THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 328/08

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Appellant
LEONARD FRANK McCARTHY	Second Appellant
and	
TSHIBVUMO PHANUEL CORNWELL TSHAVHUNGWA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent

Case No: 593/08

TSHIBVUMO PHANUEL CORNWELL TSHAVHUNGWA	First Appellant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
LEONARD FRANK McCARTHY	Third Respondent

Neutral citation:	*Tshavhungwa v NDPP* (328/09 & 593/08) [2009] ZASCA 136 (2 November 2009)
Coram:	NUGENT, LEWIS, MLAMBO, MAYA JJA and GRIESEL AJA
Heard:	16 SEPTEMBER 2009
Delivered:	2 NOVEMBER 2009
Summary:	**Claim for enforcement of constitutional right to administrative action that is lawful, reasonable and procedurally fair – dismissal of public employee – does not constitute 'administrative action'.**

ORDER

On appeal from: North Gauteng High Court (Mavundla J sitting as court of first instance)

The appeal against paragraph 1 of the order of the court below is dismissed with costs. The cross appeal against paragraph 2 of the order is upheld with costs. The order made in that paragraph is set aside and the following order is substituted:

'The costs of the application are to be paid by the applicant.'

JUDGMENT

NUGENT JA (LEWIS, MLAMBO, MAYA JJA and GRIESEL AJA concurring)

[1] We have before us an appeal and a cross appeal. To avoid confusion I will refer to the parties by their names or designations. The appeals arise from an application that was brought by Mr Tshavhungwa in the North Gauteng High Court against the National Director of Public Prosecutions, Mr McCarthy, and the Minister of Justice and Constitutional Development. To the extent that the allegations in the affidavits are disputed I will relate them in accordance with the principles laid down in *Plascon-Evans*.[1]

[1] *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A) 634E-635C.

[2] At the time that is now relevant there existed in the Office of the National Director of Public Prosecutions – established under the National Prosecuting Authority Act 32 of 1998 – a unit known as the Directorate of Special Operations (commonly referred to as the 'Scorpions'). McCarthy – a Deputy National Director of Public Prosecutions – was the head of the unit. Tshavhungwa was employed in the unit as a Deputy Director.

[3] On 15 March 2004 Tshavhungwa was called to a meeting at the office of the National Director – at that time Mr Ngcuka – which was also attended by McCarthy. There he was informed that certain allegations had been made against him that required investigation and he was placed on special leave for a fortnight. On 13 March 2004 McCarthy wrote to Tshavhungwa advising that the allegations were sufficiently serious to warrant further investigation and that Tshavhungwa was meanwhile suspended with full emoluments.

[4] On 26 May 2004 Tshavhungwa was given notice to attend a disciplinary hearing to answer to various charges of misconduct, which included 'dishonesty', 'abuse of his authority', 'disgraceful and improper conduct', and 'failing to disclose his financial interest' in certain transactions. The hearing was due to take place on 28 May 2004 but was postponed to 8 June 2004.

[5] The day before the hearing was to take place Tshavhungwa was arrested on allegations of corruption. Needless to say, the disciplinary hearing did not proceed. On 8 June 2004 Tshavhungwa was released on bail. On 18 June 2004 he was again arrested, on this occasion for failing to adhere

to the conditions of bail. Bail was revoked and Tshavhungwa remained in custody until November 2005.

[6] Meanwhile, attempts were made to bring the disciplinary proceedings to fruition. It is not necessary for present purposes to detail the various events that occurred in that regard. It is sufficient to say that in September 2004, at the suggestion of Tshavhungwa's attorney, it was agreed that in place of the disciplinary hearing, the allegations against Tshavhungwa would be subjected to 'pre-dismissal arbitration' as contemplated by s 188A of the Labour Relations Act 66 of 1995. The arbitration was set to take place over the period 10 – 12 November 2004.

[7] In the interim Ms Sparg – Chief Executive Officer in the National Prosecuting Authority – wrote to Tshavhungwa's attorney (on 21 July 2004) inviting Tshavhungwa to furnish reasons why he should not be placed on suspension without pay in view of his inability to fulfil his employment obligations and the protracted disciplinary proceedings. Notwithstanding objection his attorney was advised on 4 August 2004 – on the authority of the National Director – that he had been suspended without pay with immediate effect.

[8] Before the 'pre-dismissal arbitration' took place the Executive Committee of the National Prosecuting Authority – which is its top management structure – reconsidered the decision to subject the matter to arbitration. Upon legal advice it concluded that it should consider terminating Tshavhungwa's employment forthwith, principally on the ground that his incarceration prevented him from performing his functions.

In view of this decision Tshavhungwa was advised that the National Prosecuting Authority would not continue with the arbitration.

[9] On 3 December Sparg wrote to Tshavhungwa advising that

'I am currently considering the termination of your contract on the basis of your inability to perform your contractual obligation to the NPA and the operational requirements of the organisation as set out hereinafter. As further support for this consideration of termination of your contract, I have also set out in sections B and C hereinafter other circumstances, which in my view, constitutes an irreparable breach of trust and breakdown of the employer/employee relationship'

and she invited him to make representations as to why his employment should not be terminated. No representations were made and on 20 December 2004 Tshavhungwa was advised by Sparg that his employment was terminated with effect from that date.

[10] This concatenation of events prompted the application that is now in issue, which was for the review of certain of the decisions I have mentioned and in particular the decision to dismiss him. I do not think it is necessary to relate in full the orders that were sought. It is sufficient to say that Tshavhungwa sought orders declaring that 'the letter … dated 21 July 2004', 'the cancellation of the disciplinary hearing', 'the letter dated 3 December 2004', and the 'purported dismissal … per letter dated 20 December 2004' were 'mala fides, fraudulent, ultra vires, unlawful and void ab initio', together with other related declaratory orders, in particular an order declaring that only the Minister was authorised to discipline and dismiss him.

[11] The court below (Mavundla J) dismissed the application but ordered the National Director and McCarthy, jointly and severally, to pay the costs of the application. With the leave of that court Tshavhungwa now appeals against the order dismissing his application, and the National Director and McCarthy appeal against the order relating to costs.

[12] The application was brought only in December 2006. Tshavhungwa explained the delay on the basis that he had been incarcerated until November 2005, and had thereafter spent a year attempting to have the matter resolved by the Minister.

[13] In January 2006 he had written to the Minister requesting her intervention to 'reverse the decisions taken' alleging, amongst other things, that 'the National Director does not have the power to terminate the services of any Deputy Director of Public Prosecutions', and that only the Minister had that power. Tshavhungwa was advised on 10 March 2006 that the Minister was awaiting a report from the National Director and would reply to him once she received the report. Persistent requests by Tshavhungwa for a reply to his representations followed for much of the remainder of the year, the response on each occasion being that the Minister was awaiting the report. Meanwhile the National Prosecuting Authority had requested legal advice from the State Attorney, which it received in September 2006, and it then responded to the Minister. The Minister received the report on 26 October 2006. After considering the report, and on the advice of her advisers, she concluded that she was the only person authorised to dismiss Tshavhungwa. According to an affidavit deposed to by the Director General of the department, filed on her behalf, she then informed the National

Director of her view, and 'indicated that it is desirable that [Tshavhungwa] be re-instated so that proper disciplinary steps should be taken against him'. (The relevance of that communication will appear later in this judgment.) The representations that had been made to the Minister in January of that year were never responded to and Tshavhungwa duly launched his application.

[14] In this court counsel for Tshavhungwa did not press for all the relief that was claimed in the notice of motion but confined himself to the claim for a declaration that the purported dismissal of Tshavhungwa was unlawful. (Certain additional relief, consequent upon such a declaration, was also sought, for the first time, in this court, but in view of the conclusion to which I have come it is not necessary to deal with it.) The principal argument that was advanced in that regard was that, just as the Minister alone is authorised to appoint a Deputy Director,[2] so, too, the Minister alone is authorised to dismiss a Deputy Director, and thus the purported dismissal of Tshavhungwa by the National Director was unlawful. The Minister was represented before us to support that contention.

[15] While the argument found favour with the court below it nonetheless dismissed the application, upholding the points taken in limine that there had been undue delay in bringing the application, and further, that the court had no jurisdiction in the matter. For the reasons that follow it is not necessary for this court to pronounce upon the authority or otherwise of the National Director to dismiss a Deputy Director and I expressly refrain from doing so.

[2] Section 15(1) of the National Prosecuting Authority Act.

[16] The ground upon which Tshavhungwa sought the intervention of the High Court was that the various acts that I have referred to – including his purported dismissal – were said to infringe the right guaranteed to him by s 33 of the Constitution to 'administrative action that is lawful, reasonable and procedurally fair'. His cause of action was emphasised in his replying affidavit when, in response to an allegation that his claim was barred because it ought to have been brought within the time limit stipulated by the Promotion of Administrative Justice Act 3 of 2000 he said that his claim was not founded upon the Act but was for 'violation of [his] constitutional right to administrative action', and later, that it was 'a classic administrative law review application'.

[17] Whether s 33 of the Constitution has a residual field of operation outside the terms of the Promotion of Administrative Justice Act is not a matter that need concern us in this case.[3] It is sufficient to say that the application can succeed, whether by direct application of the Constitution, or by its indirect application through the provisions of the Act, only if the conduct complained of by Tshavhungwa constitutes 'administrative action' as envisaged by the Constitution and the legislation.

[18] In the course of its reasoning the court below gave some attention to that question with reference to the decision of the Constitutional Court in *Chirwa v Transnet Ltd.*[4] That decision, and others that followed upon it, has since been overtaken by the decision of that court in *Gcaba v Minister of*

[3] See: Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Benchbook* paras 1.27 and 1.28; *The New Constitutional and Administrative Law* Vol 2 by Cora Hoexter with Rosemary Lyster (ed. Iain Currie) pages 87-89. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25.
[4] 2008 (4) SA 367 (CC).

Safety and Security,[5] which has helpfully clarified some of the issues that arose in *Chirwa*, and which is decisive of this case.

[19] In that case Mr Gcaba was appointed as station commissioner, Grahamstown, in September 2003, and he occupied that position until the end of February 2006. When the position was upgraded, Gcaba applied, was shortlisted, and went through the interview process. However, he was not appointed, and someone else was appointed instead. Gcaba lodged a grievance with the South African Police Service but later abandoned the process and elected to refer the dispute to the Safety and Security Sectoral Bargaining Council. When the representative of the South African Police Service failed to attend the pre-arbitration meeting, the applicant withdrew the dispute from the Bargaining Council and approached the High Court with an application to review the decision not to appoint him as station commissioner. The High Court, considering that it lacked jurisdiction to consider the claim, issued an order dismissing the application.

[20] The Constitutional Court dismissed an appeal against the order of the high court dismissing the claim, on the ground that the failure to promote and appoint the applicant was not administrative action, and thus that his claim was bad in law. As stated by Van der Westhuizen J:[6]

'[T]he 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 out the case with which he approached this Court, namely an application to review what he regarded as administrative action.'

[5] [2009] ZACC 26.
[6] Para 68.

[21] Much of the basis for that finding was drawn, it seems, from the earlier analysis by Ngcobo J in *Chirwa.* Van der Westhuizen J summarised the principle that was applied as follows (referring to employment in the public sector):[7]

'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of [the Promotion of Administrative Justice Act]. 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 section 33 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.'

[22] In supplementary heads of argument filed on behalf of Tshavhungwa it was submitted, on the basis of *Gcaba,* that the claim in the present case is justiciable in the high court, and that is clearly correct, but it begs the question whether the claim is properly founded in law. Tshavhungwa might well have had remedies available to him under the Labour Relations Act 66 of 1995 (which were not justiciable in the high court), and he pertinently disavowed reliance upon contractual remedies. But his claim in the present case, as I have already pointed, was that the purported termination of his employment breached his constitutional right to lawful administrative action. *Gcaba* makes it clear that the dismissal of an employee in the public sphere does not constitute 'administrative action' and on that ground alone the claim was correctly dismissed.

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[7] Para 64.

[23] There remains the question of the costs in the court below. Generally the costs associated with a failed application will follow the result. In this case the court below ordered the National Director and McCarthy to pay the costs as a mark of its disapproval. What the court below disapproved of was their failure to disclose in their answering affidavit that the Minister had indicated that she considered it desirable that Tshavhungwa be reinstated and that a disciplinary enquiry be held. I do not think there was anything untoward in the failure to make that disclosure. The Minister was a party to the proceedings and could be expected to express her own views on the matter and I do not think the National Director and McCarthy can be criticised for failing to preempt what she might have to say. Moreover, the view that was taken by the Minister was immaterial to the relief that was sought against the National Director and McCarthy. In my view the court below misdirected itself by founding its order for costs on that consideration and this court is entitled to approach the matter afresh. I see no proper reason why the costs should not follow the result in the ordinary course. The National Director and McCarthy, and the Minister, were represented by two counsel, before us and in the court below. No doubt they considered it prudent to be represented by two counsel but I do not think that the case is one that warrants an order for the recovery of those costs.

[24] Accordingly the appeal against paragraph 1 of the order of the court below is dismissed with costs. The cross appeal against paragraph 2 of the order is upheld with costs. The order made in that paragraph is set aside and the following order is substituted:

‘The costs of the application are to be paid by the applicant.’

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R NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	J G Rautenbach
	Instructed by: Bowman Gilfillan, Pretoria Lovius Block, Bloemfontein
For respondent:	A J Freund SC (1st & 3rd) S Yacoob I A M Semenya SC A L Platt
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	The State Attorney, Pretoria (2nd) The State Attorney, Bloemfontein