: *SADTU and Others v Head of the Northern Province Department of Education* (2001 (7) BLLR 829 (LC), *Duda v MEC for Gauteng Department of Education and Others* (2001 (9) BLLR 1051 (LC), *North West Department of Education v NESWISWI and Others* 2004 (8) BLLR 792 (LC)).
[25] Paragraph 7.6 of respondents' heads of argument.
[26] Paragraph 8 of the respondents' heads of argument, *Gollach and Gomperts 1967 (Pty) Limited v Universal Mills and Produce Company Limited and Others* 1978(1) SA 914 (A), *Coin Security Franchisees and National Bargaining Council for the Security Industry and Others* 2007 (28) ILJ 2620 BCA, *Arbitrasie in die Howe* by Ester van Kerken 1993 (14) ILJ 17.
[27] *Mavundla and Others v Vulpine Investments Limited t/a Keg and Thistle and Others* 2000 (21) ILJ 2280 (LC), paragraph 8.4 of the Respondents' Heads of Argument.

followed the rule 7(a) review procedure of the Labour Court.[28]

21. The MEC may not rely on section 33 of the Constitution or the Promotion of Administration Justice Act, 3 of 2000 (PAJA) firstly, because she may not avoid PAJA and appeal directly to the Constitution.[29] PAJA, enacted to control public administration, is also not available to a State functionary; only natural persons have a right to just administrative action under section 33.[30] For decisions of the State to amount to administrative action, the State must exercise public power.[31] A State employer does not exercise public power when it performs employment related acts.[32] The legal relationship between the State and its employee does not have a public character merely because it is subject to the PSA. It remains contractual and an employment relationship,[33] not involving the exercise of public power or the performance of a public function in terms of some legislation. The employment contract has no public law elements nor is it governed by administrative law.[34] PAJA does not apply to labour matters.[35] To allow the MEC access to the Courts via PAJA would invite the State organs to approach the Court regularly to reverse fraudulent acts, mistakes, ineptitude and illegality.[36]

22. On the basis of *Oudekraal Estates (Pty) Ltd v City of Cape Town* (6)

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[28] Paragraph 8.5 of the Respondents' Heads of Argument.
[29] *Transnet Limited and Others v Chirwa* 2007 (1) BLLR 10 (SCA), paragraph 9.5 of the respondents' heads of argument.
[30] Paragraph 9.6 of the respondents' heads of argument; *Nel v Minister of Justice and Constitutional Development and Another* 2006 (7) BLLR 716 (T).
[31] Paragraph 9.9 of the respondents' heads of argument, *Chirwa v Transnet Limited and Others* 2008 (2) BLLR 97 (CC) at paragraph 44.
[32] paragraph 9.9 of the Respondents' Heads of Argument; *The South African Police Union and Another v National Commissioner of the South African Police and Another* 2006 (1) BLLR 42 (LC) at paragraph 51; *Chirwa v Transnet Limited and Others* 2008 (2) BLLR 97 (CC).
[33] Paragraph 9.10 of the respondents' heads of argument.
[34] Paragraph 9.11 to 9.14 of the respondents' heads of argument, *SAFU and Another v National Commissioner of the South African Police Service and Another* 2006 (1) BLLR 42 (LC), *Chirwa v Transnet Limited and Others* 2008 (2) BLLR 97 (CC).
[35] *Hlophe and Others v The Minister of Safety and Security and Others* 2006 (3) BLLR 297 (LC).
[36] Paragraph 9.17 of the respondents' heads of argument.

SA 222 (SCA) the promotions should be allowed to stand.

Issues for Determination

23. The Court addresses the issues for determination in the following order:
    a. Does the Labour Court have jurisdiction?
    b. Has the claim prescribed?
    c. Is the MEC *functus officio*?
    d. Is the dispute with Ritchie *res judicata*?
    e. Terminology
    f. The application of the LRA, PAJA and PSA
    g. The constitutional principles engaged.
    h. The application of the constitutional principles
    i. Costs

Jurisdiction

24. The Labour Court has exclusive jurisdiction in respect of all matters that the LRA empowers it to determine. It also has concurrent jurisdiction with the High Court in respect of any alleged violation of any fundamental right in Chapter 2 of the Constitution, arising from employment and from labour relations, and in respect of any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as an employer.[37]

25. The MEC brought this application in terms of section 158(1)(h) of the LRA. Section 158(1)(h) empowers the Court to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

26. Section 158(1)(h) is available when no other process is available or special circumstances exist to review an act of the State as employer. It is not a safety net to process disputes in public employment that

[37] Section 157 of the LRA

should have been channelled through some other prescribed provision. Nor is it a licence to bypass the prescribed conciliation, arbitration and review procedures when an applicant has missed the time limits.

27. The relief claimed, namely declarators, is not available through conciliation and arbitration, at least, not without the parties' consent. The Labour Court is empowered to grant declarators in terms of sections 158(1)(a)(iv).

28. The MEC invoked the Constitution to substantiate the relief claimed. Section 157(2) of the LRA expressly confers jurisdiction in constitutional matters on the Labour Court. Furthermore, section 158(1)(a)(iii) empowers the Court to grant

> "an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act"

29. Accordingly, the Labour Court has jurisdiction to determine this application.

Prescription

30. This application should have been brought years ago. The MEC was alerted to the need for condonation. But she made no such application. Even if she did apply for condonation, she would not have advanced any explanation for the delay, because she has none.

31. However, it will be short-sighted for the court to dismiss this application on the procedural technicality that it lacks an application for condonation or that the cause of action has prescribed because that will compound the injustice.[38] Furthermore, the balance of

[38] *Sibiya and Others v The Director of Public Prosecutions and Others* Case CCT 45/04 dated 7 October 2005

convenience favours the adjudication of the substantive merits of the dispute in the public interest and in the interests of promoting ethical, accountable and transparent public administration. The prejudice to the department and the public interest far outweighs any prejudice to the respondents. Any prejudice to Khumalo and Ritchie as a result of the delay in will be accommodated in the remedy.

Res Judicata

32. *Res judicata* literally means "a matter already judged"; the doctrine is that the matter cannot be judged again. This is a presumption founded on public policy requiring litigation not to be endless, to be in good faith and to prevent the same claim being demanded more than once.[39] As a general rule, the Labour Court does not interfere in disputes settled by agreement. To do so would undermine the entire foundation of our labour dispute resolution system which is premised on conciliation and settlement of most labour disputes. However, if the settlement agreement with Ritchie was concluded unethically, in violation of the constitutional principles of legality,[40] and the values of openness, accountability and efficiency, the agreement is a nullity. Consequently, *res judicata* will not apply.

Functus Officio

33. *Functus officio* literally means "having performed her office, duties or functions". The effect of this doctrine is that an official who discharges her official function cannot change her mind and revoke or revisit her decision. The rationale for this rule is that people are entitled to rely on the certainty and finality of government action and to be protected against injustice flowing from officials changing their minds.[41] Conversely, if allowing the decision to stand results in injustice, it must be revoked or revisited. The more obvious the illegality, the stronger

[39] *Amlers* Precedents of Pleading, 3rd Edition; *Harms* page 257-8.
[40] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 403 citing Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA) para 8; Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013
[41] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 247

the rationale for undoing the injustice.[42]

34. The value of certainty in a modern bureaucratic State trumped the values of legality in *Oudekraal Estates (Pty) Ltd v City of Cape Town* (6) SA 222 (SCA) para 25. However, that case is distinguishable because the decision to establish a township over certain graves, taken out of ignorance, was more than forty years before the litigation. In pronouncing on the validity of a decision the Court must take into account the consequences that such decision produced.[43]

35. Decisions based on ignorance, mistake or fraud should be reversed in the public interest. Citing the English case of *Secretary of State for Education v Tameside Metropolitan Borough Council* (1976) 3 All ER 665 in which the House of Lords remarked that even a *bona fide* decision that does not meet the requirements of legality is open to challenge*,* the Supreme Court of Appeal held in *Pepcor*:

> "The doctrine of legality which was the basis of the decisions in *Fedsure, Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires.*

36. *Oudekraal* and *Pepkor* set precedents for judicial review of unlawful decisions. Any doubt about the MEC's obligation to reverse an illegality at her own instance is succinctly put to rest in the following extract from *Njongi v MEC Department of Welfare Eastern Cape* 2008(4) SA 273 (CC) at head note:

> "It was always open to the provincial government to admit, without qualification, that an administrative decision had been wrong or had been wrongfully taken and consequently, to expressly disavow reliance on that decision

[42] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 247
[43] *Oudekraal Estates (Pty) Ltd v City of Cape Town* (6) SA 222 (SCA) para 25, 26, 32B-D

altogether."

37. Although this opinion is expressed in the context of an administrative law challenge to unconscionable State action in a social pension claim, it applies equally to correcting other infringements of the rule of law.

38. The doctrine of *functus officio* therefore does not bar the MEC from undoing irregularities in the interest of justice. On the contrary, section 195 of the Constitution and its values (discussed below) compel her in the public interest to avoid and eliminate illegalities in public administration. In our constitutional context, therefore, *Njongi* must apply to unlawful acts committed deliberately, negligently or even in good faith.

39. Furthermore, as Mr Blomkamp points out, other provincial Education Departments set the precedent by reversing their own decisions in at least three instances. To hold otherwise will result in delaying justice, impairing efficiency, incurring litigation costs and clogging the court rolls. Reliance on *functus officio* for failing to act in this instance is therefore no justification for launching this application.

Terminology

40. Mr Blomkamp's submissions invite some clarification of terminology. Public power is the authority, usually derived from the Constitution or legislation and occasionally from the common law, to perform acts on behalf of the public or the State[44] in the public interest.[45] As such, every act of the State is an exercise of public power, irrespective of whether the State acts as employer, administrator, legislator, adjudicator or as a party to commercial contracts.

[44] Lawrence Baxter *Administrative Law* Juta 1996 58 where the tripartite nature of public sector disputes is distinguished as the interests of the litigants, the public authority and the general public.
[45] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 3-4

41. Administrative acts are but a way of implementing or applying public power.[46] As elusive as better definitions are, these characteristics of public power and administrative action suffice to emphasise that public power is not synonymous with administrative action. Although administrative acts are always propelled by public power, the exercise of public power is not always administrative action.

42. Another misconception is that employment has no public law elements. The divide between private law and public law is permeable to the extent to which one's ideological predisposition varies between treating private law as true law and public law as administrative directives, or private law as individual and public law as collective, or by denying altogether any distinction on the basis that all law is public.[47]

43. For practical and pedagogical purposes South Africa, like England, maintain the dichotomy to distinguish between individual rights and public interest.[48] Private law matters are treated as matters for individuals to regulate, with the State's role being confined to providing dispute resolution and enforcement mechanisms. Public law matters are matters impacting on the State and the general public; therefore, the State is central to administering, protecting and prosecuting them.[49]

44. Labour law, like child protection and maintenance laws, is a hybrid of public and private law. Whilst the LRA entrenches individual and collective rights, it also recognises that the way these rights are exercised or not exercised has socio-economic implications for

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[46] Metcash Trading Ltd v Commissioner, South African Revenue Servcies 2001 (1) SA 29 (CC) para 24; Potter v Rand Townships Registrar 1945 AD 277, 287; Lawrence Baxter *Administrative Law* Juta 1996 353-4; Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 168-169

[47] Lawrence Baxter *Administrative Law* Juta 1996 57

[48] Potter v Rand Townships Registrar 1945 AD 277, 287; Lawrence Baxter *Administrative Law* Juta 1996 56

[49] Gary Slapper and David Kelly *The English Legal System 2009-2010* 10th Edition 5-6

individuals and society. The dichotomy is particularly blurred in public employment because even though public employees have individual rights, under the Constitution, they have the duty to always act in the public interest.

LRA v PAJA; LRA v PSA

45. In two decisions, the Constitutional Court (CC) sets the trend for treating labour disputes under labour laws.[50] This is true for both public and private employment. Most recently, the CC clarified the confusion in the application of the LRA and PAJA in *Gcaba v Minister for Safety and Security* Case CCT 64/08, a case similar to this case to the extent that that the employee challenged his non-promotion where "(t)he interplay between administrative and labour law principles within the context of public sector employment (was) at the centre".[51]

46. Referring to the LRA and PAJA, the CC pronounced succinctly as follows:

    a. "Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided."[52]

    b. "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." [53]

    c. "Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA."[54]

    d. "The Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."[55]

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[50] *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC); *Gcaba v Minister for Safety and Security* Case CCT 64/08.

[51] *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 17
[52] *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 53
[53] *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 56
[54] *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 64

47. These pronouncements clarify that labour disputes, whether in the public or private sector must be channelled through the dedicated structures and procedures of the Commission for Conciliation Mediation and Arbitration, bargaining councils and the labour courts. The powers of these structures are ring-fenced to resolve labour disputes under the LRA only, not under the common law or any other statute.

48. In short, labour law is not administrative law under PAJA. As labour law embraces elements of administrative law derived from the common law, and acts such as the (de)registration of trade unions are administrative, section 33 of the Constitution applies to labour related administrative acts. However, such application is through the LRA, not PAJA.

49. This interpretation and application of CC's pronouncements above do not conflict with its earlier judgments in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) and *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) in which Chaskalson CJ emphasized that "there are no two systems of law regulating administrative action – the common law and the Constitution – but only one system of law grounded in the Constitution". The concern of the CC in both cases was the creation of parallel systems of law, one striking a path to constitutional compliance via the common law and the other via PAJA. It expressed similar concerns about parallel systems and forum shopping in Labour law.[56]

50. However, as the LRA itself accesses the Constitution from many angles, the Court does not "create" a parallel path. The LRA engages

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[55] *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 73

[56] Chirwa v Transnet Ltd & Others (2008) 29 ILJ 73 (CC); *NAPTOSA v Minister of Education, Western Cape* 2001 (2) SA 112 (C) at 123B-C; *National Education Health and Allied Workers' Union v University of Cape Town* 2003 (3) SA 1 (CC) para 17

not only the right to fair labour practices, administrative law and other rights in the Bill of Rights but also the principles of legality and section 195 discussed below. Recognising such access is not a matter of choosing between "free alternatives"[57] because the path created to the Constitution is via the LRA. That path does not create parallel systems of law or forum shopping to ventilate the same cause of action but rather sets the constitutional and labour context in which the dispute arises. Context is relevant not only to the approach of the Court to the dispute but also to the remedies it prescribes.

51. In this dispute concerning promotion, section 33 of the Constitution and PAJA are not engaged, because like dismissal, promotion is not an administrative act but an employment related act justiciable under the LRA and the PSA, read with provisions of the Constitution discussed below.

52. The overall tenor of *Gcaba* also encourages cultivating coherence between laws governing employment. The PSA, like many other statutes regulating particular industries and services in the private and public sectors, co-exists in tandem with the LRA. Thus, appointments and promotions are effected in terms of the PSA, not in terms of the LRA. However, the PSA relies on the LRA for the machinery to test the fairness and propriety of appointments and promotions. There lies the intersection, not competition, between the LRA and PSA.

The Constitutional Connections

53. This dispute arises in employment in public administration. Therefore, the link to the Constitution is at least three dimensional: (1) public administration and the principle of legality as a constitutional value under section 1 and 2 of the Constitution; (2) public administration and basic values and principles governing it under 195 of the Constitution;

[57] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 125

and (3) employment and fair labour practices under section 23 of the Constitution, read with the LRA and the PSA.

The Principle of Legality and Constitutional Values

54. The principle of legality derives from the founding constitutional value of the "(s)upremacy of the constitution and the rule of law". The supremacy of the constitution means that "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[58]

55. As a constitutional principle, the principle of legality, derived from our common law, spans across all facets of law and governs the exercise of all public power.[59] In other words, this principle is not confined to application within administrative law and administrative action.

56. Although administrative law theory and practice is instructive for the application of the principle of legality in other fields, in South Africa, administrative law has evolved substantially since the adoption of the constitutional right to just administrative action and PAJA. Administrative law under PAJA incorporates, but is not limited to principles of legality. But PAJA applies only to administrative action.[60] Thus the exercise of certain public powers falls outside the scrutiny of PAJA, but not beyond the reach of the Constitution or the LRA.

57. Therefore, notwithstanding the overlap between the principles of legality and administrative law, they differ in content and scope of application.

58. For the purposes of this case, the following components of the principle of legality are relevant:

    a. The person whose act is under scrutiny must be

[58] Section 2 of the Constitution
[59] Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 117, *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC), paragraph 59; *S v Mabena* [spelt] 2006 (SCA) 132 (SCA), paragraph 51 to 54.
[60] Section 2 of PAJA

authorised by law to take such action.

b. The action must be procedurally fair.

c. The action must be rational, not arbitrary or capricious.

59. Other founding values relevant to this case include the advancement of human rights and freedoms[61] and the establishment of "a system of democratic government to ensure accountability, responsiveness and openness".[62] Furthermore, section 7(2) of the Bill of Rights in the Constitution imposes on the State the duty to "respect, protect, promote and fulfil the rights in the Bill of Rights".

Section 195(1) of the Constitution

60. The provisions of section 195(1) impacting pertinently on employment in public administration are captured as follows:

> "Public administration must be governed by democratic values and principles enshrined in the Constitution including the following principles:
>
> a. A high standard of professional ethics must be promoted and maintained;
>
> b. Efficient economic and effective use of resources must be promoted;…
>
> c. …
>
> d. Services must be provided impartially, fairly, equitably and without bias;
>
> e. …
>
> f. Public administration must be accountable;
>
> g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> h. Good human resource management and career development practices, to maximise human potential, must be cultivated."

[61] Section 1(a) of the Constitution: Supremacy of the Constitution and the rule of law.
[62] Section 1(c) and (d) of the Constitution.

61. The hallmarks of ethical public administration are:
    a. Obeying and implementing the law;
    b. Serving the public interest;
    c. Avoiding harm;
    d. Taking individual responsibility for processes and their consequences;
    e. Treating incompetence as abuse of office.[63]

62. Public accountability enforces democratic control, enhances the integrity of governance, guards against corruption, nepotism, and abuse of power, and improves overall performance of officials.[64]

63. Transparency requires officials to provide relevant, accessible and accurate information truthfully and timely.

64. Surprisingly, none of the parties rely on section 195 of the Constitution, which is foundational to public administration.

Section 23(1) of the Constitution

65. Section 23(1) of the Constitution provides:

> "Everyone has the right to fair labour practices".

"Everyone" in the context includes the department and other employees or applicants for employment. The public too has an interest in labour practices being exercised fairly not least because of the possibilities of industrial action and litigation costs.

The Intersection of Employment and Administration

66. Manifestly, public employment intersects with public administration through these provisions cited above. Cumulatively, they premise employment in public administration on the supremacy of the

[63] *Policy Making, Ethics and Accountability in Public Management* by Carol Lewis published in *Public Management-Critical Perspectives* edited by Stephen P Osborne Volume V
[64] *The Oxford Handbook of PublicManagement* edited by Ewan Ferlie, Lawrence E Lynn Jr and Christopher Pollet Oxford University Press (2005)

Constitution and the rule of law, infuse it with the values of advancing human rights and freedoms, accountability, responsiveness, openness, lawfulness, respect, the protection, promotion and fulfilment of rights, including labour rights, professional ethics, efficiency, transparency, good human resource management and fair labour practices.

67. The goal of securing *"transparency, accountability, and sound management of the revenue (and) expenditure"*[65] is also echoed in the ubiquitous Public Finance Management Act 1 of 1999 (PFMA). In other words, public administration is only as ethical, accountable and transparent as the officials and office bearers who work it. In short, section 195 applies as much to employment as it does to any other field involving public officials and office bearers.

Application of Constitutional Principles

68. The constitutional principles above compel public officials to behave honourably whether they represent the State as employer or pursue rights, benefits and protection for themselves as employees. In this case, on the undisputed evidence, the MEC and officials of the State as employer violated every principle of legality and every tenet of ethical, accountable and transparent public administration discussed above in the promotion of Khumalo and Ritchie.

69. Officials responsible for promoting Khumalo must have known or could reasonably have ascertained from the department's own records of his employment history that he did not meet the minimum requirements for the post when they promoted him. Also from the department's own records they must have known or ascertained that Ritchie and other applicants represented by NUPSAW met the minimum requirements for the post. Therefore, even though the documents relating to the decisions and reasoning of the panels that

[65] Section 2

recommended Khumalo's promotion were missing, and even if Khumalo and his representatives were unco-operative, the department's Persal system and personnel files for each employee would have had sufficient information to alert the officials that Khumalo did not meet the minimum requirements. Despite Khumalo's obvious unsuitability for the post, officials promoted him.

70. Similarly, officials responsible for appointing Ritchie (who may or may not have been the same persons responsible for Khumalo's promotion) must also have known or could have ascertained that Khumalo's promotion was manifestly unsustainable. Instead of responding ethically, accountably and transparently by conceding the impropriety and undoing it, they attempted to conceal it by settling Ritchie's claim, with both sides avoiding the scrutiny of arbitration.

71. The MEC might not have been aware of both irregularities when Khumalo and Ritchie were promoted. She certainly became aware of them when she received the grievance from NUPSAW on 6 October 2005. She too could have ascertained from the department's records of Khumalo's employment history that his appointment was unlawful. As the settlement agreement with Ritchie was founded on the illegality of Khumalo's appointment, she would have discovered that Ritchie's promotion was also contaminated. She should have invited Khumalo and Ritchie to show cause why their promotions should not have been set aside. As they cannot, in this application, give the Court a single sound reason for upholding the propriety of their promotions, they would not have been able to show good cause to the MEC, who could then have set their promotions aside.

72. Instead, the MEC established an investigative task team. Three of the seven members of the team were members of NUPSAW who, as representative of the grievants, could hardly be seen as impartial and independent. The task team purported to act in terms of Resolution

14 of 2002 of the Public Service Co-Ordinating Bargaining Council.[66] Crucially, it exercised no power to compel Khumalo and Ritchie to state whether NUPSAW's complaint was factually correct, i.e. that Khumalo did not meet the minimum requirements and that Ritchie had not been short-listed.

73. More than a year later, and after conducting interviews covering 162 transcribed pages, the task team reported that "(n)othing justifies or explains his (Khumalo's) short-listing and appointment" and that the "(s)ettlement agreement leading to the appointment of Mr K Ritchie was not prudent".[67]

74. Neither the task team nor the MEC identify a single official as a person responsible for the unfolding fiasco. That no responsible official is identified is incredible. Public employment is bureaucratic and rule driven. The bureaucracy enables every act and omission to be traceable to a person. The hierarchical nature of public employment creates a trail of actors who mandate and implement decisions. Every act or omission is authorised usually by legislation or some other document.

75. Most, if not all, employees have written job descriptions and assigned functions. Furthermore, promotion is a drawn out process through which applications are sifted to separate those that meet the minimum requirements from those that do not. Some official(s) must have performed this task. Short-listing and interviews are conducted by panels. Panellists must surely be able to name each other. Ultimately, an individual signs the letter of appointment. That individual's identity and signature should be traceable.

76. In the first instance, the Superintendent-General, the most senior bureaucrat, and in the second instance, the MEC as the Head of

[66] Page 204 of record (transcript)
[67] Page 50 of record.

Department had the power to call on every official, including Khumalo and Ritchie, to disclose who was involved at the various stages of the appointment process and who took the responsibility ultimately for promoting Khumalo and Ritchie. On the papers and submissions before Court, there is no evidence that this was ever done. Instead, they fettered and abdicated their responsibility in favour of the task team, which had none of their powers.

77. Uncovering and correcting irregularities is typically a managerial function, performed in the ordinary course of supervising a department. Managers cannot be faulted when they act firmly and decisively to reverse wrong-doing. Many departments have reversed their irregular decisions without applying to Court for assistance. [68] Therefore, a while before these promotions were effected, precedents had been set for managers of public administration to correct irregularities.

78. The MEC's explanation that she was *functus officio* is therefore not a valid reason for launching this application. It also does not explain the delay between 26 January 2007 when the task team reported and 17 October 2008 when she launched this application. At best, her explanation is an excuse for managerial indecisiveness and sloppiness; at worst, it is another cover for official misconduct.

79. A more likely trigger for this application is probably the risk of the department receiving a qualified audit as a result of incurring "unauthorised expenditure"[69] or "fruitless and wasteful expenditure" [70] as

[68] Paragraph 7.5 of the respondents' heads of argument: *SADTU and Others v Head of the Northern Province Department of Education* (2001 (7) BLLR 829 (LC), *Duda v MEC for Gauteng Department of Education and Others* (2001 (9) BLLR 1051 (LC), *North West Department of Education v NESWISWI and Others* 2004 (8) BLLR 792 (LC)).

[69] "'unauthorised expenditure' means- *(a)* overspending of a vote or a main division within a vote; *(b)* expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division."

[70] "'fruitless and wasteful expenditure' means expenditure which was made in vain and would have been avoided had reasonable care been exercised"

defined in the PFMA if the irregularities were not reversed or if eleven NUPSAW members are granted protected promotion. The MEC as head of the department and its accounting officer[71] has general responsibilities in terms of section 38 of the PFMA, including the responsibility of ensuring "effective, efficient and transparent systems of financial and risk management and internal control; …, use of the resources of the department," and complying with audit requirements. Most of all, she may not commit the department to any liability for which money has not been appropriated.[72] Non-compliance with section 38 is an offence punishable by a fine or imprisonment of up to five years.[73]

80. The MEC and her officials have a constitutional and contractual duty to advance reasons for Khumalo and Ritchie's promotions. She concedes that there are no lawful reasons for their promotions. Their decisions are therefore unethical, arbitrary, unsupported by any reasons whatsoever and not rationally connected to the information before them. That accounts for the promotion records for Khumalo's application being missing.

81. As for Ritchie's promotion, officials who negotiated the settlement of his dispute had a mandate to settle the dispute. No official who granted the mandate testifies in this application as to precisely what the mandate was. The Court therefore does not accept the MEC's hearsay evidence that the mandating official did not authorise the official negotiating the settlement to resolve Ritchie's claim by granting him protected promotion. Irrespective of what the mandate was, no official could compound the illegality perpetrated in Khumalo's promotion by granting Ritchie protected promotion. The officials who granted Ritchie protected promotion therefore acted *ultra vires*.

82. Turning to the conduct of Khumalo and Ritchie, as public employees

[71] Section 36 of PFMA
[72] Section 38(2) of the PFMA
[73] Section 86 of the PFMA

they were also bound by the constitutional values and principles identified above. Both had to act ethically, accountably and transparently. Khumalo had no basis to even apply for the post. Once he became aware that his promotion was challenged, he should have disclosed that he did not meet the minimum requirements.

83. Ritchie had a duty to disclose that he had not been short-listed. He unethically elicited a settlement to which he was not entitled by not disclosing that he had not been short-listed.

84. In the circumstances, Khumalo and Ritchie behaved dishonourably by claiming and clinging to their unlawful promotions. Their conduct is aggravated by the fact that they were Personnel Officers, and later, Chief Personnel Officers in the Human Resource component of the department. As such, they must have been aware of the impropriety of their own conduct as well as that of other officials involved in their promotion.

85. As members of responsible trade unions, they would have been alerted to the irregularities. At the very latest, if not before, they would have known of the irregularities as soon as this application was delivered. Instead of consenting to correcting the illegalities, they defended them.

86. In addition to the violation of the principle of legality, all those involved in the decisions to promote Khumalo and Ritchie violated other constitutional provisions. The grievants and other job applicants had a right to be considered fairly for promotion. They also had a right to fair labour practices, to their right and value to dignity and equality.

87. Disconcertingly, none of the officials involved in the promotion attest to any of the facts material to the promotion. Equally disconcerting too is the striking silence of the Superintendent-General throughout this application. He offers no explanation as to how these travesties could

come to pass and remain unchecked for years, and what, if anything, he did to correct them.

88. No disciplinary action has been taken against any officials for either the acts of promoting Khumalo and Ritchie or their omissions to keep records, to make disclosure and generally to take responsibility. The tendency to present the public service as a bureaucracy of unidentifiable, nameless, faceless functionaries casts a cloak of secrecy that is the very antithesis of an open, ethical, democratic, accountable and responsive public service. The bureaucracy is in fact designed to achieve the opposite result with every act and omission being traceable to a person. Wrongdoers within the public service can be rooted out, provided there is a will to do so.

89. The MEC does not explain why the wrongdoers have not been identified and called to account in this case. She is responsible for taking "effective and appropriate disciplinary steps against any official" that contravenes a provision of the PFMA, undermines the financial management and internal control system of the department, or "makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure".[74]

90. The MEC invited the Court to intervene. In accepting the invitation, the Court could not turn a blind eye to the shocking lack of good governance in this department.

Costs

91. The MEC should have reversed the irregularities as soon as she became aware of them and avoided this application. Having delayed for no good reason also disentitles the MEC to costs. As she could have reversed the irregularities herself, the costs of this application might well fall within the definition of "fruitless and wasteful expenditure" in the PFMA.

[74] Section 38(h) of the PFMA

92. Khumalo and Ritchie also disqualified themselves for a cost award as a result of their dishonourable conduct. However, as a result of the inexplicably lengthy delay, they may retain the remuneration they received while they held the post of Chief Personnel Officer.

The Order

93. In the course of the hearing, it became clear that the order sought in the notice of motion had to be amended. Mr Soni delivered an amended order, which the Court granted in the following terms

a. Declaring the promotion of first respondent, Khumalo, to the post of Chief Personnel Officer at the eThekwini Service Centre of the Department of Education KwaZulu-Natal (department) was not lawful, reasonable or fair and was accordingly invalid.

b. Declaring that the decision to agree to grant the second respondent, Ritchie, protected promotion in respect of the post of Chief Personnel Officer at the eThekwini Service Centre of the department was not lawful, reasonable or fair and was accordingly invalid.

c. Setting aside the promotion of the first respondent to the post chief personnel officer at the eThekwini Centre of the department.

d. Directing the applicant, the MEC, within one month of the grant of this order to take the necessary steps to advertise the post of Chief Personnel Officer at the eThekwini Service Centre of the department and thereafter to immediately put in place the prescribed steps to fill that post.

e. Setting aside the grant to second respondent of protected promotion in respect of the post of Chief Personnel Officer at

the eThekwini Service Centre of the department.

f. Directing the applicant to investigate which departmental officials, if any, had committed any act of misconduct and, if so, to take the necessary steps to discipline those involved.

g. Directing the applicant, within three months of this order, to deliver a report in respect of the matters referred to in paragraph f above.

h. Notwithstanding the aforegoing, no deductions are to be made from the salaries of the first and second respondents in respect of payments made at a higher salary scale.

i. Directing that each party pays its own costs.

_____

Pillay D, J

IN THE LABOUR COURT

HELD AT DURBAN

CASE NO : D749/08

Reportable

Heard: 14 May 2010

Order granted: 20 May 2010

Reasons transcribed: 11 June 2010
Reasons delivered: 6 July 2010

MEC DEPARTMENT OF EDUCATION KWAZULU-NATAL

versus

N L KHUMALO First Respondent
KRISH RITCHIE Second Respondent

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF APPLICANT : MR SONI
Instructed by : State Attorney, Durban

ON BEHALF OF RESPONDENT : MR BLOMKAMP

Instructed by : Llewellyn Cain, Attorneys

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MEC DEPARTMENT OF EDUCATION KWAZULU-NATAL

versus

N L KHUMALO	First Respondent
KRISH RITCHIE	Second Respondent

CASE NO	:	D749/08
COURT OF ORIGIN	:	DURBAN
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