THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 454/2008

In the matter between:

TSHEDISO MKUMATELA	**APPELLANT**
and	
THE NELSON MANDELA METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
S V P MAFONGOSI	**SECOND RESPONDENT**

Neutral citation: *Mkumatela v The Nelson Mandela Metropolitan Municipality* (454/2008) [2009] ZASCA 137 (6 November 2009)

CORAM: **Navsa, Brand, Maya JJA *et* Hurt, Tshiqi AJJA**

HEARD: **8 September 2009**

DELIVERED: **6 November 2009**

SUMMARY: Review application brought in High Court under Promotion of Administrative Justice Act 3 of 2000 (PAJA) in matter concerning labour relationship between organ of State and employee – held that conduct complained of does not constitute 'administrative action' as contemplated by PAJA.

ORDER

On appeal from: High Court Port Elizabeth (Revelas J sitting as court of first instance)

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

BRAND JA (Navsa, Maya JJA *et* Hurt, Tshiqi AJJA concurring)

[1] This appeal has its origin in an unsuccessful review application by the appellant against the first respondent municipality in its capacity as his employer. It raises preliminary issues which have engaged our superior courts with perturbing regularity in the recent past. They relate to the review jurisdiction of the High Court in disputes arising from labour relations; purportedly implicating both the Labour Relations Act 66 of 1995 ('the LRA') and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[2] By contrast with the technical intricacies of these preliminary issues, the background facts can be stated with refreshing simplicity. The appellant was employed by the respondent municipality when he applied for the position of assistant manager: waste operations which, for him, would have been a promotion. He was short-listed as one of four candidates to be interviewed by an appointment committee. The composition of the committee complied with the prescriptions of the municipality's Recruitment Selection and Placement Policy. In line with the policy document, it comprised of the manager of the respondent's waste management unit, Ms Zamxaka, a representative of the Human Resources Unit, Mr Jamda, a representative of the Employment Equity Officer and one representative each of the two in-house trade unions. According to the explicit directions of the policy document, the last mentioned three representatives had observer status only. Voting rights were thus restricted to Ms Zamxaka and Mr Jamda.

[3] As it happened, however, the two members with voting rights could not agree on which candidate they should recommend to the municipal manager, who had been entrusted with the ultimate responsibility to make the appointment. Ms Zamxaka awarded the appellant her highest score. Mr Jamda's preferred candidate, on the other hand, was the second respondent, Mr S V P Mafongosi. Ms Zamxaka then proposed that a recommendation should be made on the basis of the aggregate score awarded by Mr Jamda and herself. On this basis the appellant's score would be 83,5 as opposed to Mr Mafongosi's 78. But her proposal was not accepted. What happened instead was that the three members of the committee with no more than observer status were asked to reveal their scores. From these it became apparent that all three of them supported Mr Mafongosi. The 'majority' vote thus arrived at was then used as the basis for a recommendation to the municipal manager. The recommendation was, however, accompanied by a covering letter informing the municipal manager of how the recommendation had actually come about, including the fact that the two committee members with voting rights could not agree and that the issue had been decided effectively by the scores of those who had no right to score. Despite these shortcomings, the municipal manager nonetheless appointed Mr Mafongosi.

[4] In the event, the appellant brought a review application in the Port Elizabeth High Court for an order that the appointment of Mr Mafongosi – whom he joined as the second respondent – be set aside and that the appointment process for the position in contention be started anew. Apart from other lesser complaints, the appellant's main ground of objection against the recommendation which led to the appointment of his rival was that it was procedurally flawed in that the prescriptions of the municipality's own policy document had not been followed. Departing from this premise, he contended that he had been deprived of his fundamental right to administrative action which is lawful, reasonable and procedurally fair, as promised in s 33 of the Constitution.

[5] Mr Mafongosi did not oppose the application. He chose to abide the decision of the court. The municipality, on the other hand, opposed the application. Apart from its opposition on the merits, it also raised two points *in limine*. First, that the High Court had no jurisdiction to hear the matter in that, in terms of the LRA, it fell within the exclusive domain of the Labour Court. Secondly, that the appellant's case, on a proper analysis, constituted a review application under PAJA, which was not competent since the procedure complained of did not amount to 'administrative action' as contemplated by the latter Act.

[6] As to the merits, the municipality conceded that the Appointment Committee had deviated from the procedure prescribed by the policy document when it allowed its recommendation to be swayed by those who had observation status only. Nonetheless, so the municipality contended, the deviation did not affect the validity of Mr Mafongosi's appointment, essentially for three reasons. First, because the policy document constituted no more than a guide. Secondly, because the deviation did not constitute a material departure from the letter and spirit of these guidelines. Thirdly, because the final decision to appoint had not been taken by the Appointment Committee, but by the municipal manager who was fully aware of the flaws in the recommendation process when he exercised his independent discretion in favour of Mr Mafongosi.

[7] The court a quo (Revelas J) considered the two points *in limine* and found them both wanting. As to the merits, on the other hand, the court was essentially persuaded by the municipality's answers. In consequence, the review application was dismissed with costs. The appeal against that judgment is with the leave of the court a quo.

[8] In this court the municipality again relied on the same two points *in limine* as in the court a quo. The contention that the High Court had no jurisdiction was squarely based on the decision of the Constitutional Court in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); where the majority of the court essentially decided, so the contention went, that, in terms of the LRA, the

determination of disputes arising from labour and employment relations are in principle reserved for the exclusive jurisdiction of the specialised labour tribunals created by that Act.

[9] The court a quo found the answer to this contention in the earlier decision by the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC), which Skweyiya J, writing for the majority in *Chirwa,* found distinguishable from that case (paras 56-61). Skweyiya J's explanation of the distinction must be understood against the background of the fact that Mrs Chirwa's allegation that her employer's decision to dismiss her was reviewable under the provisions of PAJA, rested, inter alia, on the contention that the decision maker had 'failed to comply with the mandatory provisions of items 8 and 9 of Sch 8 to the . . . LRA'. .
In this light Skweyiya J said the following (in paras 56, 58 and 61):
'The applicants [in *Fredericks*] challenged the refusal of their applications [for voluntary retrenchment packages] on the grounds that it infringed their rights under s 9 (the right to equality) and s 33 (right to just administrative action) of the Constitution.
. . .
Fredericks (supra) is distinguishable from the present case. Notably the applicants in *Fredericks* expressly disavowed any reliance on s 23(1) of the Constitution, which entrenches the right to a fair labour practice. Nor did the claimants in *Fredericks* rely on the fair labour practice provisions of the LRA or any other provision of the LRA . . . . Ms Chirwa's complaint is that Mr Smith [the decision-maker] "failed to comply with the mandatory provisions of items 8 and 9 of Sch 8 to the LRA." . . . Thus, unlike in *Fredericks*, the applicant here expressly relies upon those provisions of the LRA which deal with unfair dismissals.'

[10] Departing from the distinction thus formulated, the court a quo found that the present case falls on the *Fredericks* side of what it perceived to be the divide between that case and *Chirwa*, on the basis that the appellant, as in *Fredericks*, and unlike in *Chirwa*, did not rely on any provision of the LRA, but founded his case squarely on s 33 of the Constitution read with the provisions of PAJA. It is true, so the court a quo further held, that the appellant would be entitled to formulate a cause of action with reference to s 186(2)(a) of the LRA

on the basis that the municipality had committed an unfair labour practice in not ‘promoting’ him. But, so the court further held, purportedly, in accordance with *Fredericks* read with *Chirwa*, the appellant had a choice as to which court he wanted to approach.

[11] Not unexpectedly, the argument in this court again turned largely on what has, since *Chirwa*, become the stock debate in matters of this kind, namely, whether the court a quo was right in placing the dispute on the *Fredericks* side of the dividing line (see eg also *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA)). But since we have heard argument in this matter, the train has moved on. What happened in the meantime is that the Constitutional Court has delivered its judgment in *Gcaba v Minister of Safety and Security* [2009] ZACC 26. And in the light of *Gcaba*, as I see it, the municipality must succeed on the basis of its second point in limine, namely that its impugned conduct does not constitute 'administrative action' as contemplated by s 33 of the Constitution and the provisions of PAJA.

[12] The *Gcaba* case, like the present, also resulted from the appellant's frustrated expectations of promotion. Mr Gcaba was employed by the South African Police Services. He occupied the position of station commander, Grahamstown. When the post was upgraded, he applied, was short-listed and went through the interview proceedings. He was, however, not appointed. In consequence, he approached the High Court with an application to review the decision not to promote him. The High Court held, on the basis of the Constitutional Court's decision in *Chirwa,* that it lacked jurisdiction to entertain the application as it related to an employment matter. In the result, the review application was dismissed with costs. The appeal to the Constitutional Court was unsuccessful; in essence, because it was held that the decision not to promote Mr Gcaba did not constitute administrative action as contemplated in PAJA and that it was therefore not reviewable under that Act. The reasons for this decision appear to be encapsulated in the following statements by Van der Westhuizen J (in para 64):

'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 [of the Constitution] 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 [of the Constitution] 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.'

[13] And (in para 66):

'In *Chirwa* Ngcobo J found [at paras 142 and 150] 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.'

[14] In the court a quo, Revelas J found that the conduct complained of by the appellant did indeed constitute administrative action reviewable under PAJA. The reasons for this finding, she stated as follows:

'In my view [the municipality] cannot argue that promoting its employees does not constitute administrative action. It is an organ of state and in promoting employees, it exercises a public power and it performs a public function in doing so. It clearly performs an administrative act when acting in terms of its policies and implementing them'

[15] As I see it, this line of reasoning cannot survive the judgment of the Constitutional Court in *Gcaba.* In fact, it is in direct conflict with the views expressed by Van der Westhuizen J. In short, I can see no basis on which this matter can be distinguished from *Gcaba* on the facts. As in *Gcaba*, the appellant's complaint also concerns a failure to promote, which Van der Westhuizen J regarded as 'a quintessential labour-related issue, based on the

right to fair labour practices'. What Revelas J found to be significant considerations as to why the impugned conduct constituted 'administrative action', was that the municipality is (a) an organ of state which (b) performs a public function in promoting its employees. Van der Westhuizen, on the other hand, believed that these considerations were of no consequence. In fact, this appears to form the very basis on which *Gcaba* was decided (see also *The National Director of Public Prosecutions v Tshavungwa* [2009] ZASCA 136 para 22). This leads me to the conclusion that, since the conduct complained of by the appellant did not constitute administrative action, the review application was rightly dismissed on that ground alone. This renders it unnecessary to consider any of the other issues raised on appeal, including those relating to the merits of the impugned decision.

[16] The appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

Counsel For Appellant:	A BEYLEVELD B HARTLE
Instructed by:	RANDELL-OSWALD INC PORT ELIZABETH
Correspondents:	CLAUDE REID INC BLOEMFONTEIN
For Respondent:	G GOOSEN SC R B WADE
Instructed By:	CHRIS BAKER & ASSOCIATES PORT ELIZABETH
Correspondents:	McINTYRE & VAN DER POST BLOEMFONTEIN