IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE
CASE NO: 2961/2020

In the matter between:

PIET JOHANNES HERMANIS	Applicant
and	
MEC: EDUCATION, WESTERN CAPE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
REGIONAL COMMISSIONER: CORRECTIONAL SERVICES	Third Respondent
CORNEA MANDEAN-STRYDOM	Fourth Respondent
DEPARTMENT OF CORRECTIONAL SERVICES	Fifth Respondent

Bench: P.A.L. Gamble, J

Heard: 24 February 2022

Delivered: 3 August 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Wednesday 3 August 2022

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. During the period 1988 to 2013 the applicant was employed by the Western Cape Education Department ("WCED") in the Boland in a variety of managerial positions. As such he was issued with a so-called "PERSAL" number which entitled him to be remunerated in terms of the WCED's payment system via a direct deposit into his bank account.[1]

2. On 27 February 2013 the applicant, while employed in the Cape Winelands Education District, was charged with misconduct arising out of allegations, firstly, of financial mismanagement and, secondly, conducting an intimate relationship with a student under his authority as the erstwhile manager of the Adult Education and Training Centre in Worcester. The disciplinary enquiry ("DC") charged with determining the applicant's case was scheduled to be convened on 12 and 13 March 2013.

3. Shortly before the DC, and on 7 March 2013, the applicant elected not to face the music and resigned from the employ of the WCED. He cited as reasons for his resignation the alleged stress arising from an on-going dispute with the WCED relating to him not being short-listed for an interview for a post for which he had applied.

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[1] According to www.allacronyms.com "PERSAL" is the acronym for "Personal and Salary System" applicable to all employees in the public service – both national and provincial – and each employee is issued with a unique "PERSAL" number.

4. Pursuant to an internal recommendation from a senior functionary on 7 March 2013, the WCED resolved that that the applicant's resignation be regarded as a deemed dismissal. In doing so, the WCED relied on the provisions of s14(1)(d) of the Employment of Educators Act, 76 of 1998, ("the EEA"), which rendered the unilateral termination of the applicant's employment contract in such circumstances a deemed discharge on account of misconduct.

> "**14 Certain educators deemed to be discharged**
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> (1) An educator appointed in a permanent capacity who –
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> (a)…
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> (b)…
>
> (c)…
>
> (d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-
>
> (i)…
>
> (ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be."

THE PERSAL NUMBER BLOCKING

5. As a consequence of the applicant's aforesaid deemed dismissal from the WCED, his PERSAL number was blocked on the national system. This appears to be standard practice and this step effectively rendered the applicant unemployable in

any position in the public service: without a valid PERSAL number he was incapable of being remunerated.

6. During early 2017 the applicant decided to offer his educational services further afield and sought employment at a school across the provincial border of the Western Cape in the Northern Cape. There he encountered a problem with the block on his PERSAL number and, when his trade union representative requested the WCED to lift the block, it refused to do so. The WCED advised that the applicant could request the relevant department in the Northern Cape provincial administration which was considering employing him, to apply for the lifting of the PERSAL block.

7. Subsequent thereto there were various further requests to the WCED to remove the block on the applicant's PERSAL number, all of which were unsuccessful. The attitude of the WCED was recorded as early as 19 May 2015 in an internal memorandum as follows.

"3.1 Sexual abuse in its various guises is a phenomenon that has been part and parcel of society for centuries. It is only in the last few decades, however that professional and societal interest in this social tragedy has been triggered, and continues to increase. Financial mismanagement on the other hand has reached pandemic proportions and need (sic) to be curbed.

3.2 Due to the serious nature and severity of the allegations against Mr. Hermanis, it is not recommended that the block be lifted."

The WCED's continued stoic resistance to lifting the block was founded on this reasoning.

EMPLOYMENT WITH DCS

8. On 11 March 2018 the applicant applied to the Department of Correctional Services ("DCS") for appointment to the position of Chairperson of the Parole Board for the Brandvlei Correctional Services Management Area near Worcester. He was

successful and concluded a fixed-term contract for three years commencing on 6 March 2019 and expiring on 5 March 2022.

9. In the founding affidavit in these proceedings for review and ancillary relief, the applicant says that he rendered his services diligently and without any complaint from DCS but was never remunerated. He says he was to be paid at the rate of R264/hour for a 40-hour week and was required to submit a claim form to that effect, whereafter his remuneration was to be paid into his bank account.

10. The applicant says further in the founding affidavit that when he enquired about this non-payment, he was told by the fourth respondent, the Regional Head of Human Resources in the Western Cape Region of DCS, that he had been dismissed from the WCED and that his number had accordingly been blocked on the PERSAL system. He claims was told by the fourth respondent that in order for the block to be lifted, he was required to provide evidence that he had not been dismissed by the WCED.

11. These allegations by the applicant are, however, not sustained by the correspondence annexed to his founding affidavit. Rather, it appears that on 26 March 2019 the fourth respondent wrote to the applicant informing him that it had recently come to the attention of her office that his services with the WCED had been terminated on 6 March 2013 in terms of s 14(1)(d) of the EEA, and that he had failed to disclose this when he applied for the position with DCS. He was asked to provide reasons for this non-disclosure.

12. The applicant then engaged the services of a firm of attorneys in Worcester who corresponded with the fourth respondent in an endeavour to explain the reason for the applicant's termination of employment with the WCED. The ensuing exchanges of correspondence, in which the applicant was afforded an opportunity "*to disclose the relevant information concerning the termination of [his] employment with the [WCED] to enable [DCS] to make an informed decision on [his] further employment",* culminated in a letter written to the applicant by the fourth respondent on 15 August 2019 informing the applicant of his suspension as chair of the Parole Board: Brandvlei Management Area.

"The previous communications by this office, whereby you were given several opportunities to respond to the issue regarding your service termination, refer.

You are hereby suspended (without pay) with immediate effect. You will be given 30 days to provide the relevant official information as required to enable [DCS] to continue with the registering of a SCC.[2]"

13. Thereafter the applicant attempted to exert political pressure on DCS by enlisting the support of, inter alia, the leader of the opposition in the Western Cape Provincial Legislature and other political functionaries perceived to be favourable to his cause, but all of this came to naught as DCS refused to budge.

14. The upshot of the exchange of correspondence with DCS was that the applicant's case was drawn to the attention to the Public Service Commission ("PSC") which proceeded to investigate his complaint. On 22 January 2020 the Western Cape office of the PSC informed the applicant of the outcome of its investigation. It is convenient to set out that response in some detail.

15. After citing s 14(1)(d) of the EEA, the PSC said the following.

"The consequence of this is that the PERSAL system will reflect a notice that you were dismissed on account of misconduct. We note that you referred to it as a 'block on PERSAL'.

The PSC tested the import of this PERSAL notice on future employment in the general Public Service. The understanding gained by ourselves is that any future government employer may request and motivate that this notice be removed from the system with a view to employing a person affected by such a notice.

The Human Resources division of the employing department will be well-acquainted with such a procedure.

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[2] This acronym is not defined in the papers

We find that the actions taken by the Western Cape Education Department in placing this PERSAL notice on the system as a consequence of you resigning during a disciplinary process both legal and procedurally fair.

Your complaint is thus found to be unsubstantiated."

INITIATION OF THIS APPLICATION

16. Having reached what he believed to be a cul-de-sac, the applicant launched the current proceedings in February 2020 for a review and certain declaratory relief. In the founding affidavit the applicant made plain that he relied on the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") in respect of all the relief sought, and in particular asked the Court to exercise its powers under s 8(1) of PAJA to make an order that was just and equitable, including the setting aside of administrative orders made by the WCED and issuing declaratory orders in respect of DCS.

17. In the notice of motion herein the applicant asked for an order in the following terms –

"1. Declaring that the decision taken by the First Respondent to dismiss the Applicant by invoking the deeming provisions of Section 14(1)(d) of the Employment of Educators Act, 76 of 1988 is unlawful and invalid and has no legal standing or effect;

2. Reviewing, correcting and setting aside the decision taken by the First Respondent to place a notice against Applicant's name on the PERSAL system thereby preventing him from being employed in any other government department;

3. Directing the Second, Third, Fourth and Fifth Respondents to remove the notice against Applicant's name on the PERSAL system;

4. Directing the Second, Third, Fourth and Fifth Respondents to remove the Applicant's suspension as the Chairperson of the Parole Board Brandvlei Management Area;

5. Directing the Second, Third, Fourth and Fifth Respondents to pay Applicant's salary with effect from 1 March 2019 to date of the orders sought in this Notice of Motion;

6. Granting the Applicant further and/or alternative relief."

It will be noted that there is no prayer for costs.

ISSUES IN DISPUTE

18. At the commencement of the virtual hearing of this application on 24 February 2022, counsel for the applicant, Mr. Kilowan, informed the Court that his client was only proceeding with the relief claimed in prayers 3, 4 and 5, prayers 1 and 2 having been abandoned there and then. The claims that thus then constituted the live issues between the parties were orders directing the second to fifth respondents, firstly, to effect removal of the PERSAL "block", secondly, to remove the suspension of the applicant as chair of the local parole board and, thirdly, to pay him his outstanding remuneration *qua* chair. For the sake of convenience, I shall refer to the relief claimed under prayers 1 and 2 as "the primary relief" and that under prayers 3 to 5 as "the secondary relied".

19. In abandoning the primary relief on behalf of the applicant, Mr. Kilowan acknowledged that the decision in this Division in De Villiers[3] was directly in point and that his client was thus precluded from seeking such relief in the High Court. I should point out that De Villiers involved the dismissal of an educator for misconduct under the EEA and a subsequent application to in this Division for his reinstatement under s 14(2) of that act. In upholding an objection *in limine* by the MEC for Education in the Western Cape*,* Davis and Allie JJ dismissed the application on the basis that the matter fell within the exclusive jurisdiction of the Labour Court

20. Counsel for the respondents, Ms. Nyman, while opposing the substantive relief sought by the applicant, noted that her clients persisted with the points *in limine* raised in the opposing papers. The opposing papers were drafted in opposition to the

[3] De Villiers v Minister of Education, Western Cape 2009 (2) SA 619 (C)

entire relief initially sought by the applicant and did not expressly address the issue of jurisdiction in respect of the individual causes of action pleaded against the two departments of state – the WCED and DCS.

21. The abandonment of the primary relief thus leaves DCS as the only respondent affected by the application. To the extent that the Minister of Justice and Correctional Services is cited as the second respondent in his capacity as the titular head of DCS, and given that the third to fifth respondents are functionaries in that department, for the purposes of further convenience I shall refer to the remaining respondents collectively as "DCS".

22. The question that has arisen as a consequence of the abandonment of the primary relief, is whether the secondary relief also falls within the exclusive jurisdiction of the Labour Court. A further issue which arises from the respondents' points *in limine* is whether the claims comprising the secondary relief have prescribed under the Prescription Act, 68 of 1969.

23. The decision in De Villiers was based on a detailed analysis of the Constitutional Court decisions in Chirwa[4] and Fredericks[5]. It was considered at the time that there was some tension between the two judgments as regards the exclusive jurisdiction of the Labour Court and the concurrent jurisdiction of the High Court in matters involving employees in the civil service. That debate was finally put to bed in the decision of the Constitutional Court in Gcaba.[6] For purposes of background then I shall discuss the approach generally to jurisdiction in employment matters and focus on the effect of Gcaba on the secondary relief sought by the applicant.

JURISDICTION - GENERALLY

24. The answering affidavit filed on behalf of the WCED was deposed to by its Deputy Director of Employee Relations, Mr. Jason Fry. The contents of his affidavit

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[4] Chirwa v Transnet Ltd and others 2008 (4) SA 367 (CC)

[5] Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) SA 693 (CC).

[6] Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC).

were supported by the second to fifth respondents, who confirmed the contents thereof to the extent relative and who also relied on the points *in limine* raised in Mr. Fry's affidavit. In that regard, the WCED expressly challenged the jurisdiction of this Court, contending that this matter fell exclusively for determination in the Labour Court. In the replying affidavit the applicant simply denied the relevant paragraphs in the answering affidavit, without seeking to engage therewith in any meaningful manner.

25. The point of departure for the jurisdiction argument put up by DCS in respect of the secondary relief is s157 of the Labour Relations Act, 66 of 1995 ("the LRA") which is to the following effect.

"**157 Jurisdiction of Labour Court**

> (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect to all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
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> > (a) employment and from labour relations;
> >
> > (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
> >
> > (c) the application of any law for the administration of which the Minister is responsible."

26. As I have said, when he commenced this application, the applicant sought the primary relief under PAJA on the basis of both substantive and procedural unfairness. He said the following in the founding affidavit.

"[14] In this application I seek an order that sets aside to the administrative decision of the [WCED] to invoke [s 14(1)(d) of the EEA] **without good cause** and **without giving me an opportunity to make representations** to the WCED as to why the provisions of s 14(1)(d)…was (sic) and is still not applicable to me."

27. Under prayer 2, the applicant asked for the review under PAJA of the WCED's "*decision to place a notice against [his] name on the PERSAL system thereby preventing him from being employed in any other government department* ". No particular legal basis was advanced in the founding affidavit for the entitlement to this relief. Nevertheless the allegedly unlawful decision was pleaded in the context of the WCED as the applicant's employer, and the abandonment of that prayer pursuant to the decision in De Villiers implicitly recognises that the implementation of the PERSAL block was pursuant to the applicant's employment under the EEA with the WCED. In the circumstances it is clear that the applicant conceded that determination of the primary relief fell within the exclusive determination of the Labour Court under s 158(1)(h) of the LRA.

JURISDICTION IN RESPECT OF THE SECONDARY RELIEF

28. The question that follows is whether the secondary relief is available to the applicant in this court under PAJA or whether the power to grant that relief too falls exclusively within the jurisdiction of the Labour Court. I intend approaching the question with reference to the argument advanced overall by Ms. Nyman as I believe it will clarify the question of jurisdiction in respect of determination of the secondary relief.

29. The point of departure in this regard is s 158(1)(h) of the LRA which provides as follows.

"**158. Powers of the Labour Court**

(1) The Labour Court may –

> (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;"

30. The jurisdiction argument advanced on behalf of the respondents generally was to the effect that the matter should have been lodged in the Labour Court for the following reasons. In respect of the primary relief, it was submitted by Ms. Nyman that the aforementioned provisions of s 14(1)(d) of the EEA, which provided that the applicant's resignation from the WCED constituted a deemed dismissal, were challenged by the applicant on the basis of the alleged absence of procedural fairness on the part of his employer. The matter thus effectively concerned an alleged unfair dismissal of the applicant.

31. Counsel consequently relied on the decision of the Constitutional Court in Chirwa for her submission that the primary relief was available to the applicant exclusively in the Labour Court. The judgment of Skweyiya J for the majority in that matter affords a useful exposition.

"[62] The LRA provides procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration, for which the CCMA is established; and establishes the Labour Court and Labour Appeal Court as superior courts with exclusive jurisdiction to decide matters arising from it. Unfair dismissals and unfair labour practices are dealt with in Ch. 8. Section 188 provides that a dismissal is unfair if the employer fails to prove that the dismissal was for a fair reason or that the dismissal was effected in accordance with a fair procedure. Item 9 in Schedule 8 to the LRA sets out guidelines in cases of dismissal for poor work performance.

[63] Ms. Chirwa's claim is that the disciplinary inquiry held to determine her poor work performance was not conducted fairly and therefore her dismissal following such inquiry was not effected in accordance with a fair procedure. This is a dispute envisaged by s 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration and review by the Labour Court. The dispute concerning dismissal for poor work performance, which is covered by the LRA, and

for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter."

32. It was further submitted by Ms. Nyman that the conduct complained of and which underpinned the secondary relief, did not constitute administrative action either and thus similarly fell within the exclusive jurisdiction of the Labour Court. In evaluating that argument, it is useful to have regard to the judgment of Van der Westhuizen J in Gcaba in which the Constitutional Court sought to clarify any confusion that may have arisen regarding jurisdiction consequent upon the decisions in Chirwa and Fredericks. The case involved a complaint by a police officer that he had been passed over for promotion.

"[64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized 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 [of the Constitution] is to deal with the relationship between the State as 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 it has few or no direct implications or consequences for other citizens, it does not constitute administrative action…

[66] In *Chirwa* Ngcobo J found that the decision to dismiss Ms. Chirwa did not amount to administrative action. He held that whether an employer is regarded as 'public' or 'private' cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr. Gcaba appears to be a quintessential labour-related issue based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr. Gcaba and has little or no direct consequence for any other citizens.

[67] This view is consistent with the judgment of Skweyiya J in *Chirwa,* who did not decide this issue, but indicated a leaning in this direction. It furthermore does not contradict the unanimous judgment of this court in *Fredericks*, which left the issue open. There was no dispute about whether the decision at the center of the dispute was administrative action.

[68] Accordingly, the failure to promote and appoint the applicant was not administrative action. If his case proceeded in the High Court, he would have been destined to fail for not making the case with which he approached this Court, namely an application to review what he regarded as administrative action…

[69] The consequence of the finding, that the conduct behind employment grievances like those of Ms. Chirwa and the applicant is not administrative action, will substantially reduce the problems associated with parallel systems of law, duplicate jurisdiction and forum shopping. As found in *Chirwa*, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA and not, for example, applications for administrative review. The High Court adjudicates the alleged violations of constitutional rights, administrative review applications, and of course all other matters. This corresponds with a proper interpretation of s 157(1) and (2).

[70] Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decision of the CCMA under s145. Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court and s 157(2) should not be read to promote the High Court to have jurisdiction over these matters as well."

33. Attached to Mr. Fry's affidavit as annexure JF 20 is a *pro forma* nine-page document described as a contract of employment concluded between the applicant and DCS, dated and signed on 7 March 2019. It is a fixed term contract for a three-year period terminating on 3 March 2022 which is subject to the terms and conditions set out therein. Those terms include, inter alia, working hours and days, the rate of

remuneration, the provision for dispute resolution through arbitration and grievance and disciplinary processes.

34. Moreover, in Steyn[7] the Labour Court recognized that a fixed term contract of employment for the Chairperson of the Parole Board constituted an employment contract regulated by the provisions of the Public Service Act, 103 of 1994.

35. Clause 6.2 of the applicant's contract of employment is instructive.

"6.2 The Minister or delegated authority (Area Commissioner) may remove a member from office on grounds of misbehaviour, incapacity or incompetence in accordance with section 74 (7)(b) of (sic) Correctional Services Act 111 of 1998 but such action by the Minister does not preclude disciplinary action against officials in the full-time service of the State as provided for in the conditions of service."

It is thus apparent that DCS had the power to take a disciplinary step such as suspension without pay against its employee, the applicant.

36. In the founding affidavit, the applicant lists a litany of complaints regarding his treatment at the hands of DCS during the currency of his of his tenure as parole board chair, all of which are manifestly actionable under the LRA. Finally, when DCS took steps to suspend the applicant on 15 August 2019, it expressly referred in its letter to the applicant in that regard (Annexure PH34 to the founding affidavit) to its contract of employment with him.

37. In the circumstances, and following the decision of the Constitutional Court in Gcaba, I conclude that the applicant's legal relationship with DCS was one of employment, albeit in terms of a fixed term contract. It follows that any legal steps which the applicant wished to initiate and/or institute against DCS flowed from his contract of employment with it and that the orders sought under the secondary relief herein fall under the exclusive jurisdiction of the Labour Court. The relevant point *in limine* must therefore be upheld.

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[7] Solidarity on behalf of Steyn v Minister of Correctional Services (2009) 30 ILJ 2508 (LC) at [14] – [15]

PRESCRIPTION

38. Ms. Nyman, relying on Pieman's Pantry[8] argued that, in any event, all of the applicant's claims (both for primary and secondary relief) had become prescribed under the Prescription Act. There may be merit in counsel's submissions in that regard but given that the applicant has not proceeded with the primary relief in this Court, and given further that I have found that this Court does not have jurisdiction to hear any of the claims, I decline to deal with the point.

39. I consider that this issue should not be regarded as *res judicata* through a ruling by this Court, thus entitling the respondents to raise prescription should the applicant elect to proceed in the Labour Court and affording the applicant the opportunity to raise such defences thereto as may be available to him.

COSTS

40. Although the applicant did not ask for costs in his notice of motion, the respondents moved for such an order in the answering affidavit. In concluding her argument, Ms. Nyman pressed for an order that costs should follow the result. There is, in my considered view, no reason why the public purse should be unduly strained by an order that precludes it from recovering what is due to it as a consequence of its success herein.

ORDER OF COURT

In the circumstances the application is dismissed with costs.

GAMBLE, J

[8] Food and Allied Workers Union on behalf of Gaoshubelwe and others v Pieman's Pantry (Pty) Ltd (2017) 38 ILJ 132 (LAC)

Appearances

For the applicant:	Mr. C. Kilowan Instructed by P. Mbabane Attorneys Paarl c/o Boshoff Njokweni Attorneys Cape Town.
For the respondent:	Ms. R. Nyman Instructed by The State Attorney Cape Town