IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: CA 09/08

In the matter between:

Riaan Booysen	**Appellant**
and	
The Minister of Safety and Security	**1st Respondent**
The National Commissioner of the South African Police Services	**2nd Respondent**
The Provincial Commissioner of the South African Police Services	**3rd Respondent**
South African Police Services	**4th Respondent**
Assistant Commissioner Y Badi N.O	**5th Respondent**

Coram: **Waglay DJP; Tlaletsi JA et Musi AJA.**

Judgment

Tlaletsi JA

Introduction

[1] This is an appeal against a judgment of the Labour Court (Cheadle AJ) dismissing the appellant's application with costs.[1] The relief sought by the appellant in the said application that was brought on urgent motion was, inter alia, an order postponing a disciplinary hearing that was scheduled to continue before fifth respondent on 13 February 2007 pending the outcome of an application to review and set aside fifth respondent's decision that the appellant was fit to participate in the hearing. The appeal is with the leave

[1] The judgment of Cheadle AJ has been reported in (2009) 30 ILJ 301 (LC) and [2008] 10 BLLR 928 (LC).

of the Labour Court. For a better understanding of the issues a brief history and chronology of events is necessary. The facts are from the founding and replying affidavits disposed to by E W Booth (the appellant's attorney), the answering affidavit disposed to by the fifth respondent on behalf of the respondents, annexures as well as other relevant documents filed as part of the record of the appeal.

Factual background

[2] The appellant was at all material times employed by the fourth respondent, the South African Police Services ("SAPS"), as a police officer holding the rank of Director under the command of the Western Cape Provincial Commissioner. On 11 July 2007 the appellant, after an investigation by a senior investigating officer, was charged with fraud, corruption and perjury. These charges related more specifically to:

2.1 fraud in respect of informer claims in the amounts of R20 000.00 and R 15 000.00 respectively;

2.2 failure to comply with National Instruction 2/2001 in respect of the Registration and Finances of Informers;

2.3 wilful or negligent mismanagement of State finances;

2.4 prejudicing the administration, discipline or efficiency of a state department, office or institution;

2.5 failure to carry out a lawful order or routine instruction without just or reasonable cause;

2.6 giving a false statement of evidence in the execution of his duties; and;

2.7 committing any common law or statutory offence, namely fraud.

[3] Given the alleged seriousness of the nature of appellant's alleged misconduct, the Provincial Commissioner (the third respondent), decided to suspend him in terms of Regulation 13(2) of the South African Police Services Disciplinary Regulations on the basis that in the opinion of the Provincial Commissioner, *inter alia:*

3.1 the charges related to misconduct described, *inter alia*, in annexure **"A"** to the Regulations, including alleged fraud, corruption and perjury;

3.2 the potential impact on the work of SAPS which is very serious, and which is highly likely to undermine any confidence his colleagues and members of the public may have in the police services;

3.3 the appellant holds a very responsible position, and had already demonstrated the ability to use his senior position to obtain information from his junior colleagues, even though he had been on sick leave since 16 February 2007, and his request to secure certain police dockets did not follow procedure; and

3.4 the circumstances in which the alleged misconduct took place were highly suspicious and appear to amount to a serious breach of police policy and procedures.

3.5 Based on the information and evidence placed before the Provincial Commissioner, he held the view that the case against the appellant appeared to be so strong that it was likely that he would be convicted of fraud, corruption, perjury and be dismissed.

[4] In determining whether an employee should be suspended without pay, Regulation 13(2) provides that the Provincial Commissioner may suspend the employee without pay:

4.1 if he is satisfied on reasonable grounds that the employee has committed misconduct listed in annexure "A", and

4.2 if the case against the employee is so strong that it is likely that the employee will be convicted of a crime, and be dismissed.

The appellant was informed of the Provincial Commissioner's decision to suspend him without pay in a letter dated 31 August 2007 which was served on him on 4 September 2007.

[5] The Safety and Security Bargaining Regulations that are applicable are the product of a collective agreement concluded in the SSSBC[2] on 20 May 2005.

[6] The appellant was charged on 11 July 2007 and was informed, on the same date, to appear at a disciplinary hearing scheduled for 3 August 2007. Due to his legal representative being abroad on vacation on 3 August 2007, the hearing was rescheduled by agreement to convene on 31 October 2007.

[7] On 17 September 2007, the appellant launched an urgent application in the Labour Court under Case No. C489/07 ("the first Court application") to *inter alia:*

7.1 compel the employer to pay his salary and other remuneration benefits pending the decision of a referral to the SSSBC;

7.2 alternatively, pending the decision of the Court; and

7.3 suspend the Provincial Commissioner's decision to suspend him from the SAPS without pay, pending the decision of the SSSBC; alternatively pending the decision of the Court.

---

[2] Safety and Security Sectoral Bargaining Council. The SSSBC has amalgamated the previous departmental bargaining council and the National Negotiating Forum in the South African Police Services.

[8] On 17 September 2007 the parties reached an agreement to postpone the first court application to 22 November 2007. The employer agreed to pay the appellant's full salary benefits, without admission of liability, until the end of November 2007, subject to the early determination of the application.

[9] On 9 October 2007, the appellant referred an unfair labour practice dispute to the SSSBC to set aside the employer's decision to suspend him in terms of Regulation 13(2) on 4 September 2007.

[10] At the commencement of the disciplinary hearing, on the morning of 31 October 2007, the appellant's legal representatives informed the Chairperson of the hearing, Mrs Yvonne Badi, the fifth respondent ("the chairperson"), that the appellant was diagnosed with post-traumatic stress disorder ("PTSD") with an associated major depressive disorder. On behalf of the employer, however, the medical reports of Drs. Loebenstein and Teggin were handed in. Both doctors had examined the appellant and were of the view that he was only able to attend his disciplinary hearing, in a controlled environment.

[11] The fifth respondent noted the request, and continued with the hearing. However, on the third day, 2 November 2007, during the cross examination of one of the witnesses[3] the appellant's legal representative requested an adjournment of the enquiry on the basis that their client was not feeling well. The appellant had at that stage suffered a "flashback/ severe panic attack". The hearing was postponed to 3 and 4 December 2007.

[12] On 22 November 2007, the first court application was again, by agreement, postponed to 21 January 2008 and the employer agreed to continue paying the appellant his monthly remuneration and other benefits until the end of

[3] The witness who is a practising advocate at the Cape Bar was allegedly paid by the appellant as an Informer but who testified that he was not.

January 2008, subject to the early determination of the application or the conclusion of the disciplinary hearing, whichever date was the earlier. It was part of the agreement that the presiding officer, would decide on the fitness of the appellant to continue with the hearing should the appellant contend that his medical condition prevented him from participating in the hearing. The order by agreement was made by Cele AJ.

[13] At the disciplinary hearing on 3 December 2007, appellant's legal representative filed an affidavit motivating this time, for the indefinite postponement of the disciplinary hearing, alternatively to a date in 2008, due to appellant's mental and medical condition. On the strength of the affidavit, the hearing was postponed by the chairperson to 8 January 2008.

[14] When the disciplinary hearing was reconvened on 8 January 2008, the appellant was absent. It was alleged that he was ill and could not participate at his hearing. The chairperson was informed that in terms of the court order dated 22 November 2007, she had to decide on the appellant's medical fitness to attend the hearing should it be contended that his medical condition prevents him from attending his hearing. On this occasion oral evidence of Prof. P P Oosthuizen and Dr E P Vorster was led on behalf of the appellant as to his medical condition.

[15] The matter was then adjourned to 14 January 2008. It was later rescheduled to 16 January 2008 in order to allow Dr Teggin to re-examine the appellant on 14 January 2008.

[16] On 16 January 2008, after hearing the medical evidence, the chairperson requested a further medical report from an independent doctor of her own choosing. The matter was initially postponed to 1 February 2008, but was later rescheduled to 6 February 2008 as judgment in the first court application which was argued before Nieuwoudt AJ on 31 January 2008 was handed down on 5 February 2008.

[17] In the said judgment Nieuwoudt AJ made the following orders:

17.1 the decision by the employer on 31 August 2007 to suspend the appellant without remuneration is varied to the extent that the continuation of the employer's membership of Polmed and the funding of the employer and employee contributions to Polmed are excluded from the decision;

17.2 the employer is directed to continue to fund the employer and employee contributions in respect of the employee to Polmed;

17.3 paragraphs 1 and 2 of the order (the above paragraphs), shall operate until the dispute referred to the SSSBC on 8 October 2007, and resubmitted on 21 November 2007, was finally determined;

17.4 the appellant is directed to deliver a copy of this judgment to the SSSBC with a request that the conciliation and, if that fails, the arbitration of this dispute be expedited;

17.5 the employer was ordered to pay the appellant's costs.

[18] It is common cause that the dispute that Nieuwoudt AJ referred to, related to a referral challenging the employer's suspension in terms of Regulation 13(2).

[19] The SAPS implemented Nieuwoudt AJ's judgment on 6 February 2008; effectively suspending the appellant without pay, subject to him receiving his medical aid benefits. The reason why appellant was to be paid medical aid benefits was because the court found that exceptional circumstances existed that warranted him receiving this benefit, due to his medical condition.

[20] On 6 February 2008 the chairperson, after the hearing and considering all the medical evidence placed before her, including that of Prof Niehaus, an independent expert she had arranged, acting in terms of the court order dated 22 November 2007 determined that despite the appellant's medical condition, his concentration and memory was not so impaired as to hinder or restrict his participation in the hearing. She based her decision on *inter alia,* the following grounds:

20.1 the appellant does indeed suffer from chronic PTSD and major depressive disorder, which condition was confirmed by all the examining doctors;

20.2 the appellant had been receiving ongoing medical treatment since March 2007, which included correcting his medical regimen, and providing psychotherapy counselling sessions;

20.3 he has been treated for a continuous period of 10 months;

20.4 Dr Teggin, who examined the appellant on 2 October 2007, 21 November 2007 and 14 January 2008, had noticed a marked improvement in the appellant's medical condition which he attributed to the correction of his medication, coupled with psychotherapy counselling, and the fact that the appellant had been on a new medical regime at the time of his last consultation with Dr Teggin for a period of approximately six weeks, which he estimated to be the appropriate time period for the medication to work effectively;

20.5 Dr Teggin's medical opinion is also consistent with the fact that the appellant was able to provide his legal representatives, with detailed accounts of dates, incidences, descriptions, names of persons that he was involved with, descriptions of incidences that occurred during his career to assist his defence and in his application application to court;

20.6 Dr Teggin was of the opinion that appellant's condition had *"plateaued"* and that little further could be done in the way of symptom improvement;

In light of the above, the chairperson ruled that, subject to the appellant continuing with his medication, he would be fit to attend his disciplinary hearing. She ruled that the disciplinary hearing was to continue.

[21] After 6 February 2008, the disciplinary hearing was rescheduled to continue on 13 February 2008, with the appellant in attendance.

[22] On 12 February 2008, the appellant launched a second urgent application in the Labour Court under Case No. C60/08 seeking to postpone the hearing on 13 February 2008, pending the decision of the court to review and set aside the chairperson's decision declaring the appellant fit and capable to attend his hearing and to prevent the hearing from continuing at all, or until some independent third party determined that he was not fit or capable to attend his hearing.

[23] It is this second application which was argued before Cheadle AJ on 12 February 2008. Cheadle AJ handed down his judgment *ex tempore* and provided an edited and expanded version of his reasons on 14 February 2008. In short Cheadle AJ determined that the Labour Court did not have jurisdiction based on section 157(1), read with section 185 to intervene in incomplete disciplinary proceedings. He accordingly dismissed the application with costs. It is this judgment that forms the subject matter of this appeal.

[24] The hearing was then rescheduled to convene on 3 March 2008. The appellant, perhaps accepting the decision of Cheadle AJ, launched a third application in the Cape High Court under Case number 3499/08, seeking the same relief as in the second application before Cheadle AJ in the Labour Court. This application (3499/08) was argued on 6 March 2008 before NC

Eramus J. The appellant's application was dismissed with costs, the court finding *inter alia*, that the High Court did not have jurisdiction to entertain the appellant's application. With this finding, the appellant had reached a *cul-de-suc*.

[25] Reverting back to the proceedings in the Labour Court, the appellant contended that the Labour Court had jurisdiction in terms of sec 157(2) of the Labour Relations Act[4] to determine the application seeking an order postponing the disciplinary hearing pending the outcome of an application for review and setting aside the decision of the chairperson that the appellant is fit to participate in the hearing. In bringing the application the appellant relied on the appellant's constitutional rights to human dignity, fair labour practices, fair administrative action, access to healthcare services, administrative justice, the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent and impartial tribunal or forum, as enshrined in sections 10, 11, 12(1)(d) and (e), 27(1)(a), 33, 34 or the Constitution of the Republic of South Africa[5] and Promotion of Administrative Justice Act.[6]

[26] The respondents opposed the application collectively on the ground that, *inter alia*:

26.1 the application is not urgent and is an abuse of the process of the court as the disciplinary proceedings had already commenced at the end of August 2007, and already postponed several times at the request of the appellant due to his alleged medical condition;

26.2 at no stage since the commencement of the disciplinary inquiry has the appellant raised any objection to the inquiry being held save that he was not medically fit to attend the disciplinary inquiry;

26.3 at no stage up until this application has the chairperson been accused of being biased against the appellant;

[4] Act 66 of 1995.
[5] Act 108 of 1996.
[6] Act 3 of 2000.

26.4 the appellant has a number of alternative remedies available to him such as (i) he has a right of appeal in the event of an adverse finding against him; (ii) he has the right to refer his matter to arbitration in the event of an unsuccessful appeal against an adverse finding; and (iii) he may thereafter also seek to review the arbitrator's decision in the event that it upholds an adverse disciplinary or appeal decision against him;

26.5 that the appellant's rights, if any, relate to a right to a fair hearing and that he has not shown that he will not receive a fair hearing. He is legally represented notwithstanding that the regulations do not permit it;

26.6 that the medical evidence relating to the appellant's medical condition is not necessarily relevant to the charges as they relate to informer claims that were processed by the appellant recently.

[27] In the judgment the Labour Court recorded that it had taken the view "*that this case turns on whether the [appellant] has a right to review and interdict the conduct of disciplinary proceedings"* and the Labour Court's jurisdiction on the right to fair dismissal procedure under the Act; the breach of the constitutional rights to dignity, fair labour practices and fair administrative action; and the inherent power of the Labour Court to remedy any injustice.

[28] The Labour Court made the following findings and conclusions:

28.1 Employees have the right to a fair procedure before they are dismissed. Jurisdiction in respect of procedural fairness follows the alleged reason therefore. Only the CCMA or a bargaining council had jurisdiction to determine the procedural fairness of a dismissal for reasons relating to conduct, and that in so far a sec 157(1) is concerned, the Labour Court does not have the jurisdiction to determine the fairness of a disciplinary hearing into misconduct, barring the two exceptions that do not affect the thrust of the

argument. That the right to challenge the fairness of the employer's decision to dismiss is a serious though constitutionally justified interference with the freedom to contract and to manage its business; that this statutory interference with the right to terminate a contract is controversial and if there is to be protection of unfair dismissal the impact thereof should be as light as possible; that judicial oversight of the conduct of disciplinary proceedings while they are in process is costly, time consuming, that intervention at this stage may prove to be unnecessary; that the right not to be unfairly dismissed constitute a careful balance between the interests of workers and employers and seeks to give expression to the right to fair labour practices being fair to both employees and employers, namely, *"sufficient protection at minimum costs;"* that the Labour Court has no jurisdiction to review and interdict the conduct of disciplinary proceeding on the ground of the right to fair procedure under the Act.

28.2 The ambit of the constitutional right to fair administrative action does not extend to employment decisions of a public sector employer, and therefore, if there is no right to fair administrative action separate from the right to fair labour practices, there can be no alleged or threatened violation of the right to fair administrative action – a requisite for jurisdiction under sec 157(2) of the Act.

28.3 The right to dignity is both a value and a right and it informs all the fundamental rights in the Constitution. Since the primary constitutional breach in this application is the right to fair labour practices, there is therefore no independent right to dignity to violate for the purposes of sec 157(2).

28.4 The right to fair labour practices is given effect to by the Act and other labour legislation and that right plays no role and does not constitute a separate source for a cause of action, apart from challenges to the constitutionality or interpretation of that legislation or the development of the common law where there is no legislation.

28.5 The Labour Court has the inherent powers of the High Court but only in relation to matters under its jurisdiction and its jurisdiction does not include interfering with disciplinary hearings.

[29] The appellant is appealing mainly against the finding by the Labour Court that it did not have jurisdiction to entertain the application and the reasons for its finding.

[30] It is necessary to mention that while this matter was pending the chairperson set the disciplinary hearing down for continuation on 2 June 2008. On this day the appellant's attorney appeared on his behalf and moved an application for the postponement of the hearing on the grounds of appellant's medical condition and that he was in hospital. The chairperson refused a postponement. She further decided that the appellant was to be suspended without remuneration in terms of the SAPS Regulations. The SAPS as the employer invoked the provisions of Regulation 18(5)(a) in terms whereof the appellant had sixty days within which to make himself available for the enquiry to proceed failing which he would be deemed to have been discharged from the service. Within the 60 days period the appellant's attorney appeared before the chairperson and presented a medical report indicating that the appellant was still sick and requested that the decision to withhold his remuneration be withdrawn and that he should not be dismissed. The request was refused and the appellant was dismissed in terms of Regulation 18(5)(a)(ii) read with Regulation 18(5)(b).

[31] An appeal against this decision was lodged internally. At the same time an unfair dismissal dispute was referred to the SSSBC on 25 August 2008. The internal appeal was ultimately successful with the effect that the appellant had to be reinstated. The SAPS was dissatisfied with the ruling of the appeal authority and instituted review proceedings against this decision in the Labour Court. The fact of the matter is that the appellant remains dismissed, and there are at least two pending proceedings in the Labour

Court, namely, that lodged by the SAPS against his reinstatement and the review application lodged by the appellant regarding his suspension without emoluments on 2 June 2008.

[32] That being the case the relief sought by the appellant in this Court has become moot. A finding in favour of the appellant will not have the effect of the SAPS being obliged to proceed with the disciplinary enquiry because the appellant is no longer its employee barring an unsuccessful application for review pending in the Labour Court. The respondents have argued that the issue that this Court is required to determine in so far as the decision of the Labour Court regarding jurisdiction is concerned is not moot, but only moot in relation to the other relief relating to reviewing the decision of the Chairperson that the appellant is fit to participate in the disciplinary enquiry. They have consequently urged the court not to make any determination in that regard.

[33] In the view that I take of this matter the issue to be determined is whether the court a quo was correct in holding that the Labour Court does not have jurisdiction to intervene in disciplinary proceedings.

[34] The Labour Court is established in terms of sec 151 of the Act as a Superior Court in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the [High Court] has in relation to the matters under its jurisdiction. The jurisdiction of the Labour Courts is provided in sec 157 of the Act. It reads thus:

"*<u>157 Jurisdiction of Labour Court</u>*

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of 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-

(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.

(3) Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.

[35] The powers of the labour are provide in sec 158 of the Act. The relevant powers for the purposes of this matter are contained in sec 158(1) which provides that:-

"(1) The Labour Court may-

(a) make any appropriate order, including-

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in this Act;

(vi) an award of damages in any circumstances contemplated in this Act; and

(vii) an order for costs;

(b) order compliance with any provision of this Act;

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a dispute between a registered trade union or registered employers' organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with-

(i) the constitution of that trade union or employers' organisation (as the case may be); or

(ii) section 26 (5) (b);

(f) subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;

(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;

(i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and

(j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law."

[36] In addition to the provisions of the Act, Section 77(3) of Basic Conditions of Employment Act[7] provides that:

"77 Jurisdiction of Labour Court

(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court."

[37] In **Gcaba v Minister of Safety & Security**[8] the Constitutional Court noted that the specific term *"jurisdiction"* has been defined as the *"power"* or competence of a Court to hear and determine an issue

[7] Act 75 of 1997.

[8] 2010 (1) SA 238 at para 74 – 75; (2008) 29 ILJ 73 (CC); [2009] 12 BLLR 1145 (CC)

between parties.[9] The Court held that jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case and, in the event of the courts' jurisdiction being challenged at the outset (*in limine*) the applicant's pleadings are a determining factor. If the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, that has to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.

[38] In **Chirwa V Transnet Ltd & others**[10] **Skweyiya J** stated that the existence of a *"purpose-built"* employment framework in the form of the Act and associated legislation infers that labour processes and forums should take precedence over *"non-purpose-built"* process and forums in situations involving employment-related matters. The issue of the jurisdiction of the Labour Court must therefore be considered bearing in mind not only the legislation itself but with the pronouncements made by the Constitutional Court and other binding precedent.

[39] The enquiry in matters of the nature under discussion is whether the facts presented indicate whether the Labour Court has jurisdiction to determine the dispute. If the answer to this question is in the affirmative, the second enquiry should be whether an applicant has met the requirements for the interdictory order.

[40] The Court a quo referred with approval to the decision of the Labour Court in **Moropane V Gilbeys Distillers and Vintners (Pty) Ltd & Another.**[11] In that case the applicant was suspended pending a disciplinary inquiry into charges relating to incapacity and misconduct. The applicant sought further particulars relating to the charges. A hearing was convened before further particulars were, according to the applicant, fully furnished. The applicant applied for a postponement of

---

[9] The Court noted further that it regularly has to decide whether it has jurisdiction over a matter and that if a litigant raises a constitutional issue the Constitutional Court has jurisdiction even through the issue may eventually be decided against the litigant.
[10] [2008] 2 BLLR 97 (CC) at para (41); 2008 (4) SA 367 (CC)
[11] [1997] 10 BLLR 1320 (LC); 1998 ILJ 635 (LC)

the proceedings for lack of an opportunity for proper representation and for an order from the chairperson that he be furnished with further particulars. The matter was allowed to stand down until the following day. The applicant was dissatisfied with this and instituted an urgent application in the Labour Court seeking, *inter alia*, an order directing the employer to furnish further particulars, and that the employer should not set the disciplinary enquiry down before the expiry of ten working days after the date upon which the aforementioned further particulars have been delivered to the applicant.

[41] The Labour Court, in **Moropane**, correctly in my view, observed that if the court has the jurisdiction it would have the power to grant an appropriate remedy and that because the Labour Court has the power to grant the remedy, it does not mean that it has jurisdiction to determine the matter. In conclusion the Labour Court held that an employee facing dismissal for misconduct or incapacity does not enjoy an independent right to procedural fairness which can be enforced by the Labour Court prior to it resulting in an unfair dismissal, and that as the applicant enjoys no such right the Labour Court has no jurisdiction to come to his aid. The applicant's application therefore failed.[12] The reason advanced by the Labour Court that an employee's right to a fair pre-dismissal hearing could not be vindicated before he was actually dismissed, was that the Act provides an exclusive remedy for breach of a fair procedure, being compensation or reinstatement or re-employment.

[42] It is important to mention that the Labour Court in **Maropane** recorded that the court was *"asked to enforce the right to a fair procedure and to do so immediately as redress by the CCMA in the form of arbitration will not cure the procedural deficiency for the respondent's disciplinary committee and as grave injustice would follow if the Court does not intervene at this stage".*[13] The Labour Court then found that adequate

---

[12] at 1326G-H.
[13] at 1322G-H.

remedies were available to the employee for breach of a fair procedure and that the employee had not succeeded to establish that he has a *prima facie* right to the relief sought. An entitlement to a *prima facie* right is one of the essential requirements for an interdictory relief. That means **Moropane** failed because he could not establish that he was entitled to the order he sought. I therefore do not understand this case to mean that the Labour Court does not at all have jurisdiction to determine whether to grant an interdictory orders in incomplete disciplinary proceedings under all circumstances. Should my understanding of the decision be wrong, and that it should be understood to mean the opposite, then in that case **Morapane** should not be followed.

[43] The next case that was considered by the court *a quo* is **Mantzaris v University of Durban-Westville & others.**[14] In that case the employee instituted review proceedings against the constitution of the disciplinary panel. Subsequent to that the employee brought an urgent application for an order *inter alia*, to have the disciplinary proceedings halted pending the outcome of the review proceedings. The Labour Court held that the application for review brought by Mantzaris was not brought in terms of sec 145 of the Act and could only be brought in terms of sec 158 (1) (g) of the Act. Section 158 (1) (g) as shown below deals with the powers of the Labour Court, subject to sec 145, review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. It does not extend to matters not under its jurisdiction.

[44] In **Mantzaris** the Labour Court held that the conduct of a disciplinary enquiry does not constitute an act or omission of any person or anybody instituted in terms of the Act; that only reference to disciplinary proceeding is in the Code of Good Practice which is nothing more than a guideline in dismissal matters. The Court then held that it lacked

[14] [2000] 10 BLLR 1302 (LC); (2000) 21 ILJ 1818 (LC)

jurisdiction to review internal disciplinary proceedings. It however held that it had jurisdiction to interdict incomplete disciplinary proceedings and that the Labour Court can only do so in the most exceptional of circumstances, where a grave injustice or a miscarriage of justice might otherwise occur, or where justice might not by other means be attained.[15]

[45] It would appear that it is only the court a quo that has found that the Labour Court lacks jurisdiction to grant relief in matters that are not specifically assigned to it in terms of sec 157 and those that would be referred to conciliation mediation and arbitration under the Act. The effect of the findings of the court *a quo* is that the Labour Court lacks jurisdiction to interdict disciplinary proceedings because the legislature has provided detailed procedures and mechanisms for employees to vindicate their fair pre-dismissal procedural rights only after they have been dismissed. This conclusion suggests or rather means that the Labour Court cannot come to the assistance of such an employee before his or her dismissal. It means that unless there is a dismissal there is no remedy. It further means that *ex post facto* relief should determine jurisdiction.

[46] By implication the court a quo's reasoning is that employees who have genuine complaints of other unfair labour practices such as unfair demotions, failure to promote or suspensions for which the Act has provided specific remedies through arbitration and not the Labour Court, cannot approach the Labour Court for interdictory relief. I doubt the correctness of such an interpretation because it has the potential of leading to absurdity situations. There are many instances where the Labour Court has deemed it necessary to intervene in deserving situstions.[16]

---

[15] at para 5.7.

[16] See generally: **Numsa & Others v Comark Holding (Pty) Limited** [1997] 5 BLLR 589 (LC). **Afrox Ltd v SAWU & Ohters; SACWU & Others v Afrox Ltd** [1997] 4 BLLR 382 (LC); **NUM v Elandsfontien Colliery (Pty) Ltd** [1999] 12 BLLR 1330 (LC); **Ndlovu v Transnet limited** [1997] 7 BLLR (LC); **SAMWU v City of Cape Town** [2008] 29ILJ 1978 (LC).

[47] This Court in **Nxele v Chief Commissioner, Corporate Services, Department of Correctional Services & others** [17] had to consider an appeal emanating from an application brought on an urgent basis for an order restraining the department of correctional services from transferring **Nxele** from one centre to the other. His application was dismissed by the Labour Court on the basis that he did not satisfy the requirements for the order on the merits. On appeal this Court recognised that the Act imposes a general obligation on employers to treat their employees fairly and that the transfer of **Nxele** if done unfairly would breach that general duty. The decision to transfer **Nxele** was found to be unfair in the manner in which the department implemented it and was set aside. This Court did not find that the Labour Court did not have the necessary jurisdiction to entertain the application brought by **Nxele** because transfers are not specifically mentioned in sec 157(1) of the Act. The approach adopted by this court in **Nxele** strengthens the conclusion that the Labour Court may in the exercise of the powers provided in section 158 (1) interdict any condudt by the employer that is found to be unfair.[18]

[48] As pointed out above section 157 of the Act should be interpreted in line with the intention of the legislature as well as the purpose of the Act. It must also be interpreted in line with what was said by the majority of the Court in **Chirwa**, that the intention of the Act is to subject all disputes concerning the alleged unfair dismissal of employees and unfair labour practices to the one-stop dispute resolution mechanism provided by the Act which are staffed by women and men who have experience and knowledge of labour and employment related issues. This could be

[17] [2008] 12 BLLR 1179 (LAC);

[18] See also: **MEC for Finance, kwaZulu-Natal & Another [2008] 6 BLLR 540 (LAC)** in which this Court held that the Labour Court is empowered to review internal disciplinary proceedings at the instance of the employer especially where the employer is the State.

one of the reasons why employment related matters were taken out of the jurisdiction of the High Court.[19]

[49] In my view, sec 157 must also be interpreted as a whole to fully understand the intention of the legislature. The majority in **Chirwa** held further that the concurrent jurisdiction provided for in sec 157 (2) of the Act is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights.[20] The implication of this finding is that sec 157 (2) must be interpreted to have given the Labour Court powers equal to that of the High Court when it comes to employment and labour matters, and not to preserve the High Court's jurisdiction over disputes arising from employment and labour relations and over the constitutionality of administrative act or conduct by the state in its capacity as employer,.[21] The following remarks by the author are persuasive[22]

> *"The Chirwa majority did not venture to suggest how its interpretation of section 157(2) impacted on section 158(g), or to elaborate on the purpose the latter provision may serve if it does not mean what it say – that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer. In the face of that unambiguous and expansive language, it is difficult to fathom why disciplinary action should be excluded, and, if it must, on what grounds. Nor did Chirwa court deal with the scope of the various powers listed in section 158(2)(a). But it is equally difficult to fathom why, if the Labour Court has exclusive jurisdiction over labour and employment disputes, it should not enjoy the same powers in that sphere as were previously exercised by the High Court – including the*

---

[19] This position was confirmed in the **Gcaba** decision n (footnote at page 257). See also para 105 of **Ngcobo J**'s judgment.
[20] para 54.
[21] See the entire article by **John Grogan** in **Employment Law Volume 25 part 1 Lexis Nexis**.
[22] at page 10 of the Article.

power to interdict unlawful or unfair disciplinary proceedings in appropriate cases".(my emphasis).

[50] Failure by the Labour Court to exercise jurisdiction over disciplinary proceedings, which are in fact conducted pursuant to the employment relationship would mean that the employee must approach the High Court to decide a matter which might in future serve before the Labour Court as part for example, of a review application. At that stage the Labour Court may be constrained to consider whether the decision of the High Court was correct or wrong in determining perhaps the fairness or otherwise of the dismissal. To allow such to happen would in my view not be in line with the spirit of the Act and the decisions of the Constitutional Court referred to above.

[51] The court a quo held that the judicial oversight of the conduct of disciplinary proceedings while they are in process is costly, time consuming, disruptive and duplication of proceedings. That may well be so. However, judicial intervention may prove to be time saving, and less costly if the process is not proceeded with. It may also prevent costly litigation. The very fact that the Labour Court has the power to issue interdictory relief suggests that the legislature was aware that the exercise of such power might interfere with the freedom of employer's to contract and the employer's business in deserving cases.

[52] Commenting on the reasoning of the court *a quo*, **Gauntlett AJ** in **Nimrod Llewellyn Mortiment v Municipality of Stellenbesch and another[23]** had the following to say:

"In his reasons, Cheadle AJ stresses the lack of an inherent jurisdiction in the Labour Court as creature of statute (in contradistinction to the High Court). Following ***Maropane v Gilbrey Distillers and Vintners (Pty) Ltd*** *he holds that the Labour court "does not have an all-embracing jurisdiction over the employer-employee relationship.*

[23] An unreported judgment of WCD (Case No 18243/2008).

As already indicated that has to be accepted as a truism --. But with respect, that is not the point. It does not address the fact that unfairness in the dismissal process is a "matter" which the LRA clearly regulates."[24]

[53] The learned acting Judge continued further thus:

"Where a person in truly extraordinary circumstances – a matter to which I revert in considering the third issue-approaches the Labour Court on the basis that a disciplinary inquiry was for instance, about to commence or was conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in Law the enquiry, I have little doubt that the labour court would in law exercise these powers to stop it."

[54] To answer the question that was before the court *a quo*, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. [25] The list is not exhaustive.

[55] In the light of my finding above and the pending disputes in the Labour Court, it is not, in my view appropriate to decide the merits of the case. The said merits were also not considered by the Labour Court. It is remarkable that this matter has travelled this far without the actual dispute relating to misconduct being part of the proceedings. But for the developments in this matter, we would not have hesitated to deal with the merits of the matter. This is a case where it would be in accordance

---

[24] **See Nomgcobo Jiba v Minister of Justice & Constitutional Development & 16 Others**, Case No J167/09 Labour Curt Johannesburg (unreported) at para 8 and 9.

[25] Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959(3) SA 133 (AD).

with the requirements of the law and fairness that each party must pay its costs.

ORDER

(1). The order of the court a quo is set aside. The following order is made:

(a) The Labour Court does have jurisdiction to grant appropriate relief in relation to pending disciplinary hearings.

(2) The matter is remitted to the Labour Court, so that the outstanding issues, if need be, can be dealt with.

(3) There is no order as to costs

____

TLALETSI JA

I agree

____

WAGLAY DJP

I agree

____

MUSI AJA

Appearances:

For the appellant: Robert Stelzner SC
Instructed by: Edward Booth Attorneys

For the Respondent: Norman Arendse SC; Brenton Joseph
Instructed by: State Attorneys Cape Town

Date of judgement: 1 October 2010