IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C183/2019

In the matter between:

PULE MAILE	1st Applicant
MALEFANE LEKGOBO	2nd Applicant
GREGORY MOKATE	3rd Applicant
MANTOMBI ELIZABETH PHINDANE	4th Applicant

and

THE FREE STATE PROVINCIAL LEGISLATURE	1s Respondent
THE SPEAKER: THE FREE STATE PROVINCIAL LEGISLATURE: M QABATHE N.O.	2nd Respondent
GOODWILL JANRAS MAVUSO	3rd Respondent

Date heard: 26 January 2021 by means of a virtual hearing
Delivered: 8 April 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This is an application in terms of section 158(1) (h) of the LRA. The respondents abide the decision of the Court. The review seeks to set aside the decision of the

First Respondent to appoint the Third Respondent to the position of Senior Public Participation and Education Officer, a level 14 post. The applicants plead in their founding affidavit that the appointment should have been made in terms of the prescripts of the Public Services Act of 194. However, in their supplementary affidavit reliance is placed on the Policy on Human Resource Management, a collective agreement signed by the First Respondent and Nehawu on 14 October 2008, as a basis to establish that the said decision should be set aside by virtue of principle of legality.

[2] With this confusion in mind, I asked Counsel for the applicants to file further Heads of Argument. These submissions correctly identified that a provincial legislature is not part of the Public Service[1]. The public service is defined in the LRA as meaning: "the national departments, provincial administrations, provincial departments and government components contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994)…". Employees of Parliament and other legislatures are not public service employees.

[3] Section 158(1)(h) gives this Court power to "(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;" In **Public Servants Association of SA on behalf of de Bruyn v Minister of Safety & Security & another**[2] the LAC considered the purpose of the inclusion of section 158(1)(h) into the LRA:

"[24] The review powers entrusted to the Labour Court in terms of s 158(1)(h) must be understood in the context when this section (indeed the entire LRA) was enacted. At that time, the employment of public servants was regulated by the common-law contract of employment, the unfair labour practice jurisdiction of the Industrial Court in terms of the Labour Relations Act 28 of 1956, other statutes and by means of common-law judicial review.

[25] Public servants were in a privileged position with regard to other employees as their choice of remedies extended to judicial review. Section 158(1)(h) was

[1] Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others was cited as authority for the fact that provincial legislatures of not departments of national or provincial government.
[2] (2012) 33 ILJ 1822 (LAC)

intended to preserve the common-law judicial review remedy of public servants. The permissible grounds of common-law review are well known."

[4] With the above interpretation of the purpose of the section in mind, the applicants who are employed by the Provincial Legislature would not have recourse to utilizing the provision in question. Even if I am incorrect and they have such recourse, it is well established that where an alternative remedy exists within the ordinary dispute resolution framework of the LRA, it is not competent for state employees to proceed under section 158(1)(h). This is because of the danger of allowing a separate legal framework to develop between private and state employees who have, since the inception of the 1995 LRA, fallen under its provisions.[3] In **Hendricks v Overstrand Municipality**[4], the LAC held that

"If a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution."

[5] As this Court in **Magoda v Director-General of Rural Development and Land Reform**[5] noted, after a thorough assessment of the relevant authorities:

"The principle emerging from Hendricks (and related case law) is that s 158(1)(h) reviews (including legality review) are only permissible where there is no other remedy available under the LRA. The principle is not defeated because an applicant relies on legality (i.e. lawfulness) in the review, while the LRA provides for a remedy in fairness, because it is the existence of a remedy under the LRA that renders the review impermissible."

[6] In this case, the applicants had at least two remedies under the LRA – by referral of an interpretation and application of a collective agreement dispute in terms of section 24, and the unfair labour practice route under section 186(2)(a) of the LRA. Neither path was pursued by them.

[3] See Khumalo v Member of the Executive Council for Education:KwaZulu Natal (2014) 35 ILJ 613 (CC) paras 30-31
[4] (2015) 36 ILJ 163 (LAC) at para 30.
[5] (2017) 38 ILJ 2795 (LC) at paragraph 11

[7] For all these reasons, the application before the Court was misconceived and falls to be dismissed.

[8] I therefore make the following order:

Order

1. The review application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicants: T. Du Preez instructed byVan der Spuy and Partners