Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No.: 1695/2022
Date Heard: 02 September 2022
Date Delivered: 21 October 2022

In the matter between:

TREVIN RALPH OLIPHANT Applicant

and

THEMBELIHLE LOCAL MUNICIPALITY 1st Respondent

MEC: CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, NORTHERN CAPE 2nd Respondent

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JUDGMENT

Tlaletsi JP

[1] The applicant, Mr Oliphant, approached this court on urgent basis seeking interdictory orders. He had been 'employed' by the first respondent, the Municipality in the position of Manager: Corporate Services with effect from 2 September 2022.

[2] The relief he seeks in his notice of motion is along the following terms:

"1. Condonation be granted in respect of the non-compliance with – and dispensing of the prescribed time periods, forms and service, so that this application be heard as one of urgency;

2. A rule nisi be issued calling upon the First Respondent to appear before this Court on Friday 14 October 2022 at 09h30 to show cause, if any, why the following orders should not be made final, namely that:-

2.1 The First Respondent be interdicted and restrained from proceeding with the appointment process for the position of the Senior Manager: Corporate and Community Service, Thembelihle Municipality, pending the finalisation of the Applicant's dispute pertaining to his unfair dismissal;

2.2 The First Respondent be ordered to pay the costs of this application;

3. The order contained in prayer 2.1 above shall operate as an interim interdict with immediate effect, pending the final adjudication of this application;

4. This application, together with annexures thereto, and the rule nisi shall be served by the Sheriff of this Court in terms of the Uniform Rules of court; and

5. Further and/or alternative relief be granted."

[3] The applicant does not seek any relief against the second respondent, the *Member of the Executive Council, Human Settlements and Traditional Affairs, Northern Cape (MEC).* A brief background to the application is apposite.

[4] Purporting to act in terms of section 56 of *the Municipal Systems' Act 32 of 2000,* the Municipality on 13 August 2019 resolved to appoint the applicant as *Manager: Corporate Services* on a permanent basis with effect from 2 September 2019. It further resolved that an employment agreement be concluded with him within sixty days of the appointment. The employment contract was ultimately concluded on 28 August 2019.

[5] In order to comply with the provisions of s56(4A) of the *Systems Act*, the Municipal Manager of the Municipality forwarded a letter dated 21 August 2019 to the MEC reporting the decision of the Municipality to appoint the applicant. The MEC replied on 25 September 2019 indicating that he regards the appointment of the applicant *null and void* for failure to comply with the Regulations promulgated under the *Systems Act* in that the applicant holds a B-Ed Hons degree and not a Bachelor's Degree in Public Administration/Management Sciences/Law or equivalent. In short, the MEC was informing the Municipality that the appointment of the applicant was

invalid because he does not hold the required academic qualification for the position.

[6] The MEC's letter was considered by the Council of the Municipality on 24 March 2020. The Council was of the view that the applicant had already been in service of the Municipality since September 2019; and that the Council was only obliged to consult the Municipal Manager before it makes the appointment. The Council resolved that the *"MEC be required to waive the requirements permanently or for a specified time period. In which time the incumbent must obtain the local government related qualification equivalent to requirement. Alternatively MEC overturn the decision of Council."* It is not clear from the papers whether this resolution was communicated to the MEC. It is also not apparent from the papers whether any action was taken for the implementation of the Council resolution or what the MEC's attitude was thereto.

[7] On 29 June 2022, about 27 months after the Council resolution, the new Mayor of the Municipality wrote to the applicant advising him that the Municipality was withdrawing his appointment with immediate effect for failure to comply with s56 of the *Systems Act*. The non-compliance with s56 of the Systems Act referred to herein is the one that was raised by the MEC in the letter dated 25 September 2019. Aggrieved by the decision of the Municipality, the applicant referred an unfair dismissal dispute to the Bargaining Council. An attempt to conciliate the dispute on 21 August 2022 was not successful,

with the result that the dispute is still pending within the structures of the Bargaining Council.

[8] On 15 August 2022, the Municipality published an advertisement inviting applications for the filling of the position that was occupied by the applicant. The closing date for the applications was 19 August 2022. The advertisement was subsequently re-published with the closing date of 12 September 2022.

[9] The applicant contends that the dispute referred to the Bargaining Council will be decided in his favour and will have to be reinstated to the position he previously occupied. However, he contends, he will be severely prejudiced should the position be filled through the current recruitment process.

[10] Both respondents oppose the application. They have both raised two points in *limine.* They contend that the matter is not urgent and that this Court does not have jurisdiction to entertain the matter. The MEC has raised the third point in *limine* contending that the applicant has failed to serve this application on the State Attorney's office as prescribed by the *State Liability Act 20 of 1957* and that this application should be dismissed on that basis alone.

[11] I first deal with urgency. It is common cause that the recruitment process to fill the position that is the subject of dispute at the bargaining council is in process. The appointment of a person to fill the position is imminent. There is no indication that the Municipality will await the outcome of the dispute

resolution process of the Bargaining Council. For that reason, I accept that the matter is urgent and it should be treated as such.

[12] The Municipality contends that the applicant's cause of action arose on 25 September 2019 when the MEC expressed his view that the appointment was *null and void.* Accordingly, the Municipality contend that the applicant should have brought this application then or soon thereafter. The point being made in this regard is that the urgency, if any, is self-created by the applicant. There is no merit in this contention. The filling of the position was not imminent up until the process to fill the vacancy started. Both the Municipality and the MEC did nothing since 2019 to show the desire to remove the applicant from the position which he occupied until 29 June 2022. Urgency is therefore not self-created as it is alleged.

[13] The issue relating to the jurisdiction of the Labour Court *vis* a *vis* that of the High Court has previously been a subject of debates and conflicting judicial pronouncements. The issue was ultimately settled by the Constitutional Court in **Gcaba v Minister for Safety and Security** 2010(1) SA 238 (CC). ***Gcaba*** tells us that:

"Furthermore, the Labour Relations Act does not intend to destroy causes of action or remedies and s157 should not be interpreted to do so. Where a remedy lies in the High Court, s157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in ***Chirwa*** *speaks of a court for Labour and employment disputes, it refers to Labour- and employment-related disputes*

for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies"[1]

[14] One should emphasise that jurisdiction relates to the power or competence of a court to hear and ultimately determine the issue before the court. It has nothing to do with the outcome of the merits of a particular case. This question was authoritatively decided in **Gcaba** as follows:

"….This Court regularly has to decide whether it has jurisdiction over a matter, because it may decide only constitutional matters and issues connected with decisions on constitutional matters. If a litigant raises a constitutional issue, this Court has jurisdiction, even though the issue may eventually be decided against the litigant".[2]

And that:

"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the

[1]At para [73]

[2]At Para [74] , See also *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 ; [2006] ZACC 24) at para 40.

supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."[3]

[15] The MEC's contention that the papers were not served on the State Attorney's office but directly at his office should be considered in the context of this matter. Neither in the answering affidavit nor during the hearing did the MEC indicate that he suffered any prejudice as a result of the applicant not serving at the office of the State Attorney. There has been substantial compliance in that the papers were served at the MEC's office and the State Attorney was instructed to act. The failure to serve on the office of the State Attorney is accordingly condoned.

[16] To obtain final relief the applicant would have to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar or adequate protection by any other ordinary remedy. (*Setlogelo v Setlogelo* 1914 AD 221 at 227; *Minister of Law and Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (B) at 98B–D; *Knox D'Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 592H–593C).

[3] At para [75]

[17] The applicant is optimistic about his success at the Bargaining Council and that he is likely to receive a reinstatement award in his favour. He contends that irreparable harm will be caused to him should the position be filled at this stage. The question that arises is whether indeed he is likely to suffer irreparable harm and that he would not have an alternative remedy in the event of a reinstatement award granted in his favour. To answer this question, one has to consider the provisions of the *Labour Relations Act,* 66 of 1995 (LRA) that regulates and govern the resolution of the dispute he has referred to the Bargaining Council.

[18] It is trite that a primary remedy for an employee whose dismissal is found to be substantively unfair by either the Commission for Conciliation, Mediation and Arbitration (CCMA), the Bargaining Council or the Labour Court is reinstatement. Section 193(1) and (2) of the *Labour Relations Act* provides:

> *"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-*
>
> *(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
>
> *(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
>
> *(c) order the employer to pay compensation to the employee.*
>
> *(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*
>
> *(a) the employee does not wish to be reinstated or re-employed;*
>
> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[19] What can be deduced from the above provisions is that the Bargaining Council or the Labour Court will be obliged to order the reinstatement of the applicant by the Municipality if his "dismissal" is found to be substantively unfair and the applicant seeks or elects reinstatement or re-employment as a remedy. To escape reinstatement or re-employment of an employee whose dismissal is found to be substantively unfair and elects either to be reinstated or re-employed, the employer must show at least one of two things: Firstly, that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or, secondly, that it is not reasonably practicable for the employer to reinstate or re-employ the employee.

[20] In **Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM on behalf of Masha and Others** (2016) 37 ILJ 2313 (LAC) the Court interpreted s193(2)(c) to mean:

"The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term not 'reasonably practicable' in section 193(2)(c) does not equate with 'practical'; as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond

possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."[4]

[21] The circumstances of this case are similar to those in **Ephraim Mashaba v South African Football Association (SAFA)** [2017] 6 BLLR 621 (LC). In that case, the applicant, who had been dismissed from his position as coach of the South African National Soccer team (commonly known as Bafana Bafana) sought an order interdicting SAFA from appointing someone else to replace him pending the outcome of the CCMA proceedings challenging his dismissal. The Labour Court correctly held that:

"[10] An employer may not thwart a dismissed employee's bid for reinstatement by replacing him and then arguing that it cannot reinstate the dismissed employee because there is someone occupying his former position. That is an eventuality the employer must take into account when it replaces a dismissed employee who is challenging [the] dismissal. In other words, if the employer does not take suitable steps in its contract with the replacement, it ought to realise it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated.

[11] Thus, on a proper interpretation of section 193(2)(c), if SAFA does appoint a replacement head coach before learning the outcome of Mr Mashaba's case, that appointment cannot protect it against an order of

[4]At para 11

reinstatement. Consequently, Mr Mashaba will not be deprived of his right to reinstatement, if the only consideration which might stand in its way is the employment of a replacement coach before his CCMA case was decided. That is not a factor which should influence any arbitrator deciding if there is anything which prevents his reinstatement, if he decides that Mr Mashaba's dismissal was substantively unfair."

[22] In *casu*, should the Municipality employ someone in the position contested by the applicant, it will run the risk of creating a problem for itself in the event of a reinstatement order. It will either have to terminate the contract it entered into with the new employee or come to an arrangement with that employee or the applicant.

[23] The right that the applicant wants to protect will only come into existence once he successfully demonstrates to the Bargaining Council that this *"dismissal"* is substantively unfair. He may or he may not succeed in that endeavour. Either of the parties who might be aggrieved by the award by the Bargaining Council has the right to take the award through the dispute resolution systems provided by the law. That might cause more delays which will be to the detriment of the residents of the Municipality. It is not for the applicant to decide that the person who is currently acting in the contested position should continue until the dispute with the Municipality is finally resolved. It is the prerogative of the Municipality to decide whether to keep the person or permanently fill the position. Whatever delay might be there, if, in the end, the applicant is successful, he will be reinstated without any loss of emoluments

due to him. His conditional right does not translate into a right to keep the position he occupied vacant indefinitely, for just in case he succeeds.

[24] In the result I am not persuaded that the applicant has shown that he has a *prima facie* right to protect and further that there is no alternative remedy should he be entitled to be reinstated. The application should be dismissed on this basis. With this conclusion, it is not necessary to consider other requirements for interdictory relief.

[25] What I need to consider is the issue of costs. The applicant, rightly or wrongly believed that he has a Constitutional right to protect by approaching this Court with this application. That right, if established, would have impacted on s 23 of the Constitution that guarantees him the right to fair labour practices. His application cannot be said to be frivolous. On the other hand, it is perspicuous that the Municipality took over 27 months before it terminated its relationship with the applicant. When terminating his services, it did so based on the reason that was raised in September 2019. Added to that, the MEC who questioned the appointment of the applicant in September 2019 appears to have done nothing to ensure that the legislation is complied with. These are sufficient reasons to depart from the general rule that costs follow the result. This is a matter where each party should pay its costs.

In the result the following order is made:

1. **The application is dismissed.**
2. **Each party to pay its costs.**

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L. P TLALETSI

JUDGE PRESIDENT

On behalf of the Applicant:	**Adv. A Stanton**
Instructed by:	Engelsman Magabane Inc.
On behalf of the First Respondent:	**Adv Njeza**
Instructed by:	Motlhamme Attorneys
On behalf of the Second Respondent:	**Mr Davis**
Instructed by:	State Attorney