REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT, PORT ELIZABETH

Case no: PA 1/12

In the matter between:

MATTHEUS ANDRIES DE BEER **Appellant**

and

THE MINISTER OF SAFETY AND SECURITY/

POLICE **First Respondent**

PROVINCIAL COMMISSIONER EASTERN CAPE

M S LANDU **Second Respondent**

Heard: **5 March 2013**

Delivered: **9 July 2013**

Summary: Hearing on appeal: Notice to cross appeal issue of jurisdiction not filed. Exceptional circumstances present-- sufficient cause shown to nevertheless deal with the issue of jurisdiction-- also in the interest of justice to do so.

Urgency and interim reinstatement: Not a proper case for consideration of grant of remedy of interim reinstatement in absence of referral to conciliation and arbitration---urgency self-created--no acceptable explanation for not instituting proceedings in the relevant forum(s)--relief sought in substance order for final reinstatement—attempt to leapfrog jurisdictional hurdles---Labour Court has no jurisdiction to grant such relief in absence of referral(s) contemplated in s191 of the Labour Relations Act No. 66 of 1995.

Duty to advise litigant of appropriate forum: appellant legally represented throughout- no duty in circumstances on respondents to advise the appellant on the appropriate forum to institute proceedings---appellant, in any event, disputing respondent's view regarding the appropriate forum.

Costs: given circumstances costs should follow the result.

Relief: striking out by court of first instance cannot be faulted—if that court had jurisdiction should have found application was for final relief—application could have been dismissed for failing to make out a case for the relief.

Appeal dismissed with costs.

Coram: Waglay JP, Tlaletsi ADJP and Coppin AJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against an order of Lallie J in the Labour Court, dismissing, with costs, a 'semi-urgent' application brought by the appellant against the respondents for the following relief:

> '1. That the requirements of the rules, relating to forms, service and time limits be dispensed with and [allowing] the application to be brought forthwith as a matter of semi-urgency.
>
> 2. That a rule nisi do hereby issue calling upon the respondents to show cause, if any, to the court on____ 2011 at 9h30 or so soon thereafter as counsel for the applicant may be heard, why an order in the following terms should not be granted:
>
> 2.1 That the applicant be reinstated forthwith in his full salary, benefits and emoluments with interest at the legal rate backdated as and from 1 December

2009, pending finalisation of the applicant's application for reinstatement and for medical boarding.

2.2 That the applicant's termination of service of 30 September 2010 be set aside and the applicant be reinstated in his employment with salary, full benefits and emoluments with interest at the legal rate up to the date of this order, pending the finalisation of the applicant's application for ill-health retirement/medical boarding.

2.3 That the applicant be allowed to apply for ill-health retirement/medical boarding.

2.4 That the respondents pay the costs of the application, jointly and severally.

3. That paragraph 2.1 above operates as an interim order pending the final determination of the application.

4. That the applicant be allowed to supplement his papers.

5. That further and/or alternative relief be granted to the applicant.'[1]

[2] Having held that the Labour Court had jurisdiction and that the matter was urgent, the court *a quo*, nevertheless, found that the appellant did not make out a case for the grant of interim relief and consequently dismissed the application with costs. On the application of the respondents, the court *a quo* had also struck out certain matter from the replying affidavit filed by the appellant on the basis that it was new matter that ought to have been contained in the appellant's founding affidavit. In brief, it is contended in this Court, on behalf of the appellant

[1] In his replying affidavit, in response to the respondents' challenge of the court's jurisdiction, the appellant states that if the court was of the view that the matter ought to have been referred to the bargaining council, he would then request amended relief as per an amended notice of motion which was annexed to the replying papers. In the amendment he, *inter alia*, asks that, pending finalisation of his application to the Public Service Co-ordinating Bargaining Council ("*PSCBC*"), his "termination of service of 30 September 2010 be set aside" and that he be "reinstated in his employment with full salary benefits and emoluments with interest at the legal rate, pending finalisation of his application for ill-health retirement/medical boarding and in terms of paragraph 2.2, that he be "allowed to apply for ill-health retirement/medical boarding". He also asks that he be "temporarily reinstated forthwith in his full salary, benefits and emoluments with interest at the legal rate backdated as and from 1 December 2009 pending finalisation of his application for reinstatement and for medical boarding". The court *a quo* never expressed the view that the matter ought to have been referred to the PSCBC and the amendment was never granted. In the appellant's heads of argument, filed in the appeal, it is submitted on behalf of the appellant, that the court ***a quo'***s order be set aside and replaced with an order in the terms set out in paragraphs 2 and 3 of the notice of motion, alternatively, the order set out in paragraphs 2, 3 and 4 of the amended notice of motion.

that the court *a quo* erred in striking the matter from his replying affidavit, because he was entitled to raise this matter in response to averments in the respondents' answering affidavit. Regarding the merits, it is submitted that the appellant made out a case for the relief he sought and specific findings of the court *a quo,* to the contrary, were challenged.

[3] The respondents, on the other hand, *inter alia*, support the dismissal of the appellant's application and the ruling on the striking-out, but contend that the court *a quo* erred in finding that the matter was urgent and that the Labour Court had jurisdiction to hear it. However, the respondents did not file a notice of their intention to cross-appeal, but submitted that the issue of jurisdiction ought, nevertheless, to be dealt with by this Court. Counsel for the respective parties were in agreement that this Court may consider the jurisdiction issue despite the absence of a formal notice to cross-appeal.

[4] I shall now first relate the background facts, then deal with the issue of jurisdiction and then, briefly, with the merits, including the striking out, and, lastly, with the issue of costs.

Background facts

[5] The appellant deposed to the main affidavit in support of the relief he claimed as well as to the replying affidavit. He also relied on confirmatory affidavits of an attorney, D. Gouws, a psychologist, J.H. Minnaar, and a psychiatrist, Dr. I. Taylor. The respondents' opposing affidavit was deposed to by Brigadier A. C. Greyling ('Greyling').

[6] The appellant was employed as an Inspector in the South African Police Service ('SAPS') until the respondents terminated his services. (The respondents aver that they terminated his services on 8 July 2010, the appellant avers that this occurred on 30 September 2010). The reason given was that he was absent from work without leave for a protracted period. It was not disputed that the appellant was absent from work from about 23 April 2009 until his services were terminated by the respondents. It was averred by the respondents that the appellant was absent without leave from 23 April 2009 until 28 July 2009 and from 1 September 2009 until 31 December 2009 and then from 23 February

2010 until 30 April 2010 and then for a further period until the respondents terminated his services as aforesaid.

[7] It was also not disputed that by a letter dated 22 July 2009, which was served on the appellant on 24 July 2009 by his supervisor, Colonel Booysen ("Booysen"), the chairperson of the Cluster Absenteeism Management Committee, Greyling, *inter alia*, instructed the appellant 'to physically resume duty' within two days of receipt of the letter failing which the South African Police Service ("SAPS") would suspend the payment of his salary. The appellant was further invited to make representations within a stated period to show why his absence was not to be treated as leave without pay. The appellant did not reply directly to the writer of the letter, but approached Booysen and requested vocational leave for one month. Booysen informed Greyling of this. According to the appellant, on 27 July 2009, he applied formally for long-term incapacity leave on the official form and the psychiatrist who was treating him, Dr Taylor, had completed the medical part of the form and the appellant had given this form to Booysen's office.

[8] It is not disputed that the appellant was indeed granted vocational leave for a month and that he did not return to work after that month. It was not in issue that Greyling, by letter dated 17 September 2009, which was served on the appellant by Booysen on 23 September 2009, *inter alia*, again informed the appellant that he had been absent from work without approved leave for an unreasonably long period of time and instructed the appellant to physically report for duty within two days of receipt of the letter failing which the SAPS would suspend his salary. The appellant was again invited to make representations why his absence should not be treated as leave without pay failing which his salary would be suspended. Despite this the appellant again failed to report for duty. No evidence was produced of any representations that the appellant made in response to the invitation. At the end of November 2009, the appellant's salary, which he had been receiving until then, was suspended. The appellant continued to be absent from work notwithstanding. There is no evidence that the appellant took any urgent action to have his salary reinstated.

[9] The second respondent, seemingly, caused a notice, headed 'Notice of Intended Termination of Employment Contract' and dated 25 May 2010, to be served on

the appellant. It appears from the notice that it was served on the appellant by Booysen on 1 June 2010. In the notice, the appellant is, amongst other things, reminded of his work obligations and told that his absence constitutes a breach of contract which could result in the termination of his employment. In the notice he was given the details of how his absence had depleted his allocated sick leave. It is stated in the notice that the appellant's absence, at that stage, exceeded 150 working days. The appellant is also, *inter alia,* requested to forthwith provide the office of the second respondent with reasons why his employment contract was not to be regarded as terminated. In terms of the notice, the appellant's response was to be submitted through Booysen within a stated period. The appellant was further informed that upon receipt of those representations the SAPS would consider 'whether there are any reasons' to retain the appellant in its employment. Further, that the failure to submit the representations 'will be regarded as consent to the termination' of the appellant's employment contract with SAPS. Attached to the notice was a schedule indicating the appellant's periods of absence (excluding vacation and family responsibility leave). It is not disputed by the appellant that at the time he had been absent from work without leave for a period of about 201 days.

[10] The appellant's attorneys, Gouws Attorneys, made written representations by letter dated 8 June 2010 addressed to Booysen. In the letter they, *inter alia*, point out that the termination of the appellant's employment contract would be 'vehemently opposed'. They state that due to time constraints they were only able to summarise the essential parts of the appellant's case, but would provide more detailed representations, supported by 'source documents', within a few days. Having pointed out that the appellant had been a loyal servant of the SAPS since his appointment on 15 December 1980 they go on to relate the reasons why the appellant 'of late' had been unable to fulfil his work obligations.

[11] In the representations, the attorneys relate, in essence, that the appellant was diagnosed as suffering from a post-traumatic stress disorder ('*PTSD*') which, according to them, constituted an 'injury on duty' ('*IOD*'). They state that the appellant was, consequently, booked off sick by his treating psychiatrist Dr Taylor, since 17 March 2009 to the date of the representations. Copies of the medical certificates are annexed to the letter and the attorneys state that the

certificates had been previously provided to the SAPS by the appellant and that the SAPS were 'well aware of them'. It is pointed out that the SAPS had not disputed that the appellant suffers from PTSD/IOD and the letter then goes on to refer specifically to a passage in another letter, dated 16 October 2009, from Booysen to the appellant's attorneys, stating, *inter alia*: 'It is furthermore evidenced that your client is not in a position to return to work due to [the] post-traumatic stress disorder he [is] suffering [from], therefore a recommendation with regard to his fitness to be a policeman will be forwarded in due course to head office.'[2] Gouws Attorneys, in their letter of representations, also refer to a letter, written by Greyling to them, dated 3 November 2009, in respect of the appellant's absenteeism and his remuneration and in which Greyling makes the following statement: 'We are not advising you or your client to return to work despite the advice of his psychiatrist. However we have no responsibility to remunerate Inspector De Beer during the period of his absence without leave.' Gouws Attorneys, further, in support of their submission that the SAPS knew of the appellant's health condition, refer to a letter of the SAPS approving an application made by the appellant on 23 March 2010 for twelve psychiatric sessions.[3]

[12] The representations made by the appellant's attorneys further, *inter alia,* stated that the appellant had previously applied for short-term and long-term incapacity leave, but has had no response from the SAPS regarding those applications and that at the time of the representations (i.e. 8 June 2010) the appellant was preparing an application for ill-health retirement which was to be presented in due course. The appellant's attorneys go on to dispute the second respondent's interpretation of Resolution 7 of 2000 as prescribing 'no work no pay' and they

[2] The paragraph is quoted out of context. The letter is with regard to sick leave. It appears to be in response to a letter from the appellant's attorneys, although we do not know what that letter was about, since a copy was not annexed to the appellant's papers. Booysen (referred to in the letter as Commander – Senior Superintendent Organised Crime Unit) states in his letter:
'1. The fact that your client is off sick until 2009-11-10 has been recorded on our records.
2. The contents of your letter were communicated with our legal services as special notices were served on the member to report on duty as stipulated.
3. Furthermore it was decided by the management that no further leave will be granted to the member within this leave cycle, not to create a further precedent.
4. It is furthermore evident that your client is not in a position to return to work due to his post-traumatic stress disorder he is suffering, therefore a recommendation with regards to his fitness to be a policeman will be forwarded in due course to head office.
5. Any further enquiries can be forwarded to Senior Superintendent H G Booysen.'

[3] It is noteworthy that this letter emanates from' the Subsection Head: Occupational Incidents' of the SAPS.

contended that in terms of paragraph 7.6(a) of the Resolution, employees who suffer from occupational injuries, or who contract occupational diseases, as a result of their work, are to be granted occupational injury and disease leave for the duration of the period that they cannot work. They contend further that paragraph 4(6) of National Instruction 2/2004 provides that such a person is entitled to leave with full pay from the time he is unable to work until he is able to resume work, or until he is discharged from service after an enquiry, of the kind contemplated in the applicable statute, has been held.

[13] In their representations, Gouws Attorneys referred to the decisions in *Mooi v SAPS*[4] and *Urquhart v Compensation Commissioner.*[5] They also referred to the fact that the appellant's salary was suspended in November 2009 and demanded that the appellant be reinstated 'fully in his salary, with all benefits, etc., as from 1 December 2009' and threatened that unless that was done the appellant would take the necessary steps. Curiously, in their letter the attorneys also enquire whether Booysen had authority to reinstate the appellant 'in his salary' and asked which forum they should approach for such relief if he (i.e. Booysen) did not have such authority. They further enquire from Booysen whether the Public Service Bargaining Council ('PSBC') was not the correct forum. In conclusion, the attorneys dispute the SAPS's entitlement to terminate the appellant's contract of employment given the circumstances. A lengthy affidavit by the appellant is also attached to their letter in which the appellant relates the cause/probable work causes for his health condition and his treatment.

[14] According to the appellant, his application for ill-health retirement had been completed by 9 June 2010 and was presented to Booysen's office. He states that the application had been completed by him, Booysen, Dr Taylor and Mr Minnaar (a psychologist). It appears from a copy of the application, that was annexed, that it was signed by the appellant and Booysen on 9 June 2010, by Dr Taylor on 2 June 2010 and by Mr Minnaar on 22 April 2010. The respondents deny the application was submitted on 9 June 2010 and state that it was submitted for the first time by the appellant's attorneys in September 2010

[4] [2007] JOL 20274 (PSCBC).
[5] 2006 (1) SA 75 (E).

together with a second set of representations which they made regarding the termination of the appellant's employment.

[15] On 8 July 2010, a written notice of termination of the appellant's employment contract was served on him. It emanated from the office of the second respondent. It informed the appellant that that office had an opportunity to study his representations, but was of the opinion that 'no compelling reasons were raised as to why' the appellant's services should be retained. The appellant was further informed as follows: 'Your continuous unauthorised absence is unacceptable and is regarded as unreasonable and subsequently your services are terminated with immediate effect.'

[16] The appellant's attorneys made written representations to the second respondent concerning the termination of the appellant's services by letter dated 6 September 2010. The letter states that the representations made therein are more detailed and in addition to the earlier representations that were made. The attorneys also request the second respondent to study their representations carefully and to reconsider his decision. In the letter they state, *inter alia*, that the appellant has made out a compelling case for medical boarding and that the medical evidence put up in support of it stands uncontested. The attorneys of the appellant go on to say, *inter alia*: 'On the probabilities we therefore have little doubt that a court will find that our client should be medically boarded. Our client gave his life to SAPS.' They state further: '[W]e therefore request you to reinstate our client forthwith in his salary with full benefits and emoluments and to allow him to apply for medical boarding.' And further: '[A]s you can imagine our client and family is suffering financially as a result of the termination of his contract. He also requires ongoing medication.'

[17] In the representations of 6 September 2010, Gouws Attorneys go on to demand a response from the second respondent within 10 days of the receipt of the representations, failing which, according to them, the appellant would have no option but to approach the appropriate forum for the necessary relief. However, in the letter the appellant's attorneys request the second respondent to advise them on the forum that they would have to approach should he refuse to reinstate the appellant 'in his salary'. Attached to the letter of his attorneys is an

affidavit by the appellant in which he relates his work history and, in particular, his exposure to traumatic incidents, or situations in the course of his work. To this affidavit of the appellant have been annexed various documents, including an application for long-term incapacity/ill-health retirement dated 9 June 2010, and Part 3 of a form completed by Dr Taylor dated 2 June 2010, a report by Mr Minnaar dated 22 April 2010; and various medical reports by different medical practitioners/specialists.

[18] The second respondent reacted to the appellant's attorneys' additional representations by letter dated 30 September 2010. In his letter, the second respondent states that even though the appellant had had ample opportunity to do so he only signed his application for ill-health retirement on 9 June 2010, a day after he had been served with a notice informing him of the intended termination of his employment. The second respondent further intimates that the additional representations had been studied carefully, and states that they, unfortunately, constitute an attempt at an application for ill-health retirement which was regarded, at that stage, as being 'inappropriate' and 'long overdue'. The second respondent further expresses the view that the appellant's attorney's last letter 'does not present reasons why' the appellant's services should have been retained. With regard to the issue of jurisdiction, the second respondent states as follows: 'Your concern regarding jurisdiction is noted. However, it is suggested that should you be unsure as to which forum to approach, you will be best served by obtaining counsel's opinion in this regard.'

[19] It is against this background that the appellant brought an application seeking the relief mentioned in paragraph [1] of this judgment. It is common cause that the appellant did not refer any dispute in connection with any of the issues raised to, either the CCMA, or any bargaining council.

Jurisdiction

[20] At the hearing in the court *a quo* the respondents challenged the jurisdiction of the Labour Court. They argued that the matter concerns an unfair dismissal and that in terms of s191(1)(a) of the Labour Relations Act[6]('the Act') the Safety and Security Sectoral Bargaining Council ('SSSBC') had the necessary jurisdiction.

[6] Act 66 of 1995.

The court *a quo* rejected the argument and held that while the SSSBC did have jurisdiction over dismissal disputes and was empowered to grant relief in respect of such disputes, the appellant was not seeking an order of reinstatement on the grounds that he was dismissed unfairly, but sought 'to be reinstated in his full salary, benefits and emoluments with interest at the legal rate backdated from 1 December 2009, pending the finalisation of his application for reinstatement and for ill-health retirement' and that the appellant was therefore intending to challenge his alleged unfair dismissal in future proceedings. The court *a quo* also held that it was empowered in terms of s158(1)(a) of the Act to grant any appropriate relief, including urgent interim relief and since this matter was urgent it had jurisdiction. In respect of the claims for remuneration, the court *a quo* held that disputes about the payment of remuneration were governed by the Basic Conditions of Employment Act[7] ('the BCEA') and that the Labour Court had exclusive jurisdiction to determine disputes governed by the BCEA. The respondents contend that the court *a quo* erred in finding that it had jurisdiction and by dismissing their challenge. Regarding the claim for the salary, it is submitted that the dispute is really about the interpretation of Resolution 7 of 2000, a collective agreement, and that the dispute regarding its meaning had to be referred to the PSCBC in accordance with the dispute resolution procedure of that body and as contemplated in s24 of the Act.

[21] In terms of Rule 5 of the rules of this Court any respondent who wishes to cross-appeal must deliver a notice of cross-appeal (Rule 5(4)) and the notice must be delivered within 10 days, or such longer period as may, on good cause, be allowed, after receiving a notice of appeal from the appellant (Rule 5(5)). The notice must state the particulars in respect of which the variation of the judgment, or order, of the Labour Court is sought (Rule 5(6)). The respondents have not delivered the required notice. They have submitted that it was not necessary to file a notice of cross- appeal on the jurisdiction issue. The appellant did not submit the contrary, and adopted the attitude at the hearing of the appeal that the issue of jurisdiction could be dealt with by this Court in the absence of a formal notice of appeal. This Court is empowered in terms of Rule 12(1) to

[7] Act 75 of 1997.

excuse the parties from compliance with any of the rules if sufficient cause is shown.

[22] Even though it is a well established principle in the practice of superior courts that, generally, an order or judgment cannot be interfered with to the prejudice of an appellant in the absence of the necessary cross-appeal by the respondent[8] there are exceptional circumstances where an order or judgment may nevertheless be interfered with in the absence of the necessary cross-appeal where it is in the interests of justice.[9] The issue of jurisdiction is crucial, because it is directly linked to the validity and status of the order made by the court *a quo* and uncertainty on those aspects might negatively impact on the effectiveness of the order.[10] In my view, in light of those factors and taking into account the following facts and circumstances, sufficient cause has been shown to consider the issue of jurisdiction in the circumstances and it is, certainly, in the interests of justice to do so:- namely, the fact that it is not necessary to obtain leave to cross-appeal in respect of proceedings in the Labour Court,[11] as well as the fact that the absence of a notice to cross-appeal has not been objected to by the appellant and has not caused any prejudice since the issue was pertinently raised and dealt with in the respondents' heads of argument which had been filed well in advance of the hearing of the appeal, the fact that we are dealing with a crisp, fundamental, legal issue, namely, jurisdiction and, significantly, that the court *a quo* erred in dismissing the respondents' point that the Labour Court lacked jurisdiction.[12]

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[8] *S.A. Railways & Harbours v Sceuble* 1976 (3) SA 791 (A) at 794C.

[9] HJ Erasmus *et al* '*Superior Court Practice"* at A-58A; *Cohen v Coetzee* 1912 EDL 305 and *Berkowitz v Wilson* 1922 OPD 230.

[10] See, for example, *S v Absalom* 1989 (3) SA 154 at 164D-E where it was held that an order made by a court that has no jurisdiction is a nullity and did not have to be complied with. Compare: *NUM v Elandsfontein Colliery (Pty) Ltd* [1999] 12 BLLR 1330 (LC) para [8] At 1332H; *Dartprops (Pty) Ltd v CCMA and others* [1999] 2 BLLR 137 (LC) paras [8] and [9] at 139F-G.

[11] *Mkhonto v Ford NO and others* [2000] 7 BLLR 768 (LAC) para [8]; *Department of Correctional Services and another v POPCRU and others* [2012] 2 BLLR 110 (LAC).

[12] In *Commercial Workers Union of SA v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC) para 68 it was held that where a point of law is apparent on the papers, but the common approach of the parties is based on a wrong perception of what the law is, a court is not only entitled, but is obliged to raise the point of law and require the parties to deal with it, otherwise the result would be a decision premised on an incorrect application of the law. The Constitutional Court held that this would infringe the principle of legality. That court accordingly held in that case the Supreme Court of Appeal was entitled to *mero motu* raise the issue of the Commissioner's jurisdiction on appeal and to require argument on the point.

[23] In terms of s158(1)(a)(i) of the Act, the Labour Court is empowered to, *inter alia,* grant a litigant appropriate urgent interim relief. On the other hand, the Labour Court is not empowered, for example, to adjudicate a dispute about the fairness of a dismissal in circumstances where the dispute was not first referred to the CCMA, or the relevant council, as the case may be, for conciliation within the prescribed period. Section 191(1) of the Act requires that such a dispute be first referred to conciliation. It is only after the council or the Commissioner had certified that the dispute remains unresolved, or a period of 30 days has expired since the council or the CCMA received the referral and the dispute remains unresolved that the council, or the CCMA, must arbitrate the dispute (section 191(5)(a)), or the employee may refer the dispute to the Labour Court for adjudication (section 191(5)(b)). It is thus clear from section 191(5) that the referral of a dismissal dispute to conciliation is a pre-condition before such a dispute can be arbitrated, or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) and the 30 day period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute.[13]

[24] The Appellant averred in his replying affidavit, *inter alia*, that '[t]here can be no dispute that this Court can order my temporary reinstatement'. This averment is unjustifiably optimistic and is not supported by the facts of his case. Regarding the remedy of interim reinstatement, in several matters in the Labour court it was considered whether such a remedy could be granted in unfair dismissal cases, where the dismissal dispute had not yet been referred for conciliation and by virtue of the court's powers in terms of s158(1)(a)(i) of the Act. In *SACCAWU v Shoprite Checkers (Pty) Ltd,*[14] Landman J assumed that the Labour Court had the necessary jurisdiction to grant such relief, but did not grant it. The same judge left the question open in *Rammekwa v Bophutatswana Broadcasting Corporation and another .*[15] In *Fordham v OK Bazaars (1929) Ltd,*[16] Revelas J held that such an order was tantamount to the *status quo* relief that could have

[13] See the majority judgment in *NUMSA v Driveline Technologies (Pty) Ltd and Another* [2000] 1 BLLR 20 (LAC) para [74] at 38A.
[14] *SACCAWU v Shoprite Checkers (Pty) Ltd* [1997] 10 BLLR 1360 (LC).
[15] *Rammekwa v Bophutatswana Broadcasting Corporation and another* [1998] 5 BLLR 505 (LC).
[16] *Fordham v OK Bazaars (1929) Ltd* (1998) 19 ILJ 1156 (LC).

been granted under the previous Labour Relations Act, but because the power to grant such relief had been deliberately excluded from the Act, the Labour Court did not have the power to grant interim reinstatement in the case of unfair dismissal before the dispute had been referred for conciliation. In *University of the Western Cape Academic Staff Union and others v University of the Western Cape,*[17] Mlambo J expressed the view that the Labour Court could by virtue of its powers in terms of s158(1) of the Act grant relief similar to the status quo orders that were granted under the previous legislative regime and that Labour Court could grant the same kind of relief that could be granted by a High Court, because it was of equal status with the High Court. In the view of Mlambo J, 'the Labour Court would be failing in its stated task if it were to deny such relief even in circumstances where the unfairness sought to be prevented is very glaring'. According to Mlambo J '[e]xperience has taught us that even in this day and age one still encounters high handed and unilateral conduct that ignored relevant provisions and any semblance of fairness. In certain circumstances the detrimental consequences of such conduct cannot be addressed by an award after arbitration and adjudication has taken place'.[18] Nevertheless, in that matter the court did not order interim reinstatement.

[25] In *SACWU and others v Sentrachem,*[19] where the applicants sought an urgent interdict compelling the respondent to reinstate the dismissed employees pending the completion of retrenchment consultations as required by the Act, Revelas J held that there was no difference in the views expressed by her in *Fordham* and those expressed by Mlambo J in the *University of the Western Cape* case. The judge was of the view that the judgment in *Fordham* 'does not have the result that interim relief can never be granted by the Labour Court, but emphasises the reluctance of the Labour Court to grant *status quo* relief in dismissal matters, in other words, reinstatement of dismissed employees when there are alternative remedies available.'[20] The court there also did not grant the relief sought. In *Hultzer v Standard Bank of South Africa (Pty) Ltd,*[21] the applicant contended that he was dismissed and sought an order restraining the

[17] *University of the Western Cape Academic Staff Union and others v University of the Western Cape* (1999) 20 ILJ 1300 (LC).
[18] See paras [11]-[12].
[19] *SACWU and others v Sentrachem* [1999] 6 BLLR 615 (LC).
[20] See *SACWU and Others v Sentrachem* at para [18].
[21] *Hultzer v Standard Bank of South Africa (Pty) Ltd* [1999] 8 BLLR 809 (LC).

respondent from carrying out the dismissal and compelling the respondent to restore his conditions of employment pending the resolution of a dispute which he had referred to the CCMA. Revelas J stated that 'the Act does not make provision for the kind of *status quo* relief as was found in section 43 of the Labour Relations Act 28 of 1956 (the former LRA). However, the Labour Court has very wide powers to grant urgent interim relief in terms of section 158(1)(a)(i) of the Act. The Labour Court is therefore empowered to grant relief tantamount to urgent reinstatement on an urgent basis. The court will, however, only grant such relief, where an applicant is able to persuade the court that extremely cogent grounds for urgency exist.'[22]The relief sought was not granted.

[26] In *NUM v Elandsfontein Colliery (Pty) Ltd,*[23] in deciding an application for leave to appeal against a judgment in terms of which it was held that the issue(s) raised was *res judicata* as it had been decided by the court in an earlier application for interim relief, Grogan AJ had to, *inter alia*, consider whether there was a reasonable prospect of another court coming to the conclusion that the earlier judgment was null and void, because that court had no jurisdiction to hear the matter concerning their dismissals in terms of s158(1), as the employees had already been dismissed by the time of the hearing. Having referred to the decisions in *Shoprite Checkers, Fordham, University of the Western Cape, Sentrachem* and *Paledi and another v Botswana Broadcasting Corporation,*[24] Grogan AJ noted that the weight of authority favoured the view that the Labour Court can, by virtue of its powers in s158(1), in appropriate circumstances, grant urgent relief to a dismissed employee in the form of an order of interim reinstatement, pending the conciliation, adjudication or arbitration of the dispute in terms of s191 of the Act. After a careful analysis, Grogan AJ concluded that s191 did not preclude the court from granting such relief pending the resolution of the dismissal dispute in the ordinary manner, nor were the powers conferred by s158, limited by s157, which, according to Grogan AJ, was the provision that determined the court's jurisdiction. It was concluded that, therefore, there was no reasonable prospect of another court coming to a different conclusion and the application for leave to appeal was dismissed.

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[22] See *Hultzer v Standard Bank of South Africa (Pty) Ltd* at para [9].
[23] *NUM v Elandsfontein Colliery (Pty) Ltd*. [1999] 12 BLLR 1330 (LC)..
[24] *Paledi and another v Botswana Broadcasting Corporation,* J323-324/98 reported in 3,4 Labour Court Digest at 184.

[27] We were not referred to and I am not aware of any case under the Act in which interim reinstatement was granted as a remedy in an unfair dismissal case before the dispute regarding the same had been referred to conciliation. Without deciding the issue, it is apparent from the decisions referred to above that even where the courts were of the view that such a remedy was feasible, they would not readily grant it and were, generally, of the view that such relief should be confined to the kind of case that Mlambo J referred to in the *University of the Western Cape* case, namely a matter which is truly urgent and in which the substantive unfairness of the dismissal is glaringly obvious. In my view, even then, because of the nature of reinstatement, it shall not be readily possible to grant, 'interim reinstatement' without deciding crucial issues pertaining to the dismissal and reinstatement, finally, albeit indirectly. What is apparent from the cases referred to is that, within the context of deciding whether the court could grant 'interim reinstatement', the true nature of the remedy of reinstatement was not expressly considered, or commented upon and, in particular, there appears to have been no consideration whether, reinstatement, due to its inherent nature, can be made interim. It is significant that in terms of s193(1) of the Act it is only if and when the Labour Court, or the arbitrator appointed in terms of the Act, finds that a dismissal is unfair, that reinstatement may be ordered. Reinstatement ordinarily means that the period between the dismissal and the resumption of service is regarded as never having been broken. In *Kroukam v SA Airlink (Pty) Ltd,*[25] Davis JA explained the nature of this remedy as follows: 'If an order of reinstatement is made, then the contract is restored and any amount due would necessarily be part of the employee's entitlement.'(Amounts due would include back pay). Again without deciding the issue, in my view there is a finality inherent in the remedy of reinstatement that would make it difficult to adapt or refashion that remedy to serve as true interim relief. Furthermore, in light of subsequent decisions, such as, *inter alia*, the majority decision in the *Driveline* case,[26] particularly on the meaning of s157(4) of the Act, and the

[25] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) para [59]. Confirmed in *Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union and others* (2007) 28 ILJ 2503 (SCA) para [19].

[26] See above at 39B-C para [81]. It was held by the majority that s157(4) of the Act does not mean that the Labour Court has jurisdiction, to, in its discretion, adjudicate a dismissal dispute that has not been referred to conciliation, but meant merely that the court had a discretion to entertain a dispute that had been referred to conciliation , but in respect of which a certificate contemplated in s191(5) of the Act had

decision in *Booysen v Minister of Safety and Security and others*[27] on the issue of the Labour Court's jurisdiction, the question of the court's power to grant interim reinstatement at all will have to be considered again in an appropriate case.

[28] However, the present case is not truly about whether the Labour Court may grant an order for interim reinstatement in terms of its powers under s158(1) of the Act. Even if it assumed for present purposes that the court has such power, this is not a case in which interim relief was truly being sought. But one in which the dispute is about the fairness of the appellant's dismissal and the fairness of the suspension of the appellant's salary was raised as a pertinent issue, and in which, effectively, final reinstatement was sought by 'leap-frogging'[28] or 'by-passing' the procedural requirements of s191 and s24, respectively, of the Act, *inter alia*, under the (rather thin guise) that the appellant did not know which forum to approach for relief, and alleged 'semi- urgency'.

[29] In my view, it was correctly noted in *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd and another,*[29] that if the Labour Court has jurisdiction to hear and determine a matter it would have the power to grant an appropriate remedy, but the mere fact that the Labour Court does have the power to grant a remedy does not mean that it has jurisdiction to hear and determine the issue between the parties.[30] It is clear that the Labour Court does not have jurisdiction to adjudicate a dispute about an unfair dismissal or unfair labour practice, unless the dispute has been referred to conciliation and the reason for the dismissal is one of those listed in s 191(5)(b) of the Act. In terms of s157(5) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires that the dispute be resolved through arbitration, save as provided under s158(2). In terms of s193 if the Labour Court finds that a dismissal is unfair it may grant, *inter alia*, an order of reinstatement. Even though in terms of s77 of the BCEA and subject to the Constitution and the jurisdiction of this Court, the Labour

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not been issued and the party had merely acquired the right to refer the dispute to the Labour Court for adjudication because the required period since the dispute had been referred for conciliation had elapsed and the dispute remained unresolved.

[27] *Booysen v Minister of Safety and Security and others* [2011] 1 BLLR 83 (LAC) para [34].

[28] Referred to by Grogan AJ in *NUM v Elandsfontein Colliery* (Pty) Ltd (see above) para [21].

[29] *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd and another* [1997] 10 BLLR 1320 (LC) at 1323 E-F.

[30] Approved in *Booysen v Minister of Safety and Security and others* (see above) para [34].

Court has exclusive jurisdiction in respect of all matters in terms of the BCEA, with the powers described in s77A of the BCEA, it has no jurisdiction to resolve a dispute about the interpretation and application of a collective agreement contemplated in s24 of the Act. Section 24(1) provides that such disputes must be resolved in terms of the procedure provided in that agreement for the resolution of such disputes. That section also prescribes that the procedure must first require the parties to resolve the dispute through conciliation, and if the dispute remains unresolved, to resolve it through arbitration. Interestingly, despite sections 77 and 77A of the BCEA, s74(2) of that Act provides that if an employee institutes proceedings for unfair dismissal, the Labour Court, or the arbitrator, hearing the matter, may also determine any claim for an amount that is owing to that employee in terms of the BCEA, provided, *inter alia*, that the claim is referred in compliance with s191 of the Act.

[30] Jurisdiction has been defined, generally, as the power of a court to hear and determine an issue between parties.[31] Jurisdiction is determined on the basis of the pleadings. In the event of the court's jurisdiction being challenged at the outset (*in limine*) the applicant's pleadings are a determining factor.[32]. The pleadings must be properly interpreted to establish whether the court has the power to hear and determine the real dispute. It is a trite principle that in application proceedings the affidavits constitute the pleadings and the evidence, and that an applicant must make out a case in its founding papers, which includes establishing that the court, in which the proceedings are brought, has jurisdiction to hear and determine the (true) issue(s). The notice of application, or notice of motion, in which the relief claimed is set out, is part and parcel of the founding papers (i.e the pleadings). From an analysis of the appellant's notice of motion and affidavits, it is apparent, given the nature of the issues raised by the appellant in its application that the Labour Court did not have the power, or jurisdiction, in the circumstances, to determine those and to grant the relief sought.

[31] If the application had been brought in the ordinary course and if the relief was not tied to urgency and worded as if it was interim relief, the court's lack of

[31] See: *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) paras 74-75*; Booysen v Minister of Safety and Security and others* (see above) para [35].
[32] See the authorities referred to in the previous footnote.

jurisdiction would have been obvious. The appellant appears to have attempted to overcome the jurisdictional difficulties by bringing the application on 'a semi-urgent basis', by wording the relief sought as if it were some kind of 'urgent interim relief' and by requesting reinstatement 'pending' one or the other event, or occurrence.

[32] The Act does not refer to 'semi-urgent interim relief'. Section 158(1)(a)(i) refers to 'urgent interim relief'. A matter is either urgent or it is not. In my view, the matter was not urgent as contemplated in the Act, or the rules of the Labour Court. The grounds for 'semi-urgency' which were primarily relied upon by the appellant, was that he was not receiving a salary and had no other source of income, his savings were almost exhausted and that he had ongoing financial commitments that he could not, or had difficulty in honouring. The loss of salary and benefits, with the concomitant financial hardship, are not regarded as sufficient to establish urgency.[33] In any case, any urgency that may have existed appears to have been self-created, either by the appellant or his legal representatives, by unreasonable delays and a failure to institute proceedings in the appropriate forum in time, or at all.

[33] Furthermore, interim relief must just be that. It must be interim not only in form, but in substance. It is an established principle that the court must not only look at the form of an order, but also its effect.[34] It is apparent from the notice of motion that the reinstatement, which the appellant sought by implication, was in fact final relief. The rule *nisi* was irrelevant because the application was served on the respondents and the matter was opposed before the rule *nisi* could be considered. Assuming the court was amenable to granting interim relief it would in all likelihood not have issued a rule *nisi* because the respondent was already before it. The reinstatement sought in paragraph 2 of the notice of motion was, in effect, for a final order of reinstatement.

[33] See, amongst other decisions: *Hultzer v Standard Bank of South Africa (Pty) Ltd* (see above); *University of the Western Cape Academic Staff Union and others v University of the Western Cape* (see above); *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) para [9].

[34] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I; *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at 55. Also compare *National Union of Metalworkers of South Africa and others v Bader Bop (Pty) Ltd and another* (2003) 24 ILJ 305 (CC), where it was held that it was the duty of the court to ascertain the true nature of the dispute between the parties and that in doing so the court must look at the substance of the dispute and not its form.

[34] In paragraph 2.1 of the application in the court *a quo,* an order of reinstatement is sought 'pending finalisation of the applicant's application for reinstatement and for medical boarding'. No mention is made in the application of the appellant having initiated any other proceedings, in any other forum, or at all, concerning his dismissal, or any aspect of his employment situation. In any event, by the time this 'semi-urgent application' was considered in March 2011, many months had already passed since the appellant's employment had been terminated. His employment was terminated on 8 July 2010. His salary had been stopped, as long ago as the end of November 2009. The time period for bringing proceedings in the CCMA or the PSCBC, or any other relevant bargaining council, had, by then, long expired. There is no rational and reasonable explanation why proceedings had not been instituted in those forums. Moreover, the reinstatement is sought pending the finalisation of a second reinstatement application that had not been instituted and in respect of which no rational information is given by the appellant. He had not even instituted any proceedings for a final order for the payment of his salary, which, at the time of the hearing in the court *a quo*, had been suspended more than a year ago. More concerning is the fact that the order was sought not only, pending, a non-existent, second reinstatement application, but, in addition, pending the appellant's application for medical boarding. The order sought was to endure until the finalisation of both those processes. In my view, the relief in paragraph 2.1 of the application cannot be construed as true and appropriate interim relief. Inherently it contains all the hallmarks of finality.

[35] In paragraph 2.2, which was not expressed to be in the alternative to the relief sought in paragraph 2.1, the appellant effectively sought reinstatement pending finalisation of his application for ill-health retirement/medical boarding. Nothing is stated either in the notice of motion or in the application that indicates that the reinstatement which he sought would indeed be interim. A final decision would first have to be taken on the applications for ill-health retirement and medical boarding and the issue of reinstatement did not have to be revisited again. If the applications for retirement and, or medical boarding were to be successful, that would be the end of the matter. The issue of reinstatement would become totally irrelevant. Nothing, for example, is said by the appellant about the position if his applications for medical boarding or ill-health retirement were to be

unsuccessful. The relief the appellant sought was nothing but final relief and required the court to adjudicate on the fairness of the termination of his employment with SAPS. It was not appropriate urgent interim relief. The court *a quo* erred insofar as it held the contrary.

[36] The appellant did not apply for the relief to be granted as per the amended notice of motion which was annexed to his replying affidavit, because in his replying affidavit he made such an application dependent upon the court ***a quo's*** ruling on the jurisdiction issue. He averred in his replying affidavit that 'if the court is of the view that a matter should be referred to the Bargaining Council I will then request amended relief as per the amended notice of motion hereto'. The court *a quo* did not say that the matter ought to be referred to a Bargaining Council presumably because it held that it had jurisdiction to grant interim relief and that the relief sought in the notice of motion was interim. But it was not for the court *a quo* to advise a litigant employee concerning the forum to which he was to refer his dispute to, particularly a litigant, who, like the appellant, was represented on a luxurious scale, by a firm of attorneys as well as junior and senior counsel. In those circumstances it was also not the duty of the respondents, nor is it the duty of this Court to advise the appellant as to the forum that he ought to have approached.

[37] The appellant denied that the main issue was about the enforcement of rights created by a collective agreement, or that his case was that the SAPS acted contrary to Resolution 7 of 2000, or about whether he ought to have referred the dispute to the CCMA, or to the relevant bargaining council, for conciliation and arbitration. Instead, the appellant averred in his replying affidavit the following: '[T]he main issue does not concern the interpretation or application of Resolution 7, but the fairness or otherwise of the second respondent's decisions to stop my salary at the beginning of December 2009, and to terminate my services on 30 September 2010.' This is contrary to what the court *a quo* perceived the appellant's case to be about. According to the appellant, it was indeed about the fairness of the suspension of payment of his salary, but more significantly, also about the fairness of his dismissal. If the appellant admitted that his case was about the interpretation or application of Resolution 7 of 2000, which is a resolution of the PSCBC and a collective agreement, he would have had to

admit that it was a matter that had to be referred to the Commission for Conciliation, Mediation and Arbitration ('CCMA') or to the PSCBC, if its dispute resolution procedure so provides, for Resolution in terms of s24 of the Act. It is plain in the Act that the Resolution of such disputes is by conciliation, if unsuccessful, by arbitration at the CCMA, or the relevant council.

[38] It is apparent from an analysis of the facts that the crucial and central issue in the matter was indeed about the termination of the appellant's employment and the fairness thereof, despite the appellant's averments to the contrary. His employment was terminated in July 2010 and not on 30 September 2010. This is clear from the letters of the second respondent to that effect which I have referred to above. In order for the appellant to be 'reinstated forthwith to his full salary, benefits and emoluments', as he claims, he would have to be reinstated in his employment. The court would, as a matter of necessity, have to decide on the fairness of the termination of his employment. The appellant cannot be reinstated in his employment, unless the court finds that his dismissal was substantively unfair.

[39] In the circumstances, the court *a quo* ought to have found that it had no jurisdiction to effectively adjudicate the termination of the appellant's employment with SAPS in the circumstances where there has been no compliance with the jurisdictional requirements provided for in s191 and s 24 of the Act.

[40] It was argued before us that if it should be found that the court *a quo* had no jurisdiction to entertain the application the appellant should nevertheless be granted the costs of the appeal, because the respondents were asked by the appellant's attorneys to advise which forum was the appropriate one for the appellant to approach, but the respondents did not do so. This argument is disingenuous. It is apparent that the respondents appropriately informed the appellant through his attorneys that he had to obtain the necessary legal advice. There is nothing to indicate that the respondents had a legal duty to advise the appellant, who was apparently adequately legally represented, of the forum that he had to approach for whatever relief he sought. In any event, the irony of this argument of the appellant lies therein that when the respondents contended in

their answering papers that the Labour Court had no jurisdiction the appellant, no doubt on the advice of his lawyers, contended the contrary. At the hearing, the respondents' point on lack of jurisdiction was also countered with a contrary argument on behalf of the appellant, who was represented by junior and senior counsel. The latter was clearly not dependent on the advice of the respondents concerning the appropriateness of the forum. If the appellant, a layperson, was not legally represented or represented to the extent that he was, this argument may have had some merit, but given that he was apparently throughout legally represented by attorneys, as well as junior and senior counsel, this argument is deserving of being rejected out of hand.

[41] In light of this finding on jurisdiction, which is decisive, I need not deal with the issue of the striking out, or the merits, in any detail. In my view, assuming the Labour Court did have jurisdiction, the court *a quo's* decision on those issues cannot be faulted, save to the extent that the court *a quo* ought to have found, in respect of the merits, that the appellant, in effect, was seeking final relief and had not made out a case for it.

[42] In the result, the appeal is dismissed with costs.

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Coppin AJA

Acting Judge of the Labour Appeal Court

I agree:

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Waglay JP

Judge President of the Labour Appeal Court

I agree:

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Tlaletsi ADJP

Acting Deputy Judge of the

Labour Appeal Court

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