

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2786/2008

In the case between:

H.A.GOLIATH

Applicant

and

MANGAUNG LOCAL MUNICIPALITY

1st Respondent

M RALEBESE: SPEAKER OF THE
MANGAUNG LOCAL MANICIPALITY

2nd Respondent

T M MANYONI: CITY MANAGER OF THE
MANGAUNG LOCAL MUNICIPALITY

3rd Respondent

G MOTHUPI: EXECUTIVE MAYOR OF THE
MANGAUNG LOCAL MUNICIPALITY

4th Respondent

JUDGEMENT:

MOLEMELA, J

HEARD ON:

04 SEPTEMBER 2008

DELIVERED ON:

11 SEPTEMBER 2008

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- [1] The applicant is employed by the 1st respondent as an Executive Director: Corporate Services. On the afternoon of the 11th of June 2008 the applicant received a notice of a meeting of the Council of the 1st respondent, which was to be held on the 12th June 2008. He also received an agenda that reflected that his employment contract would be one of the

matters to be discussed at that meeting. The applicant avers that based on the fact that the 1st respondent had, during March 2008, threatened to unilaterally shorten the duration of the applicant's fixed-term employment, he immediately suspected that the first respondent would, at that meeting, summarily terminate his employment without first giving him an opportunity to be heard. On the morning of the 12th June 2008 he approached this Court on an urgent basis. Relying only on viva voce evidence, he with leave of the court, sought an order prohibiting the respondents from terminating or invalidating his employment contract without following a fair procedure. My sister Ebrahim J granted an interim order and simultaneously issued a rule *nisi* calling upon the respondent to show cause, if any, why the following orders should not be made:

"2.1 That respondents be prohibited from terminating or invalidating applicant's employment agreement without following a fair procedure in accordance with the Labour Relations Act, No 66 of 1995 read with Schedule 8 thereof, alternatively the terms and conditions of the employment agreement.

2.2 That respondents and the Council of the first respondent be prohibited to table, consider, discuss, debate or to take any decision or resolution regarding the employment contract of the applicant.

2.3 That respondents be prohibited from interfering with the normal execution of performance of the applicant's normal duties, functions and competencies in terms of his employment contract and terms of service.

2.4 That respondents be prohibited from withholding or curtailing the payment of applicant's monthly remuneration and benefits in terms of his employment contract.

2.5 That respondents be ordered to pay the costs of the application, jointly and severally, the one to pay the other to be absolved; alternatively that the costs of this application be costs in the main cause."

[2] It was further ordered that "the orders as per clause 2.1, 2.2, 2.3 and 2.4 supra operate as interim interdicts with immediate effect, pending the final adjudication of an application for a declaratory order to the effect that the applicant's employment contract if (sic) valid and binding, to

be instituted by the applicant within 30 (thirty) days after the finalisation of this application”. Leave was also granted to the applicant to file his founding affidavit after the granting of the interim order and for the respondents to file opposing affidavits, if any. The applicant duly filed a founding affidavit after which the respondents filed a notice indicating that their opposition would be on points of law only.

[3] The rule *nisi* was, by consent of both parties, extended several times and today constitutes the agreed-upon return day. At the commencement of the proceedings both counsel were *ad idem* that, given the points of law raised by the respondents, I would essentially only have to decide whether this court has jurisdiction to grant the interim order sought by the applicant.

[4] It is common cause that the nature of the interdict sought by the applicant is of an interim nature. The applicant indicated in his founding affidavit that he would seek a declaratory order from the Labour Court. His counsel confirmed that this was still the applicant’s intention. Surprisingly though, despite relying on cases in which the courts granted interim

relief pending adjudication of matters in which they lacked jurisdiction, he was not prepared to concede, in so many words, that this court does not have the jurisdiction to adjudicate on the declaratory order regarding the validity of the applicant's employment contract. At first glance, it would seem that I do not have to decide on whether this court has the jurisdiction to adjudicate on the declaratory relief that the applicants intends seeking, especially as he has indicated that he will be launching his application at the Labour Court and not at this court. It will, later in my judgement, become evident why this court's jurisdiction in respect of the declaratory relief is integral to my decision as to whether this court has jurisdiction to entertain the application in respect of the interim relief sought.

- [5] The respondent's counsel contends that the basis of the applicant's discontent relates to his continued employment by the first respondent, to certain actions taken by the first respondent relating to this employment contract and an apparent fear that the applicant's contract will be terminated and invalidated. He accordingly contends that, in essence, the dispute before the court is a labour-related dispute for

which remedies have been provided in terms of the Labour Relations Act 66 of 1995. On those grounds, so the argument goes, the High Court does not have jurisdiction to adjudicate on the interim relief. As support for this contention counsel referred me to the Constitutional Court case of **CHIRWA V TRANSNET LTD & OTHERS, 2008(4) SA 367 (CC)**.

- [6] Counsel for the applicant contends that the High Court has inherent jurisdiction to grant interim relief and submits that I have to confirm the rule *nisi* and also grant an order enjoining the applicant to launch his application for a declaratory order within 30 days from the confirmation of the rule *nisi*. His contention as I understand it is that an interdict directed at the maintenance of the *status quo* pending a final determination of the matter is an interim interdict and the High Court always has an inherent jurisdiction to grant such relief irrespective of whether or not it has jurisdiction to adjudicate on the main dispute. Thus, in a nutshell, the applicant's counsel contends that the order the applicant is seeking is a *status quo* order and the High Court would, on account of its inherent jurisdiction, therefore have jurisdiction

to grant that order even if it did not have jurisdiction in respect of the main dispute. As authority for this view he relied on the following cases: **AIROADEXPRESS (PTY) LTD v CHAIRMAN, LOCAL ROAD TRANSPORTATION BOARD, DURBAN, AND OTHERS 1986 (2) SA 663 (A); MOBILE TELEPHONE NETWORKS HOLDINGS (PTY) LTD V KNOETZE, (2006) 27 ILJ 968 (LAC); LEGAL AID BOARD v JORDAAN 2007 (3) SA 327 (SCA); NATIONAL GAMBLING BOARD v PREMIER, KWAZULU-NATAL, AND OTHERS 2002 (2) SA 715 (CC).**

- [7] As stated in paragraph 4 (supra), there is no quarrel with the first part of the applicant's contention, i.e. that the relief sought by the applicant constitutes interim relief. The bone of contention is as regards the jurisdiction of this court to grant such an interim relief if this court does not have the jurisdiction to entertain the main dispute. It is for this reason that I find that making a finding on the jurisdiction of this court pertaining to the declaratory relief that the applicant has in mind is a *sine qua non* for making a finding as to whether this court has the jurisdiction to grant the interim relief. Thus, two questions have to be answered: (1) Does

the High Court have jurisdiction to adjudicate on the declarator envisaged by the applicant? (2) Does the High Court have inherent jurisdiction to grant interim relief as sought by the applicant? My view is that none of the cases relied on by the applicant's counsel support the applicant's contention. None of them are on all fours with the present matter. I could find no persuasive authority stating that **as a general rule** the High Court has an inherent jurisdiction to grant interim relief pending the final determination of a matter **in which it does not ordinarily have jurisdiction**. The case of **CHIRWA v TRANSNET LTD** (*supra*) provides the answer to both questions. Having considered both Skweyiya J and Ngcobo J's judgments in that matter I have no doubt that the answer to both questions is in the negative.

- [8] In my view, the effect of the **CHIRWA v TRANSNET LTD** (*supra*) is that the jurisdiction of the High Court has been ousted in **all** labour-related disputes for which a remedy is provided for in terms of the Labour Relations Act (LRA). I am fortified in this view by the ratio of this judgment, which in my view, is best expressed by quoting verbatim from the

judgment. At paragraph 41 and 42 Skweyiya J had the following to say:

“[41] *It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.”*

[42] “...Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.” (My underlining and emphasis).

[9] Paragraphs 47 and 50, respectively, are even more significant. They provide as follows:

*“[47] The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public. The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that **even if a labour dispute implicates other rights**, a litigant will be able to approach the LRA structures to resolve the disputes.”*

“[50] This section heralds the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act. Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters. When PAJA was promulgated, five years after the current LRA came into force, section 210 remained untouched. The Legislature, aware of the implications of this provision in the LRA, enacted PAJA without altering section 210. This is significant, in that it would appear that the Legislature

intended that PAJA should not detract from the pre-eminence of the LRA and its specialised labour disputes mechanisms.” (My underlining for emphasis).

[10] In my view, both the declarator and the interim interdict sought by the applicant pertain to labour-related issues that are catered for in section 185 and 186 of the LRA and for which remedies are provide in terms of section 191 and 158(1)(a) of the LRA. I align myself to the remarks of Ngobo J that in considering what the real issue is, the court should have regard to the essence as opposed to the form in which the issue is formulated. Counsel for the applicant sought to distinguish between “unfairness” and “illegality” of the respondent’s action with regards to termination of the employee’s contract. He argued that usage of the word “illegal” by the applicant with reference to the respondent’s conduct showed that the applicant was relying on his common-law contractual rights and not those granted by the LRA. I am of the view that this distinction does not hold any water, firstly because of the fact that even though Ngcobo J recognised that the source of the power in that matter was a contract of employment and that the nature of the power was

contractual, he went on to hold that the conduct of the employer was more concerned with labour and employment relations and thus classified the matter as a labour-related dispute. See *CHIRWA V TRANSNET LTD* (supra) at paragraph 142. Secondly, any employer's conduct of unfairly or unlawfully terminating an employee's contract is regulated by section 186(1)(a) of the LRA irrespective of whether the contract is a fixed-term employment contract or one for an indefinite period of time. Once it is regulated by the LRA and remedies have been provided by the LRA, it is a matter falling within the *exclusive jurisdiction* of the Labour Court. See *CHIRWA V TRANSNET LTD* (supra) at paragraphs 123 and 124, where the following was stated:

“[123] While section 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view, the only way to reconcile the provisions of section 157(2) and

harmonise them with those of section 157(1) and the objects of the LRA, is to give it a narrow meaning. The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights....” (my underlining).

[124] Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA....”

[11] On the strength of what I have stated in paragraph 10 (supra), I therefore find that the Labour Court has exclusive jurisdiction to adjudicate the declaratory relief that the applicant intends seeking. I may mention that I also find it significant that the applicant in his papers identified his dispute as a labour-related matter. In his Notice of Motion, the applicant *inter alia* sought the following order: “That respondents be prohibited from terminating or invalidating applicant’s employment agreement **without following a fair procedure in accordance with the Labour Relations Act, No 66 of 1996 read with schedule 8 thereto**, alternatively the terms and conditions of the employment contract”. In paragraph 8(d) of his founding affidavit, he made the

following averment: "...I am entitled to proper procedures being taken in terms of the Labour Relations Act prior to the terminating or invalidating (sic) of my employment contract". (My underlining for emphasis). In my view, the applicant does recognise that his dispute is out and out, a labour-related one. It is thus not surprising that the applicant has indicated his intention of launching his application for a declaratory order in the Labour Court and not in the High Court. (See the unreported judgment of this division in the case of NEHAWU obo **A ADELAJA ADEKOYA V CENTRAL UNIVERSITY OF TECHNOLOGY: FREE STATE & OTHERS** under Case No: A1671/08 at paragraphs 10 & 11).

- [12] Having found that this court does not have jurisdiction to adjudicate on the declaratory order, I now turn to deal with the question whether this court has the jurisdiction to grant interim relief pending adjudication of the main dispute. While I agree that the nature of the order sought is in effect a *status quo* order, I am not persuaded that any of the cases referred to by the applicant's counsel supports the applicant. It must, from the outset, be borne in mind that the case of

LEGAL AID BOARD v JORDAAN, *supra*, was decided prior to the ground-breaking decision of the Constitutional Court in the matter of **CHIRWA v TRANSNET** (*supra*). Significantly the court in the former case, while being under the impression that the High Court had concurrent jurisdiction on the main case, stated as follows at p. 329 par. 6(D): “That being so, unless there is a statutory provision ousting its jurisdiction to give interim relief in a case such as this, there can be no question as to the High Court’s jurisdiction to grant the order presently under consideration.” (My underlining for emphasis).

- [13] Given the interpretation given by Skweyiya J to section 157(1) of the LRA (see paragraphs 59 and 63) and by Ngcobo J (see paragraphs 113 and 123) there is just no room for accepting the case of **LEGAL AID BOARD V JORDAAN** (*supra*) as good authority for the applicant’s proposition. I also find that the case of **AIROADEXPRESS (PTY) LTD v CHAIRMAN** (*supra*) is distinguishable. In that matter the court’s inclination to grant an interim interdict was purely to avoid an injustice as the applicant in that matter had no other remedy. At p676D the court stated as follows:

“An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here.”

(My underlining and emphasis).

In casu, the applicant is not remediless as he can invoke remedies as contemplated in section 158(1)(a) of the LRA. This case therefore clearly does not support the applicant.

- [14] Counsel for the applicant also referred me to the full bench decision in the case of **FERREIRA V LEVINE NO & OTHERS VRYENHOEK & OTHERS V POWELL NO & OTHERS 1995 (2) SA 813 (W) AT 825 – 826**. It is significant that in that same case, Streicher J (as he then was) had the following to say at p821G-H: “The De Fraetas case referred to... is no authority for the proposition that a Supreme Court (High Court) has a general power to grant *pendente* relief when the court has no jurisdiction in respect of the subject-matter of the dispute. The Airoadexpress case should also not be interpreted to have decided that the Supreme Court (High Court) had a general power to grant interim relief

where it had no jurisdiction in respect of the subject matter of the dispute....”(my parenthesis).

- [15] Counsel for the applicant also referred me to the Constitutional Court case of **NATIONAL GAMBLING BOARD V PREMIER KWAZULU-NATAL AND OTHERS** (supra). In that case, the constitutional court issued certain guidelines for purposes of determining whether a High Court has the jurisdiction to grant interim relief in a matter that falls within the exclusive jurisdiction of the Constitutional Court in terms of s167(4)(a). It was held at p731C that whether a High Court will have jurisdiction to entertain an application for an interim relief **depends upon the proper interpretation of the relevant provision granting such exclusive jurisdiction** and on the substance of the order. It is clear that the Constitutional Court did not purport to give a clear-cut answer on the matter but laid out that guidance be sought from, inter alia, the provision that grants exclusive jurisdiction. Applying the principle *in casu* takes us back to the interpretation of section 157(1) of the LRA.

- [16] In *Chirwa v Transnet Ltd & Others*, at paragraph 113,

Ngcobo J succinctly defines this exclusive jurisdiction as follows: “The purpose of section 157(1) was to give effect to the declared object of the LRA to establish tribunals “with exclusive jurisdiction to decide matters from [it]”. To this extent, it has given **exclusive jurisdiction to the Labour Court and Labour Appeal Court to deal with matters arising from the LRA**”. (My emphasis). Given this interpretation, there is no room for accepting that the High Courts will still have jurisdiction to grant interim orders in respect of matters falling within the exclusive jurisdiction of the Labour Court. For the same reasons that I found that this court does not have the jurisdiction to adjudicate on the declaratory order, I am persuaded that equally so, this court does not have the jurisdiction to grant the interim order that the applicant is seeking. I reiterate that the effect of the **CHIRWA v TRANSNET LTD & OTHERS CASE** (supra) is that the jurisdiction of the High Court has been ousted in **all** labour-related disputes for which a remedy is provided in terms of the LRA. In the words of Skweyiya J, the LRA “was envisaged as a one-stop shop for all labour-related disputes”. (See paragraph 9 *supra*). To my mind, the word “all” is inclusive of interim relief.

[17] I therefore make the following order:

The rule *nisi* is discharged with costs.

M. B. MOLEMELA, J

On behalf of the Applicants: Adv. Ploos van Amstel SC
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On behalf of the Respondent: Adv. S Grobler
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