

(1) REPORTABLE : YES / NO

(2) INTERESTED TO THE JUDGES : YES / NO

(3) REVISED

03/08/2017
DATE


SIGNATURE



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 4915 / 2017

In the matter between:

THE SOUTH AFRICAN DEMOCRATIC TEACHERS UNION

APPLICANT

and

THE MEMBER OF THE EXECUTIVE COUNCIL

1ST RESPONDENT

DEPARTMENT OF EDUCATION LIMPOPO PROVINCE

**THE HEAD OF DEPARTMENT OF EDUCATION LIMPOPO
PROVINCE**

2ND RESPONDENT

JUDGMENT

SIKHWARI AJ

INTRODUCTION

- [1] This matter came by way of an urgent application on the 13 July 2017 before my brother, Muller J. The matter was postponed *sine die* by agreement between the parties. The respondents were ordered to file an answering affidavit, if any, on the 20 July 2017 and the applicant to file the replying affidavit on 25 July 2017.
- [2] It was further agreed that the disputed deductions on the salaries of members of the applicant which were due to be effected on the 15 July 2015 will now be done on the 15 August 2017.
- [3] Subsequent to the above background, the matter was then enrolled for hearing on the urgent court roll of the 01 August 2017. The respondent raised two points in *limine* which had to be determined first before venturing on merits; to which this court's lack of jurisdiction and lack of urgency.

LACK OF JURISDICTION

- [4] On the first point in *limine* for this court's lack of jurisdiction, the respondents submitted that the case of the applicants' complaint is that the salary deductions contemplated by respondents fly in the face of Section 34 of Basic Conditions of Employment Act 75 of 1997, as amended ("the BCEA"). Section 77(1) of the said

Act states further that “*the Labour Court has exclusive jurisdiction in respect of all matters in this Act* “. Section 77 (3) of the said Act confers concurrent jurisdiction for the civil courts in respect of matters concerning contract of employment. In essence, it echo Sections 157(1) and 157(2) of the Labour Relations Act 66 of 1995, as amended (“the LRA”).

- [5] Respondents further relied on the Constitutional Court judgment of *Gcaba v Minister for safety and Security & Others 2010 (1) SA 328 (CC)*, particularly paragraph [70] thereof which states that “Section 157 (1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under Section 145. Section 157 (1) should therefore, be given expansive content to protect the special status of the Labour Court, and Section 157 (2) should not be read to permit the High Court to have jurisdiction over these matters as well”. Reliance was also made on paragraph [56] of *Gcaba* judgment.

- [6] The applicant’s submissions on jurisdiction were mainly based on the provisions of Section 157 of the LRA which provides as follows:

157. Jurisdiction of Labour Court

(1) Subject to the Constitutional 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 Supreme Court-*
- (a) *in respect of any alleged Violation or threatened violation by the state in its capacity as employer of any fundamentals right entrenched in chapter 3 of the Constitutional; and*
 - (b) *in respect of any dispute over the Constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, the state in its capacity as employer.*
- (3) *Any reference to the court in the Arbitration Act, 1965 (Act no. 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.*

[7] Applicant submitted further that the high court has concurrent jurisdiction with the Labour Court in matters of the nature of the dispute which is

before court in *casu*. Applicant referred this court to the unreported judgment of the Labour Court of *Makume Simon Mosiuwa v Hakenen Transport CC*, Case number J33 / 10, where it was held that the Labour Court does not have jurisdiction concerning the enforcement of employee's rights as contained in the BCEA, other than those which consist of monetary claims. The case before this court is not for a monetary claim. It is an urgent interdict application.

[8] Applicant has also relied on paragraph [71] of *Gcaba* judgement (*supra*) where it states that "Section 157 (2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violation of fundamental rights entrenched in Chapter 2 of the Constitution and arising from employment and Labour relations, any dispute over the Constitutionality of any executive or administrative act or conduct by the state in the capacity as employer and the application of any Law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and Labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, Section 157 (2) has brought employment and Labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court...."

[9] In my view, the legislature did not intend to oust the jurisdiction of the High Court in all other matters except those stated in Section 157 (1) of the LRA. The Constitutional Court has not done so in *Gcaba* (*supra*) and *Chirwa v Transnet* decisions. The matter before this court could not be classified as a matter within the "exclusive jurisdiction" of the Labour Court. It is not a traditional labour dispute which must firstly go through the labour forums like the CCMA, Bargaining Councils, *etc.* It is not a dispute

about the legality and / or protection of the strike or lock-out or any industrial action.

[10] I am not persuaded that the nature of the dispute herein is such that the jurisdiction of high court has been ousted. Respondents were not able to show the court as to what facts or circumstances have made this interdict application to fall within the ambit of a matter in which the Labour Court must enjoy "exclusive jurisdiction" other than to rely of Section 77 of the BCEA, and section 67 (3) of the LRA which deals with strike.

[11] As stated earlier, the matter before this court is an urgent interdict; it is not a monetary claim. Therefore, reliance of the BCEA falls away. Applicant's version is that its members were not on strike but were obstructed from going to work by striking members of PSA and NEHAWU unions. Respondents dispute this version and state that applicant's members were on strike. Respondents have no direct evidence to support their strike version except to try to draw a conclusion from the fact that one Advocate Seakamela was at work although he / she is a leader or shop steward of the applicant. The presence of Adv Seakamela is not conclusive proof that the applicant's members were on strike. That is not the only inference to be drawn from the said facts. Therefore, reliance on Section 67 (3) of LRA is not sustainable.

[12] In my view, the respondents have failed to show that this court has no jurisdiction to hear the application. The point in *limine* in this regard should fall with costs.

URGENCY

- [13] The second point in *limine* raised by the respondents is lack of urgency. The respondents relied on the fact that the applicant will not suffer irreparable harm if the matter is not heard on urgency as the applicant will be able to repay the deducted amounts from the salaries of the members of the applicant should it later be found that the applicant's members were not on strike. The applicant is invoking the "*no work no pay*" policy.
- [14] The applicant relies on paragraph 44 of the founding affidavit which stated that "*I submit that the urgency in this matter is manifest particularly in the light of prejudice which the affected employees will suffer and the damage which will be caused to their reputations should they default on their financial commitments and the irreversible consequences which arise owing to the glaring illegality and unlawfulness of the conduct of the respondents.*"
- [15] Urgent applications are regulated in terms of Rule 6(12) of the uniform rules of this court. Rule 6(12)(b) states that "*in every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reason why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course*".

[16] In *Cekeshe and Others v Premier Eastern Cape and Others* 1998 (4) SA 935 (TKD) at page 948 A-F, Van Zyl, J stated that:

"It is correct that an applicant who wishes to rely on the procedure provided for in Rule 6 (12) (b) must set out sufficient facts in the founding affidavit to enable the court to decide whether urgent relief should be granted. Specific averments of urgency must be made and facts upon which such averments are based must be set out in the affidavit where it is not otherwise apparent that the matter is urgent. However, as stated by Kirk-Cohen J (as he then was) in *Sikwe v SA Mutual Fire and General Insurance CO Ltd* 1977 (3) SA 438 (W) at 44 OH, it does not follow that an application is necessarily defective if the form referred to in Rule 12 is not strictly adhere to, but that it is:

"..... the substance of the affidavit, and not its form, which will weigh with a court; if any affidavits sets out facts upon which a court can decide that an applicant is entitled to relief in terms of the subrule, the court will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with the requirements of the subrule, even though he does not make a specific averment that it is urgent".

"The same reasoning in my view applies to the requirement contained in Rule 6 (12) (b) that an applicant must set out reasons why he could not be afforded substantial redress at the hearing in due course i.e within the normal time limits as prescribed by Rule 6. In their founding affidavit the applicants state that they have been advised that they would not receive payment of their salaries as from August 1997. It is alleged that the applicants would financially be prejudiced should they not continue to receive their salaries. It is averred that if they are not paid the applicants would be unable to honour their financial commitments and that this is the position notwithstanding the fact that they have continued to report for duty.

"I am of the opinion that, on the facts alleged in the applicants' founding affidavit in conjunction with the nature of the relief claimed, the matter is one of urgency. By not receiving their salaries the applicants would be suffering financial prejudice".

- [17] In the case before this court, I share the same views expressed above by Van Zyl, J. in my view, the applicant's founding affidavit explained the irreversible financial prejudice which applicant's members will suffer if this matter is not heard on urgency. Failure to meet monthly financial commitments will attract interests or tarnish one's credit worthiness which may not be cured by redress in due course or later re-payment of deducted money from salaries.
- [18] Financial loss does constitute a valid ground for urgency. In the case of *20th Century Fox Film Corp v Black Films 1982 (3) SA 582 (WLD)* at page 586E-F, Goldstone J stated that:
- "It was then submitted that the matter was not urgent because, as yet, the applicants are not in competition with the respondent. That, however, ignores the stated intention of the applicants to exploit the copyright in video cassettes in South Africa.
- "The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorneys in fact decided to set the matter down on a Tuesday when the Chamber Court was in any event in session during the Court recess to dispose of unopposed applications.
- "In opinion the urgency of commercial interests may justify the invocation of Uniform Rule 6 (12) no less than any other interests. Each case must depend upon its own circumstances..."
- [19] Furthermore, the fact that the respondents have been unable to pay salaries of members of the applicant which led to contempt of court proceedings under case number J2909 / 2016 of the Labour Court is indicative of the severity of the prejudice which the applicants members

may have to suffer before getting their refund of deducted money, should it be necessary in future (see annexure "MJM7", paginated page 128, Labour Court's rule *nisi* for case number J 2909/16).

CONCLUSION

[20] I am not persuaded that the matter is not urgent. The applicant will not have substantial redress in due course if this application is not heard on urgency. In the circumstance, the point in *limine* for lack of urgency must fail. Costs will follow the vent.

ORDER

[21] Accordingly, I make the following order:

1. That the point in *limine* for this court's lack of jurisdiction is dismissed.
2. That the point in *limine* for lack of urgency is dismissed.
3. That the first and second respondents are ordered to pay the costs for the two points in *limine*, jointly and severally with the one paying the other to be absolved.

4. That the matter is postponed to the 8 August 2017 at 11h30 in the morning for arguments on merits.



MS SIKHWARI, AJ
Acting Judge of the High Court,
Limpopo Division, Polokwane

REPRESENTATIONS:

- | | |
|--------------------------------|------------------|
| 1. Counsel for the Applicant | : Adv M Mannya |
| 2. Counsel for the Respondents | : Adv KE Masoga |
| 3. Date of hearing | : 01 August 2017 |
| 4. Date handed down | : 04 August 2017 |