



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Case No: CA&R 63 / 15
Heard: 01 / 02 / 2016
Delivered: 05 / 02 / 2016

In the matter between:

ALLEN GREGORY CLOETE

Applicant

v

MEC: DEPARTMENT OF EDUCATION: NC

Respondent

THE HOD: DEPT OF EDUCATION: NC

2nd Respondent

**THE DEPUTY DIRECTOR: DEPT OF
EDUCATION**

3RD Respondent

**THE DISTRICT DIRECTOR: DEPT OF
EDUCATION - Z F MQCAWU DISTRICT:
UPINGTON**

4TH Respondent

**THE DISTRICT DIRECTOR: DEPT OF
EDUCATION - JOHN TAOLO GAETSWEWE
DISTRICT: KURUMAN**

5th Respondent

**THE CFO: DEPARTMENT OF EDUCATION
NORTHERN CAPE PROVINCE**

6th Respondent

Coram: Kgomo JP et Pakati J

JUDGMENT

KGOMO JP

[1] The applicant, Ms Davids-Paulse, is in the employ of the Department of Education and currently based in Upington, Northern Cape. She was previously an educator and rose to the position of school principal in Kuruman, Northern Cape. She now seeks the following relief:

- 1.1 That the decision taken by anyone of the following respondents during March 2012 in terms of which an amount of R108 432-00 was deducted from her salary be reviewed and set aside: The MEC of Education; the HOD of Education, the Deputy Directors of Education (Upington and Kuruman) and the CFO of Education (the 1st to 6th respondents, respectively).
- 1.2 That a mandamus be issued ordering the said respondents to refund Ms Davids-Paulse the stated deducted amount; and
- 1.3 That the respondents bear the costs of this application jointly and severally, the one paying the others to be absolved *protanto*.

[2] The respondents have raised two points *in limine*:

- 2.1 First, that this Court lacks the required jurisdiction to adjudicate upon this application as the Labour Court has been vested, in terms of s 157(1) of the Labour Relations Act, 66 of 1995, with exclusive jurisdiction.
- 2.2 Secondly, that, in any event, Ms Davids-Paulse has not exhausted all her internal remedies before approaching this Court for the mooted relief and must be non-suited.

THE JURISDICTION CHALLENGE

[3] Section 157(1) and 2 of the Labour Relations Act makes the following stipulation:

“ ”

- [4] Section 186(1) and (2) are pivotal to this enquiry provide:

“ ”

- [5] In **Makhanya v University of Zululand** 2010 (1) SA 62 (SCA), a matter involving termination of employment of a professor from the University of Zululand, Nugent JA remarked in this terms on the issue of jurisdiction in this context at 69A-G (paras 16-18):

“16.

- [6] The question of the infringement of a contribution right in the matter were are seized with does not arise, nor was it raised, neither does the question of a contractual obligation arise and was also not raised. If therefore, on the facts of this case, which I will examine shortly, it is found that we lack jurisdiction **Makhanya** at p83B-D (para 83):

“ ”

- [7] Demonstrably, the applicant and her legal representatives saw the challenges coming and anticipated them comprehensively in the following manner in the Founding Affidavit (paras 52-61):

“ ”

THE HISTORICAL BACKGROUND TOT HIS MATTER

- [8] Strictly speaking, more pertinently anchored on the Makhanya-judgment (above), should we find that we lack jurisdiction to adjudicate on this dispute the necessary or ruling on the second objection taken, viz that the application serves prematurely before us because all the internal

processes have not been followed or all the internal remedies have not been exhausted, would fall away. This must be so because the substratum would have fallen away. Put differently, our order would be lack authority or it would be a *brutum fulmen*.

- [9] The applicant claims to have taken sick leave for the period 25 July 2011 to 26 September 2011 (two months); and thereafter from 27 September 2011 to 31 December 2011, another two months. She was, on this evidence absence from work, rightly or wrongly, for an uninterrupted period of four months.

- [10] The applicant states in her founding affidavit that *“due to the fact that the abovementioned periods of sick-leave exceeded the periods of sick-leave which I would have been entitled to under normal circumstances, I was expected to apply for temporary additional sick leave in terms of the Policy and Procedure on Incapacity Leave and IC-Health Retirement (hereinafter referred to as PILIR) and more specifically in terms of clause 7.1.2 of PILIR.”*

- [11] The applicant goes on to state that in Kuruman, where she was a principle of a school, she was treated by Dr H Scheepers on seven occasions (with specific dates supplied) between 01 June 2011 to 09 January 2012. She maintains that on each consultation she furnished the PILIR forms to the doctor to complete *“but he unfortunately neglected”* to do so. Appended to the applicant’s papers, marked **“JAC1”**, is what she terms *“a copy of pages 18-30 of the PILIR form which pertains to me and which was completed by Dr Scheepers.”*

[12] “**JAC1**” is pro-forma. At p18 thereof is reflected “CONFIDENTIAL” and “Part C: Statement by Attending doctor” and importantly for present purposes, in bracket: “The employ is responsible to obtain this statement form the doctor.” The form purports to have been complicated and signed by Dr Scheepers on 18 November 2012. “JAC1” reflects all seven consultation dates the applicant alluded to, the last being 09 January 2012.

[13] The application is aggrieved by the fact that on 12 March 2012, when she was already stationed in Upington, she *“received a visit from two officials of the Department, Mr Gordon and Mr Demas, who requested me, apparently upon instruction of 2nd Respondent [the HOD of the Department] to submit the relevant PILIR forms within 2 (two) working days.”*

[14] On the same date (12/03/2012) the two emissaries delivered this letter, JAC2, dated 09 March 2012 to the applicant the receipt which she signed for:

“”

[15] The applicant says she queried the two-day deadline and was told and assured by Mr Gordon that her default to comply with the PILIR policy and prescripts will be condoned if cogent reasons are furnished. She has appended “JAC3” dated 16 March 2012, “JAC4” dated 27 March 2012 and “JAC5” dated 28 March 2012 which purports to the handwritten letters and reminders to Dr Scheepers to complete the PILIR forms and hand them to one Titus and/or John. “JAC6” purports to be transmission confirmation of such communication to her doctor. Applicant maintains that she copied “JAC3” to “JAC6” to the Departemnt and also communicated telephonically with certain of its officials. The Departments disputes this. There

is no need to resolve this dispute because its resolution will not contribute any essence to the outcome of this judgment.

[16] The complainant feels betrayed that notwithstanding all the assurances given to her and the representations that she made she was contacted telephonically by a Mr Burger of the Department at the end of March 2012” who informed her that a decision has been taken to deduct R108 432.00 form her salary in 12 monthly instalments.

In reaction she wrote to none other the HOD of the Department (2nd Respondent) on 02 April 2012 in “JAC7” that (my translation):

“LEAVE WITHOUT SALARY (PAY): MS JAC DAVIDS-PAULSE: 5179--- [last digits omitted]

- (a) Leave without pay on my salary has currently been instituted by the Department in the amount of R108 432.76.*
- (b) I hereby request that the amount be deducted over a period of 12 months, but if possible over a period of 24 months.*
- (c) My current financial position is such that I cannot afford the envisaged deduction over a period of 12 months. I am the sole breadwinner who has to see to the maintenance of my son and aged parents.”*

[17] Under Part B of a “Details of Grievance” Form “JAC8” an applicant is asked: What are you aggrieved about?” She states: “Acceptance of PILIR submission, because Dr completed it.” An applicant is asked: “What solution do you propose? She answers: “Install my salary.” Under her signature she has supplied only the year “2012” but omitted the day and month. However, below the applicant’s signature

is reflected B.I Mathupi's signature, his designation is "AD: Labour Relation' and dated 10 April 2012, and accordingly after she wrote the letter to the HOD on 02 April 2012.

[18] On 21 February 2014 Fletcher's Attorneys, the applicant's attorney wrote a 6-page letter the Department largely rehashing the history of this matter already covered hereinbefore. However, the following extracts points to the gravament of applicant's case:

18.1 "We are furthermore of the opinion --- page 44) made from her salary by the Department."

18.2 "Section 7(2)(a) of PAJA however precludes --- p45 referred to your offices for your kind attention??"

[19] JAC13 is a letter written by the Director General of the Public Service Commission (the PSC) dated 29 October 2014 to Fletcher's Attorneys warning or advising them that the applicant had not, amongst other things exhausted her internal remedies. JAC13 reads in part:

"According to the said Notice of Motion --- (copy 53 -54) Pubic Service Commission and could not be dealt with."

THE LEGAL SUBMISSIONS

[20] Counsel on both sides have referred us to numerous case in respect of which the question whether a "salary" is a "benefit' or not within the contemplation of s 186(2)(a) of the Labour Relations Act. None of them referred to **Appollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Medication and Arbitration and Others** [2013] 5 BLLR 434 (LAC) Cagney Musi AJA (JM Hlophe and Patel JJA concerning), which we brought to their attention. We

afforded them to file supplementary heads having heard them, which they did.

[21] Ms A Stanton, counsel for the respondents, urged us to follow the not only the Apollo Tyres decision but **South African Airways (Pty) Ltd v GJJV** [2014] 8 BLLR (LAC) which followed the Apollo Tyres judgment. Mr AD Olivier, for the applicant has now shifted ground and subtracts that, however that may be, the High Court retains jurisdiction by virtue of being clothed with concurrent jurisdiction with the Labour Court and in addition there is a constitution dimension or element to the applicant's matter which right has been infringed by the Department.

[22] In the **Apollo** judgment at paras 25-28 the LAC held:

“ ”

[23] At paras 48 – 50 the LAC then decided:

“ ”

[24] In **South African Airways (Pty) Ltd v GJJV** (supra) the LAC, in approving the Apollo decision stated at ---.

[25] What the decisions in Apollo Tyres and the SAA v GJJV cases convey to employees who find themselves in similar circumstances as the applicant in *casu* is that they would stand on solid ground.

[26] According to Mr Olivier the matter does not end there and agitated that we assume jurisdiction by virtue of the our purported jurisdiction and/or the constitutional issue raised. Counsel relies on **Gcaba v Minister of Safety and Security** 2010(1) SA 238 (CC) at pp 248-254.

[27] -----.

[28] I am, in the circumstances, satisfied that the application must fail. I therefore make the following order.

ORDER

The point *in limine* is upheld on the jurisdictional challenge. The application is dismissed.

F DIALE KGOMO
JUDGE PRESIDENT
 Northern Cape Division, Kimberley

I concur

B M PAKATI
JUDGE
 High Court of South Africa
 Northern Cape Division, Kimberley

<u>On behalf of the Applicants:</u>	Adv D.A Olivier (-----)
<u>On behalf of the Respondent:</u>	Adv A. Stanton (-----)