IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

15/12/14
DATE SIGNATURE

CASE

NUMBER: 29545/2011

In the matter between

BONGANI POSTOLIE XULU **APPLICANT**

And

MINISTER OF DEFENCE **FIRST RESPONDENT**

CHIEF OF THE DEFENCE FORCE **SECOND RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application for the reviewing and setting aside of a decision by the respondents not to renew the applicant's fixed term employment contract. The applicant

seeks an order that the respondents provide him with a contract of employment on the same terms and conditions as other members of the South African National Defence Force (SANDF) who are on medium term contracts, and other ancillary relief.

[2] The respondents applied for condonation of the late filing of their answering affidavit and heads of argument. The court may on good cause shown, condone any non-compliance with the rules. The court exercises its discretion judicially upon consideration of the facts of the case. The court may take into account factors such as the efforts made towards complying with the rules, the degree of non-compliance, the explanation therefor, the prospects of success and the importance of the case[1]. The court granted condonation having considered the reasons advanced for non-compliance and particularly the respondents' prospects of success.

[3] The applicant joined the SANDF on 29 July 1996 on a fixed term contract basis. The applicant's contract was from 1996 to 1998. It was renewed from 1998 to 2000, from 2000 to 2005 and thereafter from 2005 to 2011. On 01 December 2010 the applicant was informed that the Department of Defence intends not to renew his employment contract when it expires. The applicant made unsuccessful representations regarding the renewal of his contract.

[1] S v Yusuf 1968 (2) SA 52 (A) at 53A-54B, Federated Employers Fire and General Insurance Co Ltd v McKenzie 1969 (3) SA 360 (A) at 262G-365A, Melane v Santam Insurance Company Limited 1962 (4) SA 531(A) at 532C-F.

[4] The applicant contended that the respondents acted unlawfully and committed an unfair labour practice by not following a procedurally and substantively fair administrative procedure when taking the decision not to renew his fixed term employment contract. This argument is based on the respondents' alleged failure to comply with certain National Policy adopted by the South African Defence Force which governs the substantive and procedural aspects relating to the termination of fixed term employment contracts.

[5] The applicant is aggrieved, *inter alia,* by the fact that in deciding not to renew his contract the respondents had in particular relied on his previous misconduct relating to contravention of sections 10 and 33 of the Military Discipline Code. These contraventions took place in 1977 and 2001 respectively and relate to charges of mutiny and drunkenness. The applicant argued that the respondents failed to take into account the time when these contraventions took place and that subsequent to the first offence his contract was renewed on three occasions and in respect of the second offence it was renewed in 2005. It later transpired that the respondents had also relied on subsequent misconduct committed after the renewal in 2005 which had not be drawn to the attention of the applicant when he was required to make representations on why his contract should not be terminated.

[6] The applicant submitted that the employer must be taken to have waived his right to rely on the 1977 and 2001 offences and had acted unfairly by denying him the opportunity to make representation in respect of subsequent offences. The applicant

also contended that he had a legitimate expectation that the contract would be renewed. According the applicant this legitimate expectation is *inter alia* based on section 3(1) of Promotion of Administrative Justice Act 3 of 200 (PAJA) which provides that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair"

[7] The respondents contended, *inter alia,* that the alleged conduct sought to be reviewed did not fall within the purview of PAJA and that the termination of the applicant's employment did not constitute an unfair labour practice as envisaged in applicable legislation. It was further contended that the applicant could not have had a legitimate expectation that his contract would be renewed as it was a fixed term contract with a fixed termination date and that he did not satisfy the threshold for legitimate expectation.

[8] It is clear from the foregoing that the applicant's case involves a pure employment contract dispute. Notwithstanding the nature of the dispute between the parties the applicant contended that there has been a failure to follow fair, substantive and procedural administrative justice and that there were a litany of irregularities and contraventions of PAJA as well as the policy of the SANDF dealing with matters concerning the dispute.

[9] This is a review application firmly anchored on PAJA. In his founding affidavit the applicant unequivocally states that he relies on the grounds for review set out in section

6.2 of PAJA. Section 6.2 gives the court or tribunal the power to judicially review administrative action under certain circumstances.

[10] In terms of section 1 of PAJA,

"Administrative action" means 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 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, but does not include – ....."[2]

[11] The issue whether an employment related decision or action constitutes administrative action in terms of PAJA has been determined by the Constitutional Court. In ***Chirwa v Transnet Ltd & Others***[3] the Constitutional Court, dealing with Transnet termination of an employment contract held that: "However, the fact that the conduct of Transnet in terminating the applicant's employment contract involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to s 33 of the

[2] The definition makes certain exclusions which have no bearing on this application: see section 1(b) (aa)-(ii), see also Minister of Defence and Military Veterans v Motau and Others [2014] ZACC 18 at para 33.
[3] 2008 (4) SA 367 (CC) at para 139.

Constitution. Section 33 of the Constitution confines its operation to "administrative action", as does PAJA. Therefore to determine whether conduct is subject to review under s 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33"[4].

[12] In the *Chirwa's case (supra)* the court emphasized that the mere fact that Transnet is an organ of state which exercises public power did not transform its conduct in terminating the employment contract into administrative action and that that conduct did not constitute administrative action under section 33 of the Constitution.

[13] In ***Gcaba v Minister of Safety and Security***[5] the Constitutional Court held that "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 s 33 is to deal with the relationship between the State as a 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. When a grievance is raised by an employee relating to the conduct of the State as employer and

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[4] See also President of the Republic of South Africa & Others v SA Rugby Football Union and Others 2000 (1) SA 1 (CC) at para 143.
[5] 2010 (1) SA 238 (CC) at para 64.

it has few or no direct implications or consequences for other citizens, it does not constitute administrative action"[6].

[14] The applicant only based his review application on PAJA. Accordingly he is only entitled to relief based on his case as pleaded and nothing more. That being the case, it is evident from the provisions of section 33 of the Constitution, PAJA and decided cases that the conduct of the respondents does not constitute administrative action. Consequently the conduct of the respondents is not reviewable under PAJA. In the light of this finding, I deem it not necessary to determine the substantive and procedural issues raised by the applicant pertaining the non-renewal of his fixed term contract.

RESERVED COSTS

Reserved costs of the 19TH February 2013

[15] On 07 November 2012 Webster J granted an order compelling the respondents to provide the applicant with the policy document 32/2005 which sets out in detail the procedure and policy to be followed in terminating a fixed term contract. The order had to be complied with within 5 days. The respondents failed to comply with the order. As a result of the non-compliance the applicant instituted contempt of court proceedings against the respondents. The respondents failed to file a notice of intention to oppose within the time period prescribed in terms of the rules of court. The contempt of court application was set down on the unopposed motion court roll on 19 February 2013.

[6] See also Dlamini v Minister of Defence and Others [2012] ZAGPPHC 337 (14 December 2012), Snyman v Minister of Defence [2014] ZAGPPHC 72 (28 February 2014).

[16] A day or so prior to the matter being heard on the unopposed motion court roll, the respondents filed a notice of intention to oppose and an answering affidavit. By then it was too late to remove the matter from the roll. The parties met at court on the 19th February 2013 where the respondents' attorney provided an undertaking to provide the applicant's attorneys with the policy document. The matter was postponed *sine die* for the exchange of further pleadings. The costs of that day were reserved. The applicant seeks these costs on a punitive scale.

Reserved costs of the 30TH September 2013

[17] These costs also relate to the contempt of court application. The Respondents' attorney had made an undertaking to provide the applicant with the outstanding documents. The respondents' still failed to comply with the court order. The applicant made several unsuccessful attempts to obtain the documents from the respondents. The applicant was forced to set the mater down on the opposed motion court roll for the 30th September 2013.

[18] The Respondents, despite being afforded an opportunity to do so failed to provide Heads of Argument in regards to the contempt of court application and were entirely silent on the issue. It was only upon service of the notice of set down of the contempt of court application that the policy document was provided to the applicant. The applicant only asked for a cost order against the respondents as the document which he had sought had since been provided.

[19] On 30 September 2013 the respondents argued that it would be inappropriate for the court to hear argument only on the issue of costs and submitted that the court hearing the main application ought to decide the question of costs together with the main application. The costs were reserved for decision by this court.

[20] The applicant has asked for the reserved costs on an attorney and client' scale. The respondents submitted that these costs were not justified and should not be awarded on a punitive scale. From reading of the papers it appears that: Firstly, the respondents failed to provide a complete record as required by the rules of court. Secondly, they failed to comply with a court order compelling them to provide that record. Thirdly, despite several requests, they failed to honour an undertaking made though their attorney to provide the documents as ordered by the court. It did not end there, the respondents only provided the document to the applicant upon service of the notice of set down of the contempt of court application. The conduct of the respondents can never be justified. In my view the respondents are liable for the payment of the reserved costs. An order that such costs be paid on an attorney and client scale would be justified in the circumstances as the applicant has been put in a position where he had to incur unnecessary costs[7].

I make the following order.

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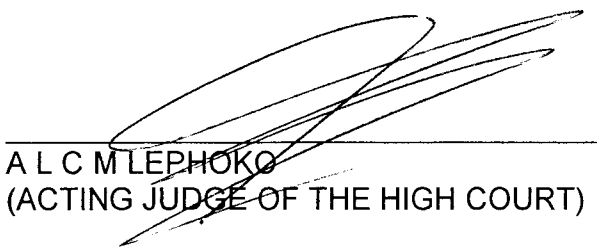
[7] Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd 1976 (1) SA 189 (W) at 191H-192C, Alluvial Creek Ltd 1929 CPD 532 at 535; Camps Bay Ratepayers' And Residents' Association v Harrison 2011 (4) SA 42 (CC) at 71B.

1. Condonation of the respondents' late filing of their answering affidavit and heads of argument is hereby granted.
2. The application is dismissed.
3. The respondents are ordered to pay the costs reserved on 19 February 2013 on an attorney and client scale.
4. The respondents are ordered to pay the costs reserved 30 September 2013 on an attorney and client scale.
5. The applicant is ordered to pay the costs of the application.



A L C M LEPHOKO
(ACTING JUDGE OF THE HIGH COURT)

Heard on: 11 August 2014.

Judgment delivered on: 15 December 2014.

For the Applicant: V Singh.
Instructed by: Viren Singh Attorneys.

For the Respondent: G. T Avvakoumides, with him L Harilal.
Instructed by: Mokuena Attorneys.