

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

Case No: CA26/2024

In the matter between:

MZOLIWA MBAMBI

Appellant

and

TYEKS SECURITY SERVICES

Respondent

JUDGMENT

BROOKS J

[1] On the 18 March 2024 Notyesi AJ granted the appellant leave to appeal to the full court against the judgment he had delivered on 4 July 2023 (the judgment). The appellant prosecuted the appeal and it became opposed by the respondent. It was argued before this court on 21 October 2024.

[2] The crisp issue in the appeal is that of jurisdiction. On 12 November 2019 the appellant instituted an action against his erstwhile employer, the respondent, for the recovery of damages. The action was defended and the respondent filed a special plea to the effect that the provisions of the Labour Relations Act¹ (LRA) conferred exclusive jurisdiction over the appellant's cause of action to the Labour Court. In his replication the appellant pleaded that the provisions of the LRA did not oust the inherent jurisdiction of the High Court and that the latter has concurrent jurisdiction with the Labour Court to adjudicate upon the action. In the judgment the court *a quo* held that:

“This is a matter in which the Labour Court and the Bargaining Council enjoy exclusive

¹ Act No. 66 of 1995.

jurisdiction.”

The order made was as follows:

“(1) Plaintiff’s action is dismissed;

(2) Each party shall bear its own costs.”

[3] It is apposite to summarise the cause of action set out by the appellant in his particulars of claim. He was previously employed as a security guard by the respondent. A written contract of employment had been concluded that provided for the employment of the appellant to extend over a fixed term. The material terms of the contract of employment are set out in the appellant’s particulars of claim. During the fixed term of the contract, four events occurred that were regarded by the appellant as a repudiation by the respondent. The appellant pleaded that by way of a written letter addressed by his attorneys to the respondent he communicated his election to accept the repudiation and to cancel the contract. Consequential damages are claimed by the appellant representing the remuneration to which he would have been entitled had the employment contract run for the entire fixed term.

[4] In its plea, the respondent denied the repudiation and pleaded that the appellant had absconded from his job as a security guard.

[5] Section 157(1) of the LRA provides for the exclusive jurisdiction of the Labour Court in all matters that – in terms of the LRA or other law – are to be determined by the Labour Court. In doing so, it fulfils one of the stated purposes of the LRA, which is to establish the Labour Court and the Labour Appeal Court as superior courts, with “exclusive jurisdiction to decide matters arising from the Act”.² Section 157(1) reads:

“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 Preamble to the LRA.

[6] Sections 68(1),³ 77(2)(a),⁴ 145⁵ and 191⁶ of the LRA provide examples of matters that, by virtue of section 157(1), fall within the exclusive jurisdiction of the Labour Court. The Constitutional Court has found,⁷ moreover, that the High Court's jurisdiction in respect of employment-related disputes is ousted only where the dispute is one for which the LRA creates specific remedies including, but not limited to, for example, unfair dismissal disputes.

[7] The Basic Conditions of Employment Act (BCEA)⁸ echo the provisions of section 157(1) of the LRA. It provides in section 77(1):

“Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.”

[8] By virtue of section 157(1), the Labour Court enjoys exclusive jurisdiction over any matter “in terms of” the BCEA. Matters governed by or concerning the enforcement of a provision of the BCEA accordingly fall within the ambit of the Labour Court's exclusive jurisdiction.

[9] The High Court has jurisdiction to adjudicate any matter, except those matters that: (i) fall within the exclusive jurisdiction of the Constitutional Court in terms of section 167(4) of the Constitution; (ii) the Constitutional Court has agreed to hear directly in terms of section

³ Section 68(1) provides: “[i]n the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction [to grant certain interdicts and orders]”.

⁴ Section 77(2)(a) provides that furtherance of protest action that does not comply with the requirements for permissible protest set out in section 77(1), “[t]he Labour Court has exclusive jurisdiction to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action”.

⁵ Section 145(1) provides that parties alleging defects in any arbitration proceedings in the CCMA “may apply to the Labour Court for an order setting aside the arbitration award”. Section 145(3) provides further that the Labour Court “may stay the enforcement of the award pending its decision” and section 145(4) provides for the powers of the Labour Court in the event that the award is set aside. See also *Gcaba* above n 1 at para 70.

⁶ Section 186 of the LRA deals with unfair dismissals, which, in terms of section 191, must be referred to arbitration following a failed attempt at conciliation and which will ultimately be for review by the Labour Court. See also *Gcaba* at para 29.

⁷ *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); and *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693; 2002 (2) BCLR 113 (CC).

⁸ Act No. 75 of 1997.

167(6); or (iii) have been assigned by legislation to another court with a status similar to that of the High Court.⁹

[10] There are various courts with a status like that of the High Court. The Land Claims Court is one such court. The Labour Court, which the respondent contends is the proper forum to hear the appellant's claim, is designated as a court with a status like that of a High Court.¹⁰ However, both the LRA and the BCEA expressly recognise that there are certain matters in respect of which the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

“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) . . .

(c)”

[11] Section 77(3) of the BCEA provides, similarly, that the Labour Court “has concurrent jurisdiction with the civil courts to hear and determine any matter concerning *a contract of employment*, irrespective of whether any basic condition of employment constitutes a term of that contract”. That disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the BCEA, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1) as follows:

⁹ Section 169(1) of the Constitution reads:

“The High Court of South Africa may decide—

(a) any constitutional matter except a matter that—

(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.”

¹⁰ Section 151(2) of the LRA.

“does not prevent any person relying upon a provision of [the BCEA] to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.”

[12] Section 157(1) of the LRA does not refer to specific sections of that Act as sources of the Labour Court’s exclusive jurisdiction. It only provides that they are to be found elsewhere in the Act. In some instances, their location is clear: for example, in the sections mentioned in paragraph 8 above. In other instances, it is left to the courts to determine whether a matter is one that arises in terms of the LRA and is, in terms of that Act, or another law, to be determined solely by the Labour Court.

[13] The reason for this delineation is that the Labour Court and the Labour Appeal Court were “designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining”.¹¹ While accepting that section 157(1) does not confer exclusive jurisdiction on the Labour Court in every employment-related matter, the Constitutional Court, in *Chirwa v Transnet Ltd and Others*¹², made it clear that the Labour Court and other specialist tribunals created under the LRA are uniquely qualified to handle labour-related disputes:

“The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolutions 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.”¹³

[14] The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of section 77(3) of the BCEA and section 157(2) of the LRA adds to their jurisdiction. Thus, it

¹¹ *Motor Industry Staff Association v Macun N.O.* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) at para 20 (*Motor Industry Staff Association*).

¹² [2007] ZACC 23; 2008 (4) SA 367 CC; 2008 (3) BCLR 251 (CC).

¹³ *Gcaba* above n 1 at para 71; *Motor Industry Staff Association* above n 17 at para 20; *Mbayeka v The MEC For Welfare, Eastern Cape* 2001 JDR 0017 (TkH) at para 19.

affords litigants an additional right to approach either court where a dispute falls within the ambit of those sections. To determine whether the Court *a quo* lacked jurisdiction to adjudicate the appellant's claim, it is necessary to determine whether the claim is of such a nature that it is required, in terms of the LRA or the BCEA, to be determined exclusively by the Labour Court.

[15] The appellant contends that the cause of action underlying the action flows from the contract. In summary, the contractual basis is that the contract was summarily terminated. In particular, he pleaded that he was prevented from executing his duties, replaced with another security officer and offered to be placed elsewhere.¹⁴

[16] The same set of facts may give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued is prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises because of a dismissal dispute, a litigant must choose the cause of action he wishes to pursue and prepare his pleadings accordingly. This, the appellant did.

[17] Had the appellant sought to pursue a claim of unfair dismissal, he would have been required, in terms of section 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court. However, that the appellant could have done so, does not mean he was bound to do so. Thus, the viability of an unfair dismissal claim did not obligate the appellant to frame his claim as one of unfair dismissal and to approach the Labour Court. A claim for the enforcement of a contractual right remains available to an employee even though they could have found on the same set of facts, a claim for relief for infringement under the LRA. The following *dictum* of the Supreme Court of Appeal in *Makhanya v University of Zululand*¹⁵ is apposite:

'The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices. Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist

¹⁴ Record: PoC – Para 7.1.1, p 27.

¹⁵ 2010 (1) SA 62 (SCA).

upon performance of a contract.

When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.’¹⁶

[18] To determine whether the Court a quo had jurisdiction, it did not have to investigate whether the appellant’s claim based, as it was, on contract had merit. This is what the Court a quo erroneously did. Instead, reference had to be made to the appellant’s averments in the pleadings to establish the nature of the right that he sought to assert in support of the claim. In *Gcaba*, the Constitutional Court laid down a principle that an assessment of jurisdiction must be based on an applicant’s pleadings, as opposed to the substantive merits of the case. It held:

‘In the event of the Court’s jurisdiction being challenged the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.’

[19] This is what the Court a quo did not do, which this Court must do. It is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action. That when assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a

¹⁶ Ibid paras 11 and 71.

different cause of action, or that he would have had a better chance of success had he done so plays no role in the enquiry. This, because such views are irrelevant to the court's competence to hear a matter.

[20] The mere fact that a dispute is in the realm of labour and employment does not exclude the jurisdiction of the High Court. Many a court has held that a breach of a contract of employment falls within the ordinary jurisdiction of the High Court, notwithstanding the fact that the contract is one of employment.¹⁷ As the Constitutional Court held in *Gcaba*:

‘[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. 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

[21] Indeed, Chapter VIII of the LRA is “not exhaustive of the rights and remedies that accrue to an employee upon termination of a contract of employment”.¹⁹ The BCEA could not have been clearer on this question. Matters “concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract”, are expressly noted in section 77(3) thereof as falling within the *concurrent* jurisdiction of the High Court and the Labour Court.

[22] Thus the High Court retains its jurisdiction in respect of claims arising from the enforcement of contractual rights in the labour environment.

[23] It follows that the correct finding in the court *a quo* should have been that the LRA does not extinguish contractual remedies available in the High Court to employees following a

¹⁷ *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; 2019 JDR 1750 (SCA) at para 9; *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA) at para 7; *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144; 2010 JDR 1423 (SCA) at para 23; *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (1) SA 49 (SCA) at paras 4-5 and 24.

¹⁸ *Gcaba* above n 1 at para 73.

¹⁹ *Fedlife* above n 23 at para 22.

breach of their contract of employment or the unlawful termination thereof. Nothing prevented the appellant from instituting the action for the recovery of damages in the High Court. The court *a quo* erred in dismissing the appellant's claim on the basis that it fell within the exclusive jurisdiction of the Labour Court and the Bargaining Council.

[24] In the circumstances the appeal must be upheld. No reason exists for costs not to follow the result. Given the relative complexity of the matter, it would be appropriate for those costs to be in accordance with scale B as referred to in rule 67A of the Uniform Rules of Court.

[25] The following order will issue:

1. The appeal is upheld with costs, such costs to be payable by the respondent on scale B and to include the costs of two counsel.
2. The order of the court *a quo* is set aside and replaced with the following:

“The defendant's special plea is dismissed with costs.”

RWN BROOKS
JUDGE OF THE HIGH COURT.

MAJIKI ADJP

I agree

B MAJIKI
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT (ACTING)

JOLWANA J

I agree

MS JOLWANA
JUDGE OF THE HIGH COURT

Appearances

For the Appellant

Adv AM Bodlani SC with

Adv Z Mashiya

Instructed by:

LM MTHAMBO ATTORNEYS

66 Stanford Terrace

MTHATHA

For the Respondent:

Adv L Nkxoyi

Instructed by:

MBULELO QOTOYI ATTORNEYS

32 Eagle Street

MTHATHA

Date heard:

21 October 2024

Date delivered

05 November 2024