REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C72/2014

In the matter between:

RIYAAD NORODIEN	**Applicant**
and	
AJAX CAPE TOWN FOOTBALL CLUB (PTY) LIMITED T/A AJAX CAPE TOWN FOOTBALL CLUB	**First Respondent**
NATIONAL SOCCER LEAGUE T/A THE PREMIER SOCCER LEAGUE	**Second Respondent**
SOUTH AFRICAN FOOTBALL ASSOCIATION	**Third Respondent**

Heard: 13 February 2014

Delivered: 12 March 2014

Summary: The Labour Court has no jurisdiction to adjudicate a dispute in which the applicant has submitted that he is not an employee.

REASONS FOR JUDGMENT

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Lallie J

[1] On 12 March 2014, I granted an order dismissing the applicant's urgent application. I further ordered the applicant to pay the first and second respondent's costs including costs of two Counsel, excluding the costs of 13 February 2014.

Reasons for my judgment are provided below.

[2] The applicant sought an order in the followings terms:

"1. Dispensing with the ordinary time limits and Court Rules relating to service, condoning non-compliance with the said rules and directing that this Application be heard as one of urgency, in terms of Rule 8 of the Rules of the Honourable Court;

2. Declaring that the Power of Attorney annexed hereto marked "X" is *void ab initio*, alternatively has lapsed, further alternatively has been validly cancelled, and is of no force or effect;
3. Declaring that the Professional Footballers Fixed Term Letter of Appointment dated 6th December 2013,together with Schedule 1 thereto, a copy of which annexed hereto marked "y", is *void ab initio* and of no force or effect;
4. Declaring that the Applicant's registration with the Second Respondent dated 17th December 2013, as appears from Annexure "Z" hereto, is *void ab initio* and of no force or effect;
5. Directing the Second Respondent to cancel the aforesaid registration;
6. Directing that the Applicant is cleared to join a club of his choice, and that he may be registered by the Second Respondent to play for such club upon compliance with the Second Respondent's other registration requirements;
7. Ordering that the First Respondent pay the costs of this Application on an attorney and client scale, save in the event of any other Respondents opposing this Application, and in which event ordering the other Respondents who may oppose to pay the costs of this application, together with the First Respondent as aforesaid, on the attorney and client scale, jointly and severally, the one paying the other to be absolved;
8. Granting the Applicant such further and /or alternative relief as the above Honourable Court may deem fit".

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[3] The factual background of this matter is that at the tender age of 13 years the applicant made an application to join the Ajax Cape Town Youth Development Academy on 13 July 2008. He was assisted by his mother who was his sole guardian to complete the standard application form. His application was successful and he commenced playing football for the first respondent ("Ajax") in its amature Youth Academy ("the academy") on the same year.

[4] The applicant submitted that he was furnished, for the first time, with a copy of his application to join the academy and a special power of attorney on 23 November 2012. The documents were attached to a letter he received from Mr Ari Efstathiou ("Efstathiou"), the executive director of the first respondent in which he advised him of his graduation from the Ajax Youth Development Program. Dealing with prayer 2 of the notice of motion the applicant submitted that the power of attorney does not appear to be initialed on the first page and does not appear to have been signed by both his mother and himself where there are designed signature spaces on the second page. Their names are merely printed with the hand writing of the same person in the space designated for signatures. The absence of their signatures renders the power of attorney, according to the submission, not binding and invalid. Another ground the applicant sought to rely on is that the witness did not initial the first page, and signed on the second page only. The applicant expressed the view that the power of attorney is either signed by one instead of two persons as required in its content or is not signed at all. It is not the power of attorney he and his mother were required to sign. The applicant does not rule out the possibility that they did not sign a power of attorney at all although the memories of both his mother and himself have paled.

[5] The applicant bases his further attack on the validity of the power of attorney on the purpose for which it was used by the first respondent in that it circumvented his right to agree to his terms of employment, particularly when he attained the age of 18 years and available to sign his documents. The applicant submitted that because the power of attorney is invalid, his registration with the second respondent as a professional football player is also invalid as it is based on the power of attorney.

[6] The applicant stated unequivocally that he is not an employee. He submitted that his contract of employment is dated 6 December 2013. It is not signed by him but by Efstathiou, purporting to act both for the second respondent and the applicant in terms

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of the power of attorney. Efstathiou accepted the terms of the contract on behalf of applicant a day before the offer of employment was made.

[7] The first respondent submitted that this court lacks jurisdiction over this matter because the applicant contended that he is not an employee. He may therefore not approach this Court as there is no employment relationship. Both the first and second respondents submitted that the jurisdiction of this Court is ousted by the arbitration clause in the second respondent's constitution which is binding on the applicant and precluded the applicant from approaching this Court before the second respondent's internal remedies are exhausted.

[8] This matter was heard on an urgent basis because the applicant had fulfilled all the requirements of urgency. Although the first respondent argued that the applicant had known of his desire to launch this application for a while, delayed and therefore created the urgency, I am satisfied that the applicant received the relevant documents from the first respondent only 5 days before this application was launched. He brought this application without undue delay thereafter. In reaching the decision that the applicant has fulfiled the requirements for an interdict, I have considered the averments by the first and second respondents that the applicant has an alternative remedy of referring this dispute to arbitration in terms of the second respondent's constitution which ousts the jurisdiction of this Court. I am not convinced that the arbitration clause precluded this Court from determining the issue of jurisdiction and further issues should it become necessary.

[9] The next determination to be made in this matter is whether this Court has jurisdiction over this dispute when the applicant has unequivocally submitted that he is not an employee. The first respondent has submitted that the answer to the enquiry should be in the negative. The second respondent argued along the same lines in its further submissions on the issue.

[10] For this Court to adjudicate a dispute, it requires the necessary jurisdiction. Jurisdiction is the power or competence of a court to hear and determine an issue between parties. See *Gcaba v Minister of Safety and Security*[1]. In *Muthusamy v*

[1] 2010 (1) SA 238 at para 73

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Nedbank Ltd,[2]it was held that where the applicant contended that he was not an employee, 'he finds himself without a jurisdictional niche of the LRA'.

[11] The applicant based his averment that he was not an employee on the power of attorney he considers invalid, his contract of employment and the second respondent's constitution and rules.

[12] The applicant raised a number of arguments which were vehemently opposed by the first and second respondents, to the effect that even if he approached this Court on the basis that he was not an employee, it has the necessary jurisdiction to entertain the present application. Amongst the authorities he relied on, is the decision in *McCarthy v Sundowns Football Club and Others*[3]where the applicant, a professional football player had concluded a two year contract with the Sundowns Football Club (Sundowns) which required him to acquire a clearance certificate from Sundowns on its termination. The contract further provided that at its expiry, Sundowns had an irrevocable option to renew it for a further two years. The applicant approached this Court claiming that he was a 'free agent' at the expiry of the two year period and entitled to the clearance certificate. He denied that the renewal clause was binding on him as he did not agree to it. The court assumed jurisdiction although the contract of employment between the applicant and Sundows had expired.

[13] In his argument that the McCarthy decision should be followed, the applicant sought to rely, inter alia, on the following dictum:

> 'The employment contract of professional footballers differs substantially from the contracts which one finds with other employees. In particular, a professional footballer cannot resign during the period of his contract of employment and take up employment with another club without agreement of his old club. If a professional footballer leaves a club after the period of his contract of employment, he cannot simply begin playing for another club unless and until he is provided with a clearance certificate by the club that he leaves as the NSL would not register the player without a clearance certificate'.

[14] The *McCarthy* decision is distinguishable in that in considering the application before him, Waglay J took cognizance of the fact that the applicant was a 25 year old

[2] (2010) 31 *ILJ* 1453 (LC)
[3] [2003] 2 BLLR 193 (LC) at 195 G-H

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footballer as opposed to a professional footballer who is under 23 for whom, in terms of FIFA and NSL regulations training and compensation fees may be payable to clubs who contributed to the training of such player prior to the age of 23. It is common cause that the applicant is not 23 years old yet and training and compensation fees play a prominent role in this matter.

[15] In terms of the doctrine of *stare decisis* I am not compelled to follow a decision of another Labour Court Judge. The reason I decline to follow the *McMarthy* decision is that the material facts which persuaded the court to assume jurisdiction are absent from the matter before me.

[16] The applicant argued that notwithstanding the reality that he is not an employee, the current dispute arises from labour relations. The source of this court's jurisdiction over his dispute is therefore section 157 (2) of the Labour Relations Act 66 of 1995 ("LRA") which provided as follows:

> '(1) 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-
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> (a) employment and from labour relations;
> (b) any dispute over the 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'.

[17] Provisions of section 157 were interpreted as follows in *Gcaba (supra)*[4]

> '[72] Therefore, s 157 (2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s 157 (2)(a), (b) and (c).

[4] (2009) 30 ILJ 2623 (CC) at para 72 and 73

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[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157 (2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgement 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 High Court and Equality Court, can no longer be adjudicated 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'.

[18] The applicant may therefore not rely on section 157 (2) and allege that the present dispute arises from employment and labour relations because his case is that when he approached this court he was not an employee. There was therefore, no employment as envisaged in section 157 (2) (a). The dispute does not even arise from labour relations. The term labour relations does not have a wide interpretation as the applicant argues that it has. The jurisdiction of this Court referred to in section 157 (2) as enunciated in *Gcaba (supra)* does not extend to every dispute arising out of employment relations. It is limited to those disputes for which the LRA creates a remedy. The LRA has not created a remedy for an applicant who approaches this Court in the applicant's circumstances alleging that he or she is not an employee. Jurisdiction is determined on the pleadings. The averment that the applicant is not an employee is not insignificant. It is in the heart of the applicant's case. He sought to support it with averments of the invalidity of the power of attorney, his contract of employment, his registration documents and the constitution and the rules of the second respondent.

[19] I have considered the applicant's argument that this Court should exercise jurisdiction over this matter as it does in dismissal disputes which involve people who are no longer employees. This argument loses sight of the fact that the LRA expressly grants this Court jurisdiction over such dismissal disputes. When dismissed employees approach this Court they do so because they claim relief in terms of the LRA.

[20] The weakness of the applicant's reliance on the interpretation of section 157 of the LRA by this Court in *McCarthy (supra*) disregards the fact that *McMarthy* was

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decided before the Constitutional Court elucidated the correct meaning of the same section in 2009, in *Gcaba (supra*).

[21] It is for those reasons that the application was dismissed.

[22] An order was granted for the applicant to pay the first and second respondent's cost including costs of two Counsel. The costs excluded the costs of 13 February 2014. This matter was set down for 13 February 2014 on which day it was postponed to the following day. The postponement could not be attributed solely to the conduct of the applicant. It would therefore have, in the circumstances not be fair to order the applicant to pay the costs of the 13 February. Section 162 of the LRA provides that an order for payment of costs may be made according to the requirements of law and fairness. The law requires that cost should generally follow the result. It would not have been fair to expect the first and second respondent to incur costs as a result of the incorrect manner in which the applicant chose to approach this Court.

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Lallie J

Judge of the Labour Court of South Africa

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APPEARANCES

For the Applicant: Mr Bollo of Biccari Bollo Mariano Inc

For the First Respondent: Advocate Stelzner SC with Advocate Coetzee

Instructed by A J Tapeenden & Co

For the Second Respondent: Advocate Cassim SC with Advocate Mooki

Instructed by Werksman Attorneys

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