REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1956/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

.....

.....

DATE 5-8-2019 SIGNATURE NV Semenya

In the matter between:

SOUTH AFRICAN DEMOCRATIC

TEACHERS UNION **: APPLICANT**

And

DEPARTMENT OF EDUCATION,

LIMPOPO PROVINCE **: RESPONDENT**

JUDGMENT

SEMENYA J:

[1] On the 14 November 2014, the Head of Department of the respondent issued circular No. 121 of 2014 (the circular). The said circular was intended to regulate the appointment of educators who have previously resigned from the public service as educators and who had either re-entered the profession or intend to do so in the future. The said circular provides as follows:

> *"1. The Department of Education has noted that there are educators who terminate their services before reaching the retirement age, and after a short period of absence, re-enter the teaching profession.*
>
> *2. In the case of re-appointments, consideration shall be given to the interests of the Limpopo Provincial Education.*
>
> *3. Secondly, other applicants who comply with the prescribed requirements for appointment, and young entrants to the teaching profession shall be given preference over persons who have already had the opportunity of an extensive career in education.*
>
> *4. Thirdly, if there is no other young entrants to the teaching profession, the re-appointment of an educator who had retired*

prematurely should be on contract not exceeding twelve (12) months.

5. Lastly, these educators who had a break in service should not be appointed without prior approval of the Head of Department..."

[2] Subsequent to the coming into operation of this circular, Thlako M A (Thlako), one of the educators who have previously resigned from the teaching profession, and has since been appointed again as an educator, received a letter which informed him that his permanent post has been converted into a temporary one on the strength of the circular. The applicant, a registered trade union which represents educators, launched this application on behalf of Thlako and other educators who were affected by the circular. It is imperative to quote the orders sought in the notice of motion in view of the events that took place after the launch of the application as well as the nature of the issues raised. The prayers are as follows:

"3. Interdicting the respondent from converting from permanent to temporary the employment status of any educator who has been appointed on a permanent basis previously resigned from the public service

4. Interdicting the respondent from discriminating against any educator who previously resigned from the public service and who applies for a post for appointment as an educator whether on permanent or temporary basis.

5. Declaring as unlawful, unconstitutional and discriminatory Departmental Circular no. 121 of 2014 dated 14/11/2014.

6. Declaring the conversion of the appointment status of Thlako M A and/ or any other educator from permanent to temporary on the basis of their previous resignation from the public service to be unlawful and of no force and effect.

7. Declaring that any educator who has voluntarily resigned from the public service qualifies for permanent appointment upon meeting all requirements for permanent appointment as an educator.

8. Directing the respondent to restore the appointment of Thlako M A or any other educator who was appointed on a permanent basis and whose appointment was converted to temporary for the reason of their previous resignation to permanent as per their letters of permanent appointment.

9. Directing the respondent to restore Thlako M A and any other educator affected by the impugned action and whose services were subsequent to the impugned conversion terminated in its employment.

10. Directing the respondent to pay the salaries of Thlako M A and any other educator whose services were terminated owing to the conversion of their

appointment from permanent to temporary for the period such termination until restore to their permanent positions.

11. Directing that any educator who previously voluntarily resigned and applied for and was recommended for appointment permanent be appointed in any such educator post and to the school for which she or he was recommended for any appointment.

12. Directing the respondent to provide applicant's Attorneys with a list details of all educators who were not shortlisted and/or were removed from a shortlist owing to the fact of their previous resignation from public service.

13. Directing the respondent to provide applicant's Attorneys with a list and the details of all educators who were interviewed and recommended for permanent appointment but were disqualified owing to their previous resignation."

[3] On the 8 August 2018, the respondent issued circular number 125 of 2018. The parties are in agreement that this circular had the effect of withdrawing circular number 121 of 2014. Pursuant to the issue of circular 125 of 2018, the applicant abandoned prayers 3, 4, 5 and 7 of the notice of motion on the basis of mootness. During argument the applicant stated that the remaining issues between the parties are limited to the rights of Thlako alone. This judgment will therefore be restricted to the issues relating to Thlako only.

[4] The applicant alleges that the application is brought in terms of section 89 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and section 38 (b) – (e) of the Constitution of the Republic of South Africa, 1996. Section 89 of the BCEA provides that:

> *"(1) A registered trade union or registered employers' organisation may act in anyone or more of the following capacities in any dispute to which any of its members is a party:*
>
> *(a) In its own interest;*
>
> *(b) on behalf of its members;*
>
> *(c) in the interest of any of its members.*
>
> *(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to these proceedings."*

Thlako has deposed to a supporting affidavit in which he states that he is an educator and a member of the applicant. In response to the preliminary issue of the applicant's lack of *locus standi* raised by the respondent, the applicant argued that it was not necessary for the applicant to attach Thlako's membership to its founding papers in view of this supporting affidavit. I agree with

this contention, more so in that the respondent did not furnish any evidence that counter this averment. The respondent is therefore entitled to act on behalf of Thlako on the strength of subsection (1) (b) of section 89 the BCEA above.

[5] The respondent abandoned its initial preliminary issue of the applicant's failure to certify what appeared to be the class action. This point of law was raised on the basis of the applicant's allegation that it was acting on behalf of all educators who have previously resigned from the public service and seek to be employed again or are already employed by the respondent. This point of law was withdrawn in view of the applicant's submission that it will argue the matter on behalf of Thlako only. It is therefore not necessary to address this issue in this judgment.

[6] The respondent contended that the decision taken by the respondent amounts to an administrative action and therefre falls within the ambit of Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondent argued that the proper procedure that should have been followed was for the applicant to apply for review of this administrative

action in terms of the PAJA. The respondent argued, based on **Oudekraal Estate (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)** at **[26]-[28]** (Oudekraal)that the administrative action or decision remains valid until it is set aside by a competent court. On this point, the applicant argued that the cause of action is determined by the prayers sought in the notice of motion and not by what the respondent wishes them to be. The applicant stated that Thlako is challenging the constitutional validity of the decision taken by the respondent in terms of the Constitution as well as its breach of the Employment of Educators Act 76 of 1998 (EEA). The applicant submitted that the issues raised are not those that can be challenged in terms of PAJA.

[7] Counsel for the applicant argued that Oudekraal did not impose an absolute obligation on private citizens to take steps to strike down an invalid administrative action affecting them. He further argued that the decision of the respondent amounts to legislative decision, which is the power that the respondent did not have. He submitted that even if this court were to find that the impugned circular amounts to administrative action, it will not be precluded from declaring the conduct invalid for inconsistency with the Constitution. I do not agree with counsel for the applicant that the respondent was exercising legislative powers when it

issued circular number 121 of 2014. The circular sets out policy to be followed in the Department of Education, Limpopo Province, whenever an appointment of educator is to be made. The development and implementation of Provincial policy by the executive have been expressly excluded from the definition of administrative action in terms of section 1(bb) of PAJA.

[8] Counsel for the respondent contended that the applicant should have referred the matter to the Labour Court and not to this court. Counsel for the applicant stated that the matter was initially referred to the Education Labour Relations Council which ruled that the dispute referred to it by the applicant does not fall within its jurisdiction on the basis that it was a contractual claim. It was stated in that ruling that Thlako has a choice of either accepting the repudiation of the contract by the respondent or suing for damages or rejecting it and seeking specific performance. It appears to me that Thlako opted for approaching this Court for a different order instead of challenging that decision of the Education Labour Relations Council.

[9] The respondent argued, on the basis of the judgment of the Western Cape Division of the High Court in **Minister of Health v New Clicks SA (Pty) Ltd and Others 2006 (1) BCLR 1 (CC) at 436 (New Clicks and**

Others) that the issues between the parties in this matter fall squarely within the jurisdiction of the Labour Court. It was submitted that the applicant cannot rely on the Constitution or the common law in a case where there is legislative provision specifically promulgated to deal with labour issues. In New Clicks and Others it was stated that:

> *"In my view, there is considerable force in the view expressed in NEPTOSA. Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on section 33 (1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33 is applicable, is inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under section 33 and the common law. Yet this Court has held that there are not two systems of law regulating administrative action…"*

Counsel for the applicant argued that the applicant is not relying on a Statute but on common law principles of legality in that the respondent usurped the powers of the Minister of Education when it issued the circular which has the effect of discriminating educators who have previously resigned from their posts. Counsel for the respondent contended that the applicant failed to specify the grounds upon which it relies on in alleging discrimination. In relying on the principles laid down in Clicks and Others above, the respondent argued that the legislature has enacted the Employment Equity Act 55 of 1998 and the BCEA

which, among others, address equality in the work environment issues. It was argued that the applicant cannot rely on common law on this basis, more so in that the constitutionality of these two Acts is not challenged.

[10] I am in agreement with the respondent's contention as stated in paragraph [9] above. In paragraph 9 of the notice of motion the applicant has stated that it is launching this application in terms of the BCEA. Section 77 of the BCEA provides that the Labour Court has exclusive jurisdiction in respect of matters contained in the Act. In **Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC)** it was held that *"Therefore, section 157(2) should not be interpreted to extend the jurisdiction of the High Court to determine issues which (as contemplated by section 157 (1) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdiction areas which have been created for it by the LRA, and are covered by section 157(2) (a), (b) and (c)."* The Labour court has, as contended by the respondent, exclusive jurisdiction to hear this application.

[11] The impugned circular has been withdrawn and is therefore of no force and effect. There is no need, in my view, to declare the circular

unlawful on common law grounds. Such declaration will simply be academic. I agree with counsel for the respondent's contention that the applicant should have amended its papers in this regard. It is correct so that the applicant can no longer base its cause of action on a circular that has already been withdrawn.

[12] On the issue of costs, I am of the view that I should not follow the general rule that costs should follow the results. The circular was withdrawn after the launching of this application. On the basis of **Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA232 (CC)**, I deem it unnecessary to penalise a union for seeking to ventilate the issues that affect the rights of its members.

[13] In the premises I make the following order:

i. The application is dismissed.

ii. No order as to costs is made.

M.V SEMENYA
JUDGE OF THE HIGH COURT;
LIMPOPO DIVISION.

APPEARANCES:

ATTORNEYS FOR THE APPLICANT	: MARWESHE ATT
COUNSEL FOR THE APPLICANT	: ADV. B. MARAIS
ATTORNEY FOR THE RESPONDENT	: STATE ATTORNEYS
COUNSEL FOR THE RESPONDENT	: ADV. M S MPHAHLELE
RESERVED ON	: 18 APRIL 2019
JUDGMENT DELIEVERED ON	: 05 AUGUST 2019