REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 889/2011

In the matter between:

GAYLE CHERYLYN KAYLOR	**Applicant**
and	
MINISTER FOR PUBLIC SERVICE AND ADMINISTRATION N.O.	**First Respondent**
DIRECTOR-GENERAL OF PALAMA N.O.	**Second Respondent**

Heard: **5 June 2012**

Delivered: **25 July 2012**

Summary: Legality review i.t.o. LRA s 158. Decision to abolish employee's post and to appoint her into another post without consultation unlawful.

JUDGMENT

STEENKAMP J

Introduction

1] This is a legality review in terms of s 158(1)(h) of the Labour Relations Act.[1] The applicant, Ms Gayle Kaylor, claims that the decision to relocate her to Pretoria and to appoint her to the position of Chief Director: Quality Assurance should be reviewed and set aside.

Background facts

2] Ms Kaylor ("the employee") is employed by the Public Administration Leadership and Management Academy (PALAMA). PALAMA is a government department falling within the National Ministry for Public Service and Administration, having its origin in s 4 of the Public Service Act.[2] The Minister for the Public Service and Administration is cited as the first respondent *nomine officio*; and the Director-General of PALAMA as the second respondent *nomine officio*.

3] PALAMA has the statutory mandate for training in the public service. It manages and offers training and development to public servants at national, provincial and local spheres of government.

4] The employee was employed by PALAMA on 1 July 2009 in the position of Chief Director: Business Development (Provincial and Local Government), based at its Cape Town office. The head office is in Pretoria. She was appointed to and placed in the position of Chief Director: Quality Assurance in Pretoria on 8 July 2011 with retrospective effect from 1 April 2011. It is this appointment that she wishes to have reviewed and set aside.

5] When she accepted the offer of employment, the employee wrote to PALAMA's Director: Human Resources and stated:

> "It remains my understanding that the position you are offering me is based in **Cape Town** and that I'll be provided with suitable parking facilities."[3]

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1 Act 66 of 1995 (the LRA).

2 Proclamation 103 of 1994, as amended.

6] When she was interviewed for the post, the employee indicated to the selection panel that, as a result of her personal circumstances, she could only be based in Cape Town. The circumstances related primarily to the fact that she is the primary caregiver for her sick and failing father, who was 76 years old at the time of her appointment and has a serious heart condition. The previous director-general of PALAMA, Dr Mark Orkin, was the chairperson of the interview panel. Dr Orkin stated unequivocally in a subsequent statement that he gave the employee an explicit verbal undertaking that she would be based in the Cape Town office. He viewed that as a clear and binding part of her contract of employment, although it was not carried over into the written contract of employment that she signed. That contract was entered into between Dr Orkin, representing the executive authority, and the employee. It states that:

> "The employee shall serve the employer in the Academy at such place as may from time to time be directed by the employer or any other officer duly authorised thereto in this respect."
>
> and:
>
> "The employee may be required to perform the duties or to work at other places that may reasonably be required by the employer."

7] The employee was based in Cape Town from the time of her appointment, although she travelled throughout the country as and when necessary, to fulfil her duties.

8] On 12 November 2010, the Director-General (Prof LS Mollo) issued a directive to the employee to relocate to the PALAMA head office in Pretoria with effect from 1 February 2011, purportedly in terms of section 7(3)(b) read with section 14 of the Public Service Act.

9] On 23 November 2010 and 7 December 2010 respectively, the employee made representations to the Director-General. She pointed out that she believed his decision to direct her to relocate was "not reasonable nor was it arrived at in a procedurally fair manner." She continued:

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3 Bold in original.

> “Aside from the two meetings in which ‘relocation’ was raised, there has been no proper consultation with me as to allow me an opportunity to make any meaningful representation to you on this very important to the condition of employment at PALAMA.”

10] She also wrote:

> “Whilst your directive on my relocation to Pretoria might arguably be lawful, your decision that I do so by 1 February 2011 in my view not rational or reasonable and was not arrived at in a fair manner."

11] The director-general responded on 13 January 2011. He referred to the contract of employment and section 14 of the Public Service Act and reiterated:

> "You are therefore hereby instructed to report and assume duty at this office in Pretoria with effect from 1 February 2011. Please be advised that failure to report as instructed will be tantamount to insubordination and I shall be left with no option but to exercise my further rights."

12] On 20 January 2011, the employee again wrote to the director-general. She reiterated her view that the directive was unreasonable and requested a proper consultation process. The director-general responded in the following terms on 27 January 2011:

> "After carefully considering your representations, I wish to reiterate my directive that you report for duty at the PALAMA head office in Pretoria on 1 February 2011.
>
> You are further advised that, should you fail to report to the head office on 1 February 2011, I will instruct HRM&D [*sic*] to take formal disciplinary steps against you. This is in line with a notice that was communicated to you in my correspondence dated 13 January 2011, that failure to do such will be viewed as insubordination and desertion and PALAMA reserved its rights."

13] On 1 February 2011 the employee lodged a formal grievance in accordance with the SMS Handbook for members of the senior management service in the public administration with the Minister.[4]

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4 Minister Richard Baloyi at the time.

14] Whilst the grievance was still pending, the director-general announced a new organisational structure for PALAMA with effect from 1 April 2011. In terms of the new structure, the employee's position of Chief Director: Business Development was abolished and she was instead appointed to the position of Chief Director: Quality Assurance, based in Pretoria, with effect from 1 April 2011. She was only formally appointed to that position (with retrospective effect) on 8 July 2011.

15] On 18 April 2011 a junior functionary sent the employee an e-mail attaching the Minister's response to her grievance. The Minister's decision was the following:

> "The DG to have consultation with the aggrieved to consider her personal circumstances in giving this matter the attention deserved."

16] On 25 and 30 May 2011 the director-general met and consulted with the employee in relation to the relocation directive and the restructuring of PALAMA (which had already taken effect on 1 April 2011).

17] The director-general submitted his report on the consultation process in relation to the relocation issue to the Minister on 28 June 2011. He indicated that "a window of opportunity still exists for Ms Kaylor's placement to be reconsidered through the correct process which will include the involvement of the relevant stakeholders."

18] By 4 August 2011 the employee had not received any response from the director-general in relation to her various letters to him, other than an e-mail from one Pumla Nhleko of the Office of the Director-General stating that "the DG requests that you desist from sending any correspondence pertaining to the matter to him" pending resolution by the Minister.

19] She therefore wrote to the Minister on 4 August 2011 and requested his response. By 16 August 2011 the Minister had still not responded to her grievance filed on 1 February 2011 or her subsequent letters, other than the response of 18 April 2011 directing the DG to consult with her in connection with her relocation. She therefore lodged a dispute with the General Public Service Sectoral Bargaining Council, alleging that the

relocation directive as well as her appointment to the new position of Chief Director: Quality Assurance amounted to a unilateral change to her terms and conditions of employment.

20] The Minister eventually responded on 16 September 2011, more than seven months after the employee had lodged her grievance, and after the employee's attorneys had written to him on 25 August 2011. The Minister referred to the grievance of 1 February 2011 and simply stated:

> "I have received the report from the DG regarding the consultative meetings he had with you regarding your grievance, and I am satisfied that the due process of consultation has been met.
>
> "Due consideration taken of applicable circumstances on this matter I conclude this matter in agreement with the DG's original directive that you relocate to PALAMA's head office in Pretoria."

21] The Minister did not express any view on the decision of the Director-General to place the employee in the position of Chief Director: Quality Assurance with effect from 1 April 2011.

22] On 30 September 2011 the Director-General issued another directive for the employee to relocate to Pretoria within 30 days, following the Minister's decision in relation to the grievance.

23] On 18 October 2011 the GPSSBC advised the employee that it did not have jurisdiction to arbitrate over matters relating to unilateral changes to terms and conditions of employment. On 19 October 2011 the employee successfully brought an urgent application in this court to stay the relocation directive pending the determination of this application. She launched this application on 9 November 2011 and it was heard on 5 June 2012.

<u>The relief sought</u>

24] The applicant no longer seeks to have the first directive, ordering her to relocate to Pretoria ("the relocation directive") reviewed and set aside. That directive – and the relief sought – has effectively been rendered moot

by the Director-General's second directive ("the placement directive") that she takes up the position as Chief Director: Quality Assurance in Pretoria. The post of Chief Director: Business Development was unilaterally abolished with effect from 1 April 2011and the DG no longer seeks to relocate the applicant to Pretoria in order to carry on with her duties in that post (to which she was initially appointed).

25] The applicant therefore persists in her application to have the placement directive reviewed and set aside. Should she be successful, she seeks certain consequential relief, amounting to a mandatory order that the DG engage in a full consultation process with her in order to identify suitable positions in Cape Town; and, should that fail, to engage in a consultation process in terms of s 189 of the LRA.

The legal framework

26] The employee locates the relief she seeks in s 158(1)(h) of the LRA. That subsection provides that the Labour Court may –

> "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."

27] This court noted in *National Commissioner of South African Police Service v Harri N.O.*[5]*:*

> "In *Chirwa v Transnet Ltd and others*[6] and *Gcaba v Minister of Safety and Security and others*[7], the Constitutional Court decided that matters relating to the employer-employee relationship, even in the public service, does not constitute administrative action for the purposes of PAJA. But that is not the end of the matter. Those cases concerned, respectively, a dismissal and a decision not to appoint an employee in the public sector. The case before me concerns the review of a decision of the state as an employer as contemplated in section 158 (1) (h) of the LRA. That section provides that the Labour Court may 'review any decision taken or any act performed by

5 (2011) 32 *ILJ* 1175 (LC) paras [16] – [39].

6 2006 (4) SA 367 (CC).

7 (2010) 31 *ILJ* 296 (CC).

the state in its capacity as employer, on such grounds as are permissible in law' ".

28] Having considered the dicta of Skweyiya J and Langa CJ in *Chirwa*[8]*,* this court held in *Harri:*

> "The Constitutional Court has thus put it beyond dispute in *Chirwa* and *Gcaba* that the dismissal of a public service employee does not constitute administrative action. Why, then, should the state as employer be able to review a decision by its own functionary in this case?
>
> The distinction appears to me to lie in the fact that, in this case, the state is acting *qua* employer; and the functionary is fulfilling his or her duties in terms of legislation."

29] Section 33 (1) of the Constitution[9] provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

30] In an attempt to define administrative action, the Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others*[10] held that:

> "In section 33 the adjective 'administrative' and not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."

31] The court in *Harri* noted that this test may not be determinative in the light of the *dicta* of the Constitutional Court in *Chirwa* and *Gcaba*. But in *MEC for Finance, KwaZulu-Natal & another v Dorkin NO & another*[11] and in

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8 *supra*, at para [73].

9 Constitution of the Republic of South Africa, 1996.

10 2000 (1) SA 1 (CC) at para [141] (my emphasis).

11 [2008] 6 BLLR 540 (LAC).

Ntshangase v MEC for Finance, KwaZulu-Natal & another[12] the court held that the MEC exercises public power in the public interest in terms of legislation. When the MEC appointed Dorkin to preside over a disciplinary hearing, it did so in its capacity as the State. It followed that the MEC's action qualified as administrative action.

32] As was noted in *Harri*, the effect of these decisions seems anomalous. The dismissal of a public service employee does not ordinarily constitute administrative action; yet the decision of the chairperson of a disciplinary hearing in the public service, appointed in terms of legislation, does. I am bound by the decisions in *Dorkin* and *Ntshangase.* And in the case before me, the applicant specifically challenges the decisions of the Minister and the Director-General in terms of s 158(1)(h) of the LRA. She does not rely on PAJA; therefore, the question whether PAJA applies, does not arise.

33] The applicant bases her grounds of review on the doctrine of legality. This court recently confirmed in *POPCRU v Minister of Correctional Services*[13] that it has review jurisdiction in terms of s 158(1)(h) of the LRA on the basis of the doctrine of legality. That doctrine implies that public officials may only exercise such powers and perform such functions as are permissible and conferred upon them by law. In addition, not only must the exercise of such power be lawful, but it must also not be arbitrary, unreasonable or irrational; and it must be procedurally fair.[14]

Evaluation / Analysis

34] In order to be lawful and administratively fair, did the DG have a duty to consult the employee before appointing her to the position of Chief Director: Quality Assurance and ordering her to relocate to Pretoria? And

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12 2010 (3) SA 210 (SCA).

13 *Police & Prisons Civil Rights Union v Minister of Correctional Services & Another* (2011) 32 *ILJ* 2541 (LC).

14 *Fedsure Life Assurance & Ors v Greater Johannesburg Transitional Metropolitan Council & Ors* 1999 (1) SA 374 (CC) paras [56] – [59]; *Pharmaceutical Manufacturers' Association of SA & Ano: In re Ex parte President of the RSA & Ors* 2000 (2) SA 674 (CC) para [50]; *Booysen v Minister of Safety & Security and Ors* [2012] ZALCCT 2 para [31].

did he act within his powers?

Audi alteram partem

35] In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Ors*[15] the Labour Appeal Court accepted that the transfer of public servants in terms of s 14 of the Public Service Act constituted administrative action. In that context the LAC held that a public servant must be informed that her transfer is being considered and she must be given reasons for the proposed transfer and an opportunity to make representations before a final decision is made. In *Nxele,* the National Commissioner of Correctional Services had taken a decision to transfer the employee before he had been notified of the contemplated transfer and before he had been given an opportunity to make representations. That, the court held on appeal, was bad in law and rendered the transfer invalid and unlawful. The LAC[16] held that the *audi alteram partem* rule applied to transfers in the public service; and that the employer had to observe that rule before it can take a decision adversely affecting the employee.

36] As this court noted in *Mineworkers' Union / Solidarity obo McGregor v SA National Parks*[17], having considered the employer's decision to make a "policy shift"*:*

> "This necessitated a change in the applicant's terms and conditions of employment. This the respondent was entitled to do, provided that it was preceded by consultation."[18]

37] That position appears to me to be unchanged by the decisions of the Constitutional Court in *Chirwa* and *Gcaba.*[19]

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15 (2006) 27 *ILJ* 2127 (LC); (2008) 29 *ILJ* 2708 (LAC).

16 Per Zondo JP at paras [61] and [69].

17 (2006) 27 *ILJ* 818 (LC) para [38].

18 My emphasis.

19 *Supra*.

38] In the present case, the Director-General did not consult the employee before he issued the directive on 12 November 2010 for her to relocate to Pretoria. His belated attempt to consult, following on the Minister's instruction to do so, was in the context of a *fait accompli.* Nor was there any consultation with the employee before the Director-General decided to abolish her position of Chief Director: Business Development and unilaterally decided to appoint her to the position of Chief Director: Quality Assurance at the PALAMA head office in Pretoria. That much is common cause. In both these instances the decision was at least procedurally unfair.

39] It is common cause that the DG's decision to place the employee in this position was announced at a meeting in Pretoria on 30 March 2011. She only found out about it from a junior staff member who attended the meeting. It is apparent from the 'consultation report' that the DG submitted to the Minister, dated 28 June 2011, that there was no consultation with the employee before he issued the directive placing her in the post of Chief Director: Quality Assurance in Pretoria (and abolishing the post in which she had been appointed).

40] The DG also failed to comply with the guidelines relating to restructuring issued by the Department of Public Service and Administration (DPSA). These guidelines required across-the-board prior consultations with all potentially affected employees, whereas the applicant was only informed of her placement into a different position and the abolition of her post after restructuring had already taken place.

Ultra vires

41] There is another reason why the placement directive is open to review in terms of s 158(1)(h) of the LRA. That is that the Director-General exceeded his powers.

42] In terms of s 3(1)(b) of the Public Service Act, the Minister is responsible for establishing norms and standards relating to the organisational structures and establishments of departments and other organisational

and governance arrangements in the public service. He must give effect to this subsection by making regulations.[20]

43] PALAMA was established in terms of s 4 of the Public Service Act as a "training institution listed as a national department". In terms of s 4(2) –

> "The management and administration of such institution shall be under the control of the Minister."

44] In terms of s 9 of the Public Service Act, "an executive authority" may appoint any person in accordance with the Act in such manner and on such conditions as may be prescribed. "Executive authority" is defined, in relation to a national department (such as PALAMA), as the Minister.

45] Section 42A(1)(a) of the Public Service Act does provide that the Minister may delegate to the Director-General any power conferred on the Minister by the Act. But in the present case, the respondents provided no proof of such delegation. There is no evidence that the previous delegation to employees in PALAMA's predecessor, the South African Management Development Institute, also applied to or was transferred to PALAMA.

Conclusion

46] The placement directive falls to be reviewed and set aside in terms of section 158(1)(h) of the LRA and the principle of legality. Firstly, the decision was made without any prior consultation with the employee. It is not procedurally fair. Secondly, the Director-General exceeded his powers.

Costs

47] The employee did not have the means of the State, funded by the taxpayer, to enjoy the privilege of having senior and junior counsel in court to argue her case. However, her counsel was assisted by a junior in the drafting of heads of argument. She asked that she be awarded the costs of both counsel to the extent that they were so employed, as well as the costs of the urgent application for an interim interdict (which was opposed)

20 Public Service Act s 3(2).

under case number C 774/2011. In law and fairness, and in terms of the provisions of s 162 of the LRA, there is no reason why the successful party in this case should not be awarded those costs.

Order

48] For these reasons, I issue the following order:

48.1 The applicant's appointment to the position of Chief Director: Quality Assurance is reviewed and set aside.

48.2 The second respondent is ordered to engage in a full consultation process with the applicant (as envisaged by the DPSA guidelines) within one month of this judgment with regard to suitable alternative positions either in PALAMA or in another department in Cape Town.

48.3 Insofar as a suitable alternative position may be available in another department, the second respondent is directed to do all things necessary to engage the applicant, the Minister and/or the head of the relevant department with regard to a transfer of the applicant to that department.

48.4 Should no suitable alternative position be available, the second respondent is directed to engage in a consultation process in accordance with section 189 of the Labour Relations Act with the applicant.

48.5 The respondents are ordered to pay the applicant's costs, including the costs of two counsel where so engaged, and including the costs of the urgent application under case number C 774/2011, jointly and severally, the one paying, the other to be absolved.

Steenkamp J

APPLICANT:	ML Sher
	Instructed by Bowman Gilfillan, Cape Town (E Abrahams).
RESPONDENTS:	BR Tokota SC (with him M Gwala)
	Instructed by the State Attorney, Pretoria.