

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



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 495/13

In the matter between:

RIVONIA MORWAKGOSI

APPLICANT

And

NATIONAL UNION OF MINE WORKERS

FIRST RESPONDENT

PRESIDENT: NATIONAL UNION OF MINE WORKERS

SECOND RESPONDENT

GENERAL SECRETARY: NATIONAL UNION OF MINE WORKS

THIRD RESPONDENT

Date of hearing: 13 September 2013

Date of judgment: 08 November 2013

JUDGMENT

PHATSHOANE J

1. Mr Rivonia Morwakgosi, the applicant, approached this Court for relief in the form of a mandamus that the National Union of Mine Workers (NUM); the President of NUM; and the General Secretary of NUM, the first to the third respondents, be ordered and/or compelled to furnish him with the written reasons for his dismissal and the transcribed records of the disciplinary enquiry held on 07 August 2012. Attendant costs on a punitive scale are also sought.
2. The applicant was an employee of De Beers Consolidates Mines (Pty) Ltd (De Beers) since 16 October 1985. He was seconded to NUM as a Regional Chairperson, Northern Cape, but remained an employee of De Beers. On

07 August 2012 the applicant was summoned to attend a disciplinary enquiry at the head offices of NUM in Johannesburg where he faced two counts. Count 1 related to fraud alternatively theft. It was alleged that he lodged a claim at NUM's Kimberley Regional office for the refund of petrol expenses in the amount of R901.00 but was in the end exonerated. On count 2 he was accused and found guilty of gross dishonesty. He was relieved of his duties as the Regional Chairperson of NUM with effect from 14 September 2012, which decision was confirmed on 06 October 2012. The applicant's services with De Beers were terminated with effect from 31 October 2012. He is currently unemployed.

3. Clause 28.1 of NUM's constitution provides that any person found guilty has a right of appeal, which must be submitted in writing to the relevant appeal body within seven days of the notice of the adverse decision. The applicant states that on 06 October 2012 he directed a letter to NUM in which he notified them of his intention to file an appeal against the decision to remove him from his office. He also requested that he be furnished with copies of the transcribed records of the disciplinary enquiry. His request was not acceded to. On 09 October 2012 the applicant's attorneys directed a letter to the General Secretary of NUM in which the following is recorded:

"RE: NOTICE OF APPEAL AGAINST NEC RESOLUTION OR FINDING OF THE DISCIPLINARY HEARING REFERRED TO IN YOUR LETTER DATED 03 OCTOBER 2012

We refer to the above mentioned matter as well as your letter referred to above, copy of which is attached hereto for your easy reference.

Please be advised that we are acting on behalf of our client, Mr Rivonia Malombo Morwakgosi. Our client instructed us to notify your good selves of his intention to invoke his right to appeal the findings of the disciplinary hearing and/or the resolution of the NEC. However, we find it difficult to convey to you our grounds of appeal because our client has not yet been issued with the report and/or transcribed record which would in all probabilities outline the decision of the disciplinary committee and reasons thereof.

Further, that your letter referred to above just conveys that the NEC has resolved and the resolution was conveyed to our client on the 14th September 2012 and that our client has been relieved of his duties as the Regional Chairperson of the Kimberley Region with effect from the 14th of September 2012.

In the light of the above, you are kindly requested to provide us with the disciplinary committee's report and /or a copy of the transcribed records in order to formulate our client's grounds of appeal.

We trust that you will find the above in order and that your cooperation will be highly appreciated."

4. An aspect which is perhaps noteworthy in the aforesaid correspondence is that the applicant requested written reasons **and/or** the transcribed records of the disciplinary enquiry. To my mind either one or both of these documents would have sufficed to enable him to exercise his right to appeal in terms of the trade union's constitution. As a sequel to his request of 09 October 2012, to NUM to be provided with reasons and/or the transcript, the applicant launched this present application on 02 April 2013, almost six months later. There is nothing showing that between 09 October 2012 and 02 April 2013 he did anything in an effort to enforce his right to appeal. In response to his application the respondents' attorneys directed a letter dated 12 April 2013 to his attorneys in which they recorded the following:

"We act for the respondents in this application, which was served on the first respondent's regional office on Monday 8 April 2013.

Your client's application is fatally defective in that the Labour Court has exclusive jurisdiction to determine a dispute of this nature.

Nevertheless, we attach the written reasons provided by the chairperson of your client's disciplinary hearing.

Our clients are not under any obligation to provide your client, who was present at the disciplinary hearing, with a transcribed record of the hearing.

In the circumstances, kindly confirm by close of business on 16 April 2013 that your client will withdraw the application. Should we not receive such confirmation, we are instructed to deliver a notice of opposition and thereafter an answering affidavit, and seek an appropriate costs order against your clients..."

5. The applicant was provided with the written reasons of the outcome of the disciplinary enquiry which runs up to 28 pages. One would have expected him to note his appeal in accordance with the union's constitution soon upon receipt of the reasons. He did not do so. He persisted with the application and still claimed that the refusal by NUM to provide him with the transcribed records of the disciplinary enquiry made it impossible for him to exercise his right of appeal. This should be seen in the context that by way of a letter from his attorneys referred to earlier the applicant pressed that if he were to be provided

with the reasons “**and/or**” the transcript he would be in a position to settle his grounds of appeal.

6. The first to the third respondents resist the application on the basis that this Court is not clothed with the jurisdiction to hear it. Firstly, they contend that s 157(1) of the Labour Relations Act, 66 of 1995 (the LRA), gives the Labour Court the exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court. Adv Rautenbach SC, for the respondents, contended that in terms of s 4(2)(a)(c) of the LRA every member of a trade union has a right to participate in its lawful activities, to stand for election and be eligible for appointment as an office bearer or official subject to the constitution of the trade union. He contended that any disputes concerning the interpretation or application of Chapter 11 of the LRA which includes s 4 may be referred to the Bargaining Council or the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation. Should there be an unsuccessful attempt at conciliation the dispute may be referred to the Labour Court for adjudication.
7. Mr Rautenbach further argued that the cause of action did not arise within the jurisdiction of this Court in that the disciplinary enquiry took place in Johannesburg; the decision to remove the applicant from office was taken in Johannesburg; the applicant's request to be furnished with the record of the disciplinary enquiry was directed to the General Secretary of NUM in Johannesburg; and the decision not to accede to the request was carried out in Johannesburg.
8. Landman AJ remarked as follows in *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another*(1998) 19 ILJ 635 (LC) at 638A-D:

'The notion that this court should intervene as does the High Court in *res media* to prevent a grave injustice is not an unattractive one. Any argument that proposes that a court should act "in rare cases where grave injustice might otherwise result or where justice might not by other means be attained" (see *Walhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119 - 20) appeals to one's sense of justice. If the Court has the necessary jurisdiction it might be prepared to entertain an application and should not draw back from doing so for fear of being

overwhelmed by ill-conceived applications. It must do this even though it may be sorely tempted to head off a flood of possibly undeserving applications for relief. In *Ndlovu v Transnet Ltd t/a Portnet* (1997) 18 UKH 1031 (IC); (1997) 7 BLLR 887 (LC) this Court considered whether it should intervene in similar circumstances but found that on the facts an intervention was not called for.'

The views expressed by Landman J above were approved and followed in *Mhlambi v Matjhabeng Municipality and Another* 2003 (5) SA 89 (O) at 94-95 paras 13-14.

9. In *Mkhwanazi v Plasser Railway Machinery (SA) (Pty) Ltd* (1993) 14 ILJ 237 (IC) it was held that the statement that 'it is a principle of fairly general application that a party should utilize his domestic remedy and procedures before approaching a Court' is an oversimplification of the law. The principle is that one has to look to the applicable Act, regulations, constitution or contract to determine whether the failure to exhaust internal remedies precludes or delays access to the court. The Court further held that where an employer fails to make a copy of the record of a disciplinary inquiry available to the employee, the employee's refusal to appeal in terms of the disciplinary code until the record is made available is justified.
10. The applicant did not point to any provision in NUM's constitution to assert his entitlement to the transcribed record of a disciplinary enquiry. He merely attached a copy of clause 28 of the NUM's constitution marked annexure "RM8" to his application as authority for his right to file an internal appeal within seven days of the decision. Clause 28 of NUM's constitution provides:

"28. Appeal Procedure

- 28.1 Any person found guilty has a right of appeal, which must be submitted in writing to the relevant appeal body contemplated in clause 5.3 within 7 days of the notice of the decision.
- 28.2 If the General Secretary or Deputy General Secretary is being disciplined, he or she must submit the appeal notice to the President.
- 28.3 Appeals against decisions of:

the Branch Disciplinary Committee must be heard by the Regional Disciplinary Committee;

the Regional Disciplinary Committee must be heard by the National Disciplinary Committee;

the national Disciplinary Committee must be heard by the NEC of any other body that the NEC appoints to hear the appeal.

28.4 The relevant appeal body must determine the procedure for the appeal.

28.5 The relevant appeal body may confirm, vary or reverse the decision appealed against."

11. In my view nothing stood in the applicant's way to file his appeal and to direct his request to be provided with the transcribed record at that appeal tribunal. After all clause 28.4 of NUM's constitution provides that the relevant appeal body must determine the procedure for the appeal.

12. Mr Khokho, for the applicant, contended that in terms of s 32(1)(b) of the Constitution of the Republic of South Africa, Act 108 of 1996, everyone has the right of access to any information that is held by another person that is required for the exercise or protection of any rights. In *MEC For Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at 488-489 para 40 Langa CJ pronounced:

"[40] This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'."

The national legislation enacted to give effect to the right of access to information that is held by another person and that is required for the exercise or protection of any rights as set out in s 32(1)(b) of the Constitution is the Promotion of Access to Information Act, 2 of 2000 (PAIA). In his papers the applicant does not rely on the PAIA and neither did he seek any relief that he be exempted from complying with the provisions of the PAIA.

13. In his founding affidavit the applicant states that he requires the transcribed record in order to formulate his grounds of appeal. In his reply he mentioned that the transcribed records were sought because this would enable him to approach the Labour Court 'for a proper deliberation over a labour related issue'. Belatedly, in his heads of argument, he submitted that he required the document in order to file a review application at the Labour Court against the decision of NUM in relieving him of his duties. Rule 7A of the Rules for the conduct of proceedings at the Labour Court is apposite. It provides, *inter alia*:

"7A Reviews

- (1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.
- (2) The notice of motion must-
 - (a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
 - (b) **call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done;** and
 - (c)
- (3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.
- (4) **If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.**
- (5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct...
- (8) The applicant must within 10 days after the registrar has made the record available either-
 - (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
 - (b) deliver a notice that the applicant stands by its notice of motion."

Rule 7A of the Labour Court also confers the right to information. I fail to see the logic in approaching this Court to obtain the transcribed records of the disciplinary enquiry for the purposes of filing a review in the Labour Court when there are mechanisms provided to access the solicited information under the auspices of that Court.

14. Section 157 of the LRA provides:

“157 Jurisdiction of Labour Court

- (1) Subject to the Constitution 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 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-
 - (a) employment and from labour relations;
 - (b) any dispute over the constitutionality of any executive or administrative act or 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.
- (3)”

15. The ConCourt resolved the previous overlapping jurisdictional uncertainties between the High Courts and the Labour Court and the precise constraints thereof in *Gcaba v Minister for Safety and Security* 2010(1) SA 238 (CC). In the wake of *Gcaba* it is now settled that a quintessential labour-related issue should be dealt with by the appropriate labour forums. The relevant ratio lies at 261-263 paras 70-73 where the following was held:

“[70] 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 s 145. Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and s 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.

[71] Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Ch 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 its 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, s 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. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role.

[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).

[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 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."

16. From the background sketched the applicant was relieved from his duties as the Branch Chairperson of NUM. The latter dispute may well have a bearing on his freedom of association which falls within the purview of chapter II of the LRA. Nevertheless, on the view I take of this matter, it is not necessary to determine if this Court has jurisdiction to hear it. From the analysis set out above the application stands to be dismissed.

17. There now remains the aspect of costs. Mr Rautenbach urged the Court to mark its displeasure by way of an award of costs against the applicant on a punitive scale. Indeed this litigation could have been avoided but I am not persuaded that this is a case where costs should be on a punitive scale. The fact that the applicant was cautioned not to pursue the litigation but persisted is not sufficient to warrant that he be censured with a punitive costs order. He sought, though unsuccessfully, to assert his constitutional right. In my view costs should follow the success on party and party scale.

Order:

18. In the result:

1. The application is dismissed with costs.

MV PHATSHOANE
JUDGE
NORTHERN CAPE HIGH COURT

<i>Appearance for the applicant : Adv.N.D Khokho</i> <i>Instructed by Mzuzu Attorneys</i>
<i>Appearance for the respondent: Adv.J.G Rutenbach SC</i> <i>Instructed by Cheadle Thompson & Haysom C/o Neville Cloete Attorneys</i>