



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable

CASE NO: 441/04

In the matter between :

**UNITED NATIONAL PUBLIC SERVANTS
ASSOCIATION OF SOUTH AFRICA**

Appellant

- and -

S J DIGOMO NO

First Respondent

**THE PREMIER OF THE PROVINCIAL GOVERNMENT
OF THE NORTHERN PROVINCE**

Second Respondent

C BALOYI & 34 OTHERS

Third Respondent

Before: SCOTT, CAMERON, BRAND, NUGENT & MLAMBO JJA

Heard: 19 AUGUST 2005

Delivered: 2 SEPTEMBER 2005

Summary: Application to set aside appointment of state employees - whether dispute falling within the exclusive jurisdiction of the labour courts.

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The period preceding the transition to democracy in 1994 saw many irregular appointments being made to posts in the civil service. Amongst them was the promotion of eighty four employees of the Department of Health and Welfare of the territory that was then known as Gazankulu to the post of chief clerk notwithstanding that there were only thirty five such posts on the department's establishment. The irregular promotions were subsequently set-aside by a commission that was established by the president in terms of s 236(6) of the Interim Constitution¹ to review appointments of that kind. But in addition to setting aside the promotions, as it was statutorily empowered to do, the commission went on to direct the Department of Health of the Northern Province to establish a task-team to determine, 'on the basis of merit and seniority', which of the affected employees should have qualified for promotion to the available posts. The task-team was duly established, it identified thirty five of the employees whom it recommended should be promoted to the available posts, and its recommendation was adopted by the provincial government. The employees were selected for promotion by the task-team solely on the basis of seniority because, according to the chairman of the task-team, it was simply not possible to conduct merit assessments.

[2] The appellant, on behalf of its members who were not selected for promotion, alleges that the task-team acted unlawfully because it based its selection solely on seniority, whereas, so it is alleged, the task-team was bound

¹ Constitution of the Republic of South Africa, 1993.

to take account of merit when making its selection, in accordance with the directive of the commission. It accordingly applied to the High Court at Pretoria for orders setting aside the proceedings of the task-team and referring the matter back to the task-team for reconsideration in accordance with the directive of the commission.

[3] The application foundered on a preliminary point. The court *a quo* found that the claim made by the appellants was ‘clearly a labour matter which is premised on [an] unfair labour practice [as contemplated by the Labour Relations Act 66 of 1995]’ and thus fell outside the jurisdiction of the High Court to consider, and on that ground the application was dismissed. This appeal against that finding comes before us with the leave of this court.

[4] The remedies that the Labour Relations Act provides against conduct that constitutes an ‘unfair labour practice’ are not exhaustive of the remedies that might be available to employees in the course of the employment relationship.² Particular conduct by an employer might constitute both an ‘unfair labour practice’ (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant’s claim in the present case was not that the conduct complained of constituted an ‘unfair labour practice’ giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair

² *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SAC); *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 680 (CC).

administrative action – a right that has its source in the Constitution and that is protected by s 33 – which is clearly cognisable in the ordinary courts.³

[5] We are not called upon in this appeal to decide whether or not the conduct of the task team does indeed constitute administrative action that is liable to be set aside. It is sufficient to say that the appellant's claim as formulated in its application did not purport to be one that falls within the exclusive jurisdiction of the labour courts and the objection to the jurisdiction of the High Court ought to have been dismissed. Accordingly the following orders are made:

The appeal is upheld with costs. The order of the court *a quo* is set aside and the matter is remitted to the court *a quo* to consider and determine the remaining issues in the application. The costs incurred thus far in the court *a quo* shall be costs in the application.

R.W. NUGENT
JUDGE OF APPEAL

SCOTT JA)
CAMERON JA)
BRAND JA)
MLAMBO JA)

CONCUR

³ *Fredericks*, footnote 2.