IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 2083/17

In the matter between:

BUNTU BERNARD DLALA **Applicant**

and

O.R. TAMBO DISTRICT MUNICIPALITY **First Respondent**

THE MUNICIPAL MANAGER:
O.R.TAMBO DISTRICT MUNICIPALITY **Second Respondent**

JUDGMENT

MBENENGE ADJP:

[1] The applicant is a General Assistant: Water Conservation Department in the employ of O.R. Tambo District Municipality (the first respondent) and has been for the past 14 years in terms of a month to month special employment contract.

[2] It came to pass that the first respondent advertised certain vacant posts for filling within its establishment. One of such posts was that of Assistant

Manager: Water Conservation and Demand Management. The relevant advert made it a requirement for interested persons to hold a "*certificate, diploma or degree or extensive experience*." Being a holder of a diploma in public administration and considering himself to have extensive experience in water services, the applicant applied for the post.

[3] It is the applicant's case that the advert had been meant to attract persons already in the employ of the first respondent, in conformity with the applicable human resource policies making provision for the advertisement of permanent positions internally so as to secure the retention and ensure upward mobility of persons already in the employ of the first respondent.

[4] In the course of time the applicant was invited to an interview scheduled for 11 April 2017. On the appointed day he attended the interview, only to be informed that, because he was a month to month employee (as opposed to being a permanent employee) of the first respondent, he did not qualify for being considered for appointment. Resulting from this stance, he was excluded from the interview process.

[5] Aggrieved by the first respondent's decision excluding him from the interview process, the applicant resorted to the instant proceedings after meaningfully engaging the first respondent to re-instate him as interviewee, so as to stand equal chances with other employees of being considered for appointment to the subject senior position, to no avail.

[6] The application was launched by way of urgency, with the applicant seeking, in the main, an order in effect setting aside his exclusion from the interview process and directing the first respondent to re-instate him as interviewee. Ancillary thereto, the applicant seeks, *inter alia*, an order interdicting and restraining the first respondent from employing any other candidate in the advertised post, pending the finalisation of this application.

[7] The applicant, correctly so, steered clear of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), as indeed the impugned decision constituted not an administrative action within the meaning and contemplation of the PAJA.[1]

[8] Instead, the applicant founded his case principally on "*unfair discrimination*", lamenting that his exclusion as candidate in the interview process denied him equal opportunity ordinarily availed the first respondent's employees, thwarting a reasonable and legitimate expectation he harboured that the first respondent would not discriminate against him unreasonably in relation to other permanent staff. The applicant complains that the exclusion complained of makes non-sense of the principle of legality enshrined in the Constitution of the Republic of South Africa Act 108 of 1996) (the Constitution) and constitutes a breach of his "*right to pursue a career, trade and occupation of [his] choice."*

[9] The respondents delivered notice to oppose the application just before the matter was called. I was informed from the Bar that the respondents would deliver neither an answering papers nor a notice to raise a legal point in terms of rule 6 (5) (d)(iii) of the Rules of Superior Court Practice (the Rules), having been content to have the matter disposed of on two bases, namely whether on the founding papers as they stand –

(a) this court has the jurisdiction to entertain the application; and

(b) whether a proper case for the matter to be heard as one of urgency has been made.

[10] I had neither the benefit of having recourse to the parties' heads of argument nor, as pointed out above, a rule 6 (5)(d)(iii) notice articulating in clearer terms the nature and ambit of the competing contentions. I nevertheless

[1] *Mkumatela v Nelson Mandela Metropolitan Municipality* 2010 (4) BCLR 347 (SCA).

adopted a benevolent approach, being content to entertain argument on the understanding that the above issues emerge in plain terms from the papers.

[11] I am satisfied that, by its nature, the application had sufficient degree of urgency warranting being heard as such. My view is informed primarily by the fact that on the applicant's un-contradicted version the interview process is still under way and there does not appear to have been any appointment made. This then leaves the court having to consider whether the high court has the jurisdiction to entertain the dispute.

[12] It is trite law that jurisdiction is determined on the basis of the pleadings.[2] The papers make it plain that the parties are engaged in an employment relationship dispute. Central to the dispute is the contention that the applicant has been unfairly discriminated against. The conduct complained of (unfair discrimination), so the applicant's case goes, also violates the applicant's constitutionally protected right to pursue his chosen career, trade and occupation.

[13] On the papers as they stand, nothing points to this case as being an unfair discrimination case based on the application of the Employment Equity Plan Act 55 of 1998 (The EEA), section 6 of which, as does section 9 of the Constitution, prohibits unfair discrimination directly or indirectly against any one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, social orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground. Even during oral argument there was not the slightest mention of the EEA as founding the case of the applicant.[3]

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[2] *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC)

[3] In terms of section 10 of the EEA disputes concerning unfair discrimination are to be referred in writing to the the CCAM, and in terms of section 40 the Labour Court has exclusive function to determine any dispute about the interpretation or application of the EEA, except where the EEA provides otherwise.

[14] This court was also not constituted as an Equality Court in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). Equality Court judges are designated to serve in the Equality Courts by the Judge President of the particular high court,[4] and not by the President on the advice of the Judicial Service Commission. Section 16 (2) of the Equality Act provides that only a judge who has completed a training course in terms of section 31 (4) may be designated to hear a matter under that Act. Certain procedures are set in motion before a matter serves before the High Court, if it is must sit as an Equality Court.[5] It is not necessary to go into any further detail on this aspect. Suffice it to say that none of the requisite formalities have been shown to have been complied with prior to the matter seeing the doors of this court.

[15] The nature of unfair discrimination is also dealt with in the Labour Relations Act 66 of 1995 (the LRA).

[16] The applicant disavowed reliance on the LRA. The applicant's disavowal of the provisions of the LRA is irrelevant. Section 157 (2) of the LRA which acknowledges that the High Court enjoys concurrent jurisdiction with the Labour Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from employment and labour relations, was given the following interpretation in *Chirwa v Transnet Ltd & Ors:*[6]

> "While s 157(2) remains on the statute book it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of s 157(2) and harmonise them with those of s 157(1) and the primary objects of the LRA is to give s 157(2) a narrow

[4] Section 16 (1) (b) of the Equality Act
[5] Section 20
[6] 2008 (4) SA 367 (CC) para [123]

> meaning. The application of s 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle that we have recently reinstated, namely, 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."

[17] The same approach was adopted by the Constitutional Court in the *Gcaba* case,[7] where it was held:

> "…another principle or policy consideration is that 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. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. 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. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees".

[18] The Supreme Court of Appeal (the SCA) has cautioned against the persistent attempts by practitioners to fashion cases to suit their clients' choice of forum.[8] It is unavailing for litigants to raise a complaint of unfair discrimination, which is an area the legislature has made the subject of specialization by specific courts, and then seek to disavow itself of the provisions of the relevant legislation.

[19] The reliance by the applicant on the principle of legality in the context of this matter is also misplaced. In *Macun*[9] it had been argued that in terms of section 157 of the LRA the high court enjoyed concurrent jurisdiction with the labour court to consider a challenge by way of review to the extension to non-

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[7] S*upra* para [56]
[8] *Motor Industry Staff Association v Macun NO* [2016] 3 BLCR 284 (SCA) (cited with approval in *SAMWU v Mokgatla* (2016 (5) SA 89 (SCA))
[9] S*upra*

parties of a bargaining agreement concluded in terms of section 66 of the LRA. The Minister of Labour, so it was argued, had, in purporting to extend the collective agreement to non-parties, acted *ultra vires* section 32 of the LRA. This challenge had been based on the principle of legality in respect of which both the labour court and high court has concurrent jurisdiction. The contention was done short shrift with the SCA holding that the protections, both procedural and substantive, relating to collective bargaining were sourced in the LRA and that, therefore, the high court lacked jurisdiction.

[20] Here, too, unfair discrimination is sourced in the LRA, hence the applicant's disavowal of the LRA is irrelevant. We are here dealing with an employment and labour relationship issue. Section 23 of the Constitution regulates the employment relationship between employer and employee and guarantees the right to fair labour practice. The labour court is the proper forum for disputes emanating from a breach of the right to fair labour practices.[10]

[21] Reliance by the applicant on the alleged constitutionally protected right to pursue a career of his choice etc does not change the character of the applicant's cause of action – it is an employment relationship dispute, justifiable in the labour court after all other procedures provided for in the LRA have been followed. In any event, section 22 of the Constitution enshrines the right to choose trade, occupation or profession freely. It remains to be seen whether, on the facts of this matter and on the applicant's own showing, that right has been violated.

[22] In all these circumstances, this court lacks the jurisdiction to entertain the instant dispute.

[23] The application is accordingly dismissed with costs.

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[10] See, for example, *Solidarity* obo *Barnard v SAPS* 2014 (2) SA 1 (SCA) and *Solidarity & Ors v SAPS & Ors* [2015] 7 BLLR 708 (LC)

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

MTHATHA HIGH COURT

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Ex Tempore judgment delivered on:	25 May 2017
Written judgment delivered on:	06 June 2017