REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3697/2018

IN THE MATTER BETWEEN:-

PHALAFALA, PHEEHA AUBREY AND 321 OTHERS **APPLICANTS**

AND

MEMBER OF EXECUTIVE COUNCIL FOR EDUCATION, LIMPOPO PROVINCE **FIRST RESPONDENT**

HEAD OF DEPARTMENT, EDUCATION LIMPOPO PROVINCE **SECOND RESPONDENT**

MINISTER OF BASIC EDUCATION **THIRD RESPONDENT**

JUDGMENT

INTRODUCTION

[1] This matter first came before me on **26 January 2022** as a special allocation. Three court days prior to the hearing, the Respondents brought an application for leave to file a further affidavit. The supplementary affidavit as I understand, sought to argue that the main application has been overtaken by events and become moot. Naturally, the Applicant's Counsel applied for a postponement to consider the issues raised and the matter was postponed to **25 February 2022** with further directives on the filing of additional documents.

[2] On the **25th February 2022**, it being my last day on the bench. I duly enquired from the parties if it would not be better to remit the matter to the **Judge President** for re-allocation. After some deliberations, I was informed that parties would want me to hear their submissions on jurisdiction as a point in *limine*. In the event jurisdiction is confirmed, the remaining issues will be adjudicated by another judge on a date to be allocated by the Registrar.

History of the matter

[3] The dispute between the parties arises out of an implementation of an incentive policy published by the then Minister of Education in the Government Gazette. The policy prescribes the criteria to be used by the Provincial Head of Departments in the determination of the teachers who qualify for the payment of the incentive. On the papers before me, the Applicants allege that they have

been discriminated against and that the decision to exclude them is both unlawful and irrational.

[4] Prior to the institution of this proceedings, the Applicants instituted action proceedings under case number 1161/2013 in the then Polokwane Circuit Court of the North Gauteng High Court, Pretoria. They prayed for an order that the Department be directed to pay each one of them an incentive allowance on a monthly basis in accordance with the prescripts of the incentive policy.

[5] The Department defended the proceedings and raised an exception that the High Court lacked jurisdiction to adjudicate the matter as "the dispute forming part of this litigation constitutes a pure labour dispute". It was argued that section 157(1) of the Labour Relations Act 66 of 1995 grants an exclusive jurisdiction to the Labour Court.

[6] Raulinga J considered the submissions by the parties and after reviewing case law including the constitutional court judgment of ***Gcaba v Minister for Safety and Security, 2010 (1) SA 238 (CC)*** arrived at a conclusion that the High Court has jurisdiction to adjudicate the dispute. This order was never appealed, and the parties proceeded to exchange the pleadings.

[7] Over time, the parties agreed to have the issues identified decided by way of a stated case. The issues to be decided were the following:- *"Whether the Plaintiffs (Applicants in this case) would be entitled to rural incentives considering the criteria mentioned in the schedule. The Court was further requested to make a determination as to the status of the documents and in the event it is found that the documents constitute official policy, are they not unfairly discriminating or excluding the Plaintiffs".*

[8] The Respondents contended that the Applicants do not meet the qualifying criteria and in the event that the Court finds that they qualify and the department is not properly implementing the policy or that the criteria is unfair, the proper course of action will be to bring an application to review and set aside the criteria and/or its implementation.

[9] In the fullness of time, the matter came before Makgoba JP who found in favour of the Applicants and ordered the Respondents to pay the costs.

[10] Unhappy with the outcome, the Respondents appealed to the full Court which found merit in their submissions that the decisions made by the Head of Department were of an administrative nature. The proper approach to be taken by any person aggrieved by an administrative decision including the manner of its implementation, is to have it reviewed and set aside. The full court upheld the appeal having ruled that action proceedings were inappropriate in the circumstances.

[11] Based on the outcome of the appeal, the Applicants instituted this application proceedings in which they sought to review and set aside the decisions and/or determinations made by the Head of Department of Education, Limpopo Province relating to the implementation of the policy together with ancillary matters. The application is opposed, and the Respondents have raised several points in *limine* including lack of jurisdiction which is the subject of this judgment.

Jurisdiction

[12] The starting point on any matter relating to jurisdiction is the Constitution which states that judicial authority vests in the Courts. The Constitution further creates a High Court and provides in section 169(1) that :- The High Court of South Africa may decide: -

"(a) any constitutional matter except a matter that;

(i) the constitutional court has agreed to hear directly in terms of Section 167 (6)(a) or;

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa and;

(b) any other matter not assigned to another court by an Act of Parliament".

[13] Relying on the provisions of section 169 of the Constitution read together with section 157 (1) of the Labour Relations Act 66 of 1995, Advocate Mphahlele SC argued fervently that the Labour Court has exclusive jurisdiction by virtue of the fact that the dispute between the Applicants and the Respondents is employment-related and therefore assigned for exclusive adjudication in the Labour Court which has a similar status to the High Court.

[14] In support of his contention, he submitted that the dispute raised by the Applicants, properly considered, relates to the provision of benefits. An employee who complains about the conduct of an employer relating to the provision of benefits is required by section 191(5) of the Labour Relations Act to lodge an unfair labour practice dispute with the relevant bargaining council and utilise LRA mechanisms. He found legal authority in the dicta of Skweyiya J in ***Chirwa v Transnet Limited & Others (2008) 29 ILJ 73 (CC)*** where the learned Judge said:- *" It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims".*

[15] The Applicants represented by Advocate Uys SC contends otherwise and argue that the issue in dispute in so far as they are concerned arises out of an exercise of public power and infringes upon their rights enshrined in the constitution. It is submitted on their behalf that the decision by the Head of Department not to pay them the incentive in accordance with the policy constitutes an administrative act

and therefore susceptible for review in the High Court. The Applicants further argue that no where in their papers do they allege an unfair labour practice under the Labour Relations Act. Relying on the judgment of the full court, they located their case squarely within PAJA and characterized the decision of the Head of Department as an administrative action which falls to be reviewed and set aside.

[16] Under Section 38 of the Constitution, the allegation of the infringement of a fundamental right would be sufficient to clothe the High Court with jurisdiction to enquire whether the right to just administrative action has been infringed or not and to grant appropriate relief depending on its finding. PAJA therefore gives specific content to this competence in relation to the fundamental right to a just and administrative action.

[17] There is substance in these submissions because it is not every employment related dispute which must be resolved exclusively through the mechanisms created by the Labour Relations Act. The legislature is assumed to know the law and was probably aware of this fact when it enacted section 157(2) of the Labour Relations Act giving the Labour Court concurrent jurisdiction with the High Court.

[18] Whilst it is accepted that the Labour Court is a specialized Court created specifically for labour related dispute, the power and competence of the High Court to adjudicate over disputes arising out of employment has not been completely ousted, except in those matters falling within the provisions of section 157(1) of the Labour Relations Act.

[19] In my view, the fact that the Applicants have a remedy under the Labour Relations Act does not take away the power of the High Court to adjudicate over the same matter if referred to it. Cameron JA (as he then was) makes this point clear in ***Boxer Superstores Mthata v Mbenya [2007] 8 BLLR 693 (SCA)*** when he says:-

> *"Section 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship*

> *between employer and employee and since the LRA affords the labour court no general jurisdiction in employment matters, the jurisdiction of the High Court is not ousted by Section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations".*
>
> The LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that may be available to employees in the course of the employment relationship-particular conduct may not only constitute an unfair labour practice (against which the LRA gives a specific remedy) but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated as an unfair labour practice.

[20] The correctness of this position was acknowledged by Skweyiya J in *Chirwa* supra with particular reference to public sector employees such as the Applicants when he said:- *"The provisions of Section 157(2) of LRA has resulted in complex jurisdictional disputes insofar as determining where the jurisdiction of the Labour Court ends and that of the High Court begins…….. To the extent that PAJA and the LRA overlap in providing public sector employees with remedies for labour-related issues, there is an urgent need to revisit the provisions of section 157(2) of LRA to ensure development of a coherent legal framework within which all labour disputes may be speedily resolved." (para 70-71).* The legislature has not yet done so and the two courts still enjoy concurrent jurisdiction.

[21] In the recent judgment of the constitutional court on this issue, Theron J writing for the court in the matter of ***Baloyi v Public Protector [2021] 42 ILJ 961(CC)*** underscored this point when she said:- "it is trite that the same set of facts may give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued is prescribed in terms of legislation*. In the labour law context where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly. Where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so.*

Put differently, the fact that cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that particular cause of action". She stated as a matter of fact at paragraph 45 that *"the mere fact that a dispute is located in the realm of labour and employment does not exclude the jurisdiction of the High Court".* She once again emphasized on the authority of *Gcaba* that *"jurisdiction is determined on the basis of pleadings and not the substantive merits of the case".*

[22] Adv Mphahlele SC unsuccessfully sought to persuade me that the facts in Baloyi supra are different from the one at hand. That may well be so but the approach on the issue of jurisdiction is more illuminated and sharply demonstrate the consistency of the constitutional court on this aspect. One can only hope that the judgment by Theron J clarifies any uncertainty that existed on how to approach jurisdiction on an employment-related matter. The fact that the dispute arises out of employment does not grant the Labour Court exclusive jurisdiction. It may well be that it is convenient to approach the Labour Court but convenience should not be confused with exclusivity.

[23] Indeed as said in Gcaba the LRA does not intent to destroy causes of action or remedies and Section 157 should not be interpreted to do so. Where a remedy lies in the High Court, Section 157(2) cannot be read to mean it no longer lies there and should not be read to mean as much……. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court does not have the power to deal with the common law or other statutory remedies.

Conclusion

[24] Following on the guideline provided by the Constitutional Court on the approach to adopt when determining jurisdiction as a point in *limine* , I have considered the pleadings in their entirety with a view to establish the case for the Applicants. On the authority of the judgment of *Baloyi v Public Protector*, I have no hesitation in concluding that the Applicants located their case within the provisions of section 33 of the Constitution and seek to challenge the decision of the Head of Department in the manner in which she implemented the incentive policy. Both parties are agreed that the decision is administrative in nature and therefore I find that the High Court has concurrent jurisdiction with the Labour Court on this matter.

Costs

[25] What remains is the issue of costs. The Respondents have previously raised jurisdiction as an issue for consideration by this Court then operating as a circuit Court. The Court made an order which was not appealed thereby suggesting that they were happy with the order. When the judgment of Makgoba JP was appealed the Respondents argued that their decision was administrative in nature and appropriate course to follow was judicial review. It is trite that the high court has jurisdiction for a review of administrative decision, this could not

therefore be a matter falling exclusively within the jurisdiction of the Labour Court even though as argued by Advocate Mphahlele SC, the Labour Court had jurisdiction by virtue of the provisions of section 158(1)(h) of the Labour Relations Act. In my view the Respondents' persistence with this point was ill-advised and disingenuous. Costs should follow suit.

[26] In the premises, the following order is made:-

1. The point *in limine* on lack of jurisdiction is dismissed with costs, including that of Senior Counsel.

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MANGENA A.J
ACTING JUDGE OF HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Applicants	:	Adv J C Uys SC
Instructed by	:	Mashabela attorneys inc

Counsel for the Respondents	:	Adv M S Mphahlele SC
Instructed by	:	State attorney
Date of hearing	:	25 February 2022
Date of judgment	:	16 May 2022