



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

CASE NO: A2023/091028

pp
18 February 2025
SIGNATURE

DATE

In the matter between:

**DARIO INVESTMENTS (PTY) LTD t/a
THEMBISA SUPERSPAR**

APPELLANT

and

MATOME JOSEPH MAKWEALA

FIRST RESPONDENT

SHADRACK SIMPHIWE MACHABAWA

**SECOND
TO FURTHER RESPONDENTS**

J U D G M E N T

BOOYSEN AJ

Introduction

[1] This is an appeal against the whole of the judgment and order of Phahlamohlaka AJ in this Division granted on 10 October 2023. The following

order was granted by the court *a quo*:

"a) The matter is heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

b) The decision of the respondent to terminate the appellants' employment contracts with effect from 26th August 2023 is hereby declared to be unlawful.

c) The applicants be re-instated to their employment with effect from the date of the termination of their employment contracts, with backpay and all the benefits.

d) The respondent is prohibited from terminating the applicant's employment contracts without complying with its internal policy procedures.

e) The respondent is ordered to pay costs".

[2] An application for leave to appeal was dismissed with costs by the court *a quo* on 26 January 2024.

[3] The appellant applied for leave to appeal to the Supreme Court of Appeal. Zondi JA and Nicholls JA granted leave to appeal in the following terms:

"1. Leave to appeal is granted to the Full Court of the Gauteng Division of the High Court, Johannesburg.

2. The costs of the court *a quo* in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay the costs."

Background and common cause facts

[4] The appellant carries on business in the food retail sector and owns and operates Tembisa Super Spar.

[5] The respondents were former employees of the appellant deployed in the appellant's business.

[6] During May 2023, Justice for All Workers of South Africa Trade Union on behalf of the respondents issued a demand to the appellant for:

"1.4 weeks annual bonus;

2. 10% annual increase for the year 2023."

[7] The appellant could not comply with the demand and the dispute was referred to the Council for Conciliation, Mediation and Arbitration (CCMA) on 24 May 2023.

[8] The CCMA process did not result in resolution of the dispute and on 4 July 2023 the CCMA issued a "Certificate of Outcome of Dispute Referred to Conciliation" which confirms that the dispute remained unresolved as at 4 July 2023 and that "strike/lockout" are the steps that may be taken.

[9] On 23 August 2023 the respondents issued a 48-hour notice to strike, "until our demands as set out in CCMA referral form" are met.

[10] The appellant brought an urgent application in the Labour Court on 25 August 2023 (the 25 August Urgent Application) for an order interdicting the threatened illegal strike, preventing access to appellant's business premises, disrupting appellant's operations and causing a nuisance. That application was dismissed on the merits.

[11] The appellant brought a further urgent application in the Labour Court on 27 August 2023 (the 27 August Urgent Application) for an order against the respondents (to the extent relevant here) to commence and continue their strike but not within a 200-meter radius of the entrance of the appellant's store. This application was struck from the roll for lack of urgency.

[12] On 28 August 2023 the appellant issued a notice to all its employees to attend a disciplinary hearing on 30 August 2023 at the Premier Hotel, 73 Gladiator Street, Rhodesfield, Kempton Park in respect of the following allegations of misconduct:

"(A)_Threatening Behaviour

Threatening and harmful behaviour:

1. In that on 26, 27 and 28 August 2023, you threatened fellow employees and management that if they do not participate in the strike, you will harm them.
2. Blocking the entrance of the employer's store on 28 August 2023, to prevent patrons from entering, by standing or sitting in the entrance.
3. Physically removing patrons, intending to enter the employer's store, on 28 August 2023.

(B) Intimidation and or incitement

Intimidation and/or incitement

1. In that on the 27th and 28th of August 2023, you threatened employees and management, through words or conduct or a combination of both with the intention to influence them to act in a certain way, namely to join the strike and down tools. This is aimed at actions that are detrimental to the company, its staff and/or clients.
2. On Monday the 28th of August 2023, you intimidated prospective patrons of the employers, by physically removing them from the store entrance, and forcing them to leave. This is aimed at actions that are detrimental to the company, its staff and/or clients.
3. This conduct is detrimental to the maintenance of good order within the work place.

(C) Sabotage

Sabotage in that:

1. On 28 August 2023, you wilfully blockaded the entrance of the employer, thus hindering trade and normal business activities on that day.
2. You deliberately sabotaged the company from trading.
3. You deliberately and intentionally caused the employer financial harm, by refusing to adhere to reasonable request by the employer and centre management to move to a demarcated area.

4. Your conduct is detrimental to the image and or good standing of the company within the perception of the public thereby creating a negative image of the company.

(D) Breach of Company Policy and Breach of Trust:

1. Your unlawful conduct is contrary to the company policy that has been implemented by way of your conduct as described above.

2. Your conduct results in a serious breach of trust."

[13] The appellant also brought an *Ex parte* spoliation application (the *Ex parte* application) against the respondents in the High Court, Gauteng Division, Pretoria, for restoration of peaceful and undisturbed possession of its business premises and to prohibit the respondents from harassing, intimidating and threatening the appellant's employees and customers. The High Court, Gauteng Division, Pretoria issued an interim order with a return date of 15 January 2024 to show cause why the order should not be made final.

[14] On 29 August 2023 the respondents brought an urgent application for hearing on 30 August 2023 at 14h00 in the Labour Court for an interdict to prohibit the disciplinary hearing from taking place. The Labour Court did not hear the matter. The reasons as explained by the respondents, being an apparent confusion whether the matter was enrolled for 30 or 31 August 2023.

[15] The disciplinary hearing was conducted on 30 August 2023 at 16h30 before Adv B Delport.

[16] The following extracts from the chairperson's findings in the disciplinary hearing are relevant:

"1. In these disciplinary proceedings there are 72 (Seventy-Two) and additional 13 (Thirteen) Employees that have been charged with misconduct. Attendance Register attached as "A". The Employees were given notice of the disciplinary proceedings on 28 August 2023, at least 48 hours in advance. Notice attached as 'B'."

"2. The proceedings were conducted at the Premier Hotel O R Tambo. At the commencement of the hearing there were only three Employees present by the names of Charmaine Nkanyane, Thandi Nkuna and Nyiko Beauty Maringa."

"3. Some of the Employees were gathered at the premises of the Hotel but never actually attended the disciplinary hearing and remained in the lobby of the Hotel of their own free will and volition. When asked by Mrs Schoeman who was going to be their three representatives as there was no way to hear them all, no response was given, and they began singing and caused great uproar and disturbance in the Hotel."

"4. Due to the elected non-appearance of the remainder of the Employees the disciplinary hearing proceeded."

"10. Whilst the Employer representative was making final submission for the Employer four unidentified persons entered the conference room where the disciplinary proceedings were taking place. Two of them were recording on their cell phones."

"11. At such time, I asked them if they were here as the representatives for the Employees or were they also here to represent themselves. To which no response was received, they only stopped recording and walked out again."

"12. After the Employer representative was done making submissions on behalf of the Employer and setting out the facts of the misconduct, another three persons entered the conference room, two of them remain unidentified."

"13. I proceeded to ask them if they were Employees' representative to which a man by the name of Joseph Makwela answered that he was the representative. This was around 17:15. When I asked if they were ready to proceed and to plead to the charges, he indicated that the Employees sought a postponement."

"14. Such request for a postponement was subsequently denied, as the only reason that they provided was that they did not have sufficient time to prepare for the hearing as they were at the Labour Court. It was further correctly pointed out by the Employer Representative that should they have desired a postponement, they should have communicated that to the Employer. Also, if they were desirous of a postponement they should have been present at the commencement of the proceedings and requested a postponement."

"15. The matter was at that point part-heard and it was found that sufficient notice was given of the disciplinary hearing. It was established that the Employee representative was not the representative at the Labour Court and therefore there was no reasonable substantiation for the granting of a postponement."

"16. As a courtesy the Employee representative was given until 17:30 to obtain instruction for (sic) the Employees and return. During such adjournment the Employees in the lobby caused such havoc that the security had to remove them from the premises completely."

"17. At 17:35 no one of the Employees or any other Employee returned after the adjournment. The proceedings continued and the Employer representative made her closing argument and addressed the chair on sanction in the event that the Employees are found guilty."

"18. The Employer representative set out the case for the Employer and made the submissions as to the events that transpired from 26 up until 29 August 2023. Video evidence of the events that transpired were presented by the Employer."

"23. The charges pertaining to the Employees does not relate to the unlawfulness of the strike but relates to the conduct of the Employees during the strike."

"24. It was further submitted that throughout the strike the Employees gathered in front of the entrance of the Employer which is located in a cul-de-sac section of the mall. This caused disturbance of not just the Employer but also other shops in the mall."

"25. On 27 August 2023, the strike continued without proper notice. On this day, the Employer as well as the Centre Manager of the mall requested the Employees to just continue with their strike outside."

"27. On the same day, the EFF and the community threatened the non-striking Employees and called them the 'Rats of Society'. The store once again was closed due to the conduct of the Employees, the EFF and the community."

"28. On 28 August 2023, the strike continued without authorisation, the store was opened on this day but subsequently had to be closed again. In the video of evidence, it was clear that the strike involved Employees, members of the EFF

and the community laying on the floor, standing and sitting in front of the entrance of the Employer."

"29. There was also singing and chanting, the participants were prohibiting other Employees as well as patrons from entering the store by physically blocking the entrance and intimidating them. There is one video where an elderly lady was grabbed by the arm whereafter she turned around and walked away from the store."

"30. During the duration of the strike the Employer as well as Centre Management of the mall requested by Employees numerous times to strike peacefully and to continue with the strike outside the mall as to not affect the business and trade of not only the Employer but other business in the vicinity as well. No response or adherence was given to these requests."

"32. In closing it was submitted that the conduct of the Employees has caused a complete breakdown of trust between the Employer and Employee. Therewith, that the conduct further caused damage to the reputation of the Employer."

Employees' Submissions

"38. Other than these three Employees who elected to represent themselves and had enough regard for the Employer and valued their employment, none of the other Employees attempted to attend the proceedings in order to deal with this dispute at hand."

"39. The behaviour displayed by the remainder of the Employees were purely disgruntled. No submissions were made on behalf of the remainder of the Employees despite numerous attempts to reason with the Employees and requesting that they send a representative on their behalf."

"40. There is, therefore, no submissions by the remainder of the Employees to consider. There were therefore also no submissions in mitigation of sanction as the Employees continuously elected to remain outside."

Chairperson's Findings

"41. No reason was found to disregard or otherwise not accept the submissions made by the Employer representative."

"42. The conduct of the Employees was clearly aggressive, disorderly, intimidating, and harmful. This conduct ultimately caused the Employer to have to close the store on several occasions."

"44. This intentional disobedience of the Employer's reasonable request and lawful instructions to continue with the strike outside, was unreasonable and intentionally disrespectful to the Employer."

"46. The conduct of the Employees not only caused the Employer great damage to its reputation but also resulted in a complete breakdown of the trust relationship essential to the Employer-Employee relationship."

"47. I also cannot ignore the conduct of the Employees on the day of the disciplinary hearing. The absolute disregard and disrespect shown not only towards the Employer and the instructions given but also towards the proceedings as a whole, is utterly disgraceful."

"48. The conduct displayed by the Employees not just during the strike but also during the proceedings is a clear indication of the complete breakdown of the relationship and of the Employees intent to cause harm to the Employer and its reputation."

"52. As for the remainder of the Employees, their conduct during the strike that took place from 26 August until 28 August 2023 was nothing short of threatening, harmful and intimidating. Their blatant disregard for reasonable request by the Employer and even during the proceedings clearly show their malicious intent towards their Employer."

"53. In the premise, I make the following findings in terms of the charges against the remainder of the Employees:

CHARGE (A) – Guilty

CHARGE (B) – Guilty

CHARGE (C) – Guilty

CHARGE (D) – Guilty"

SANCTION

"54. I therewith propose that the appropriate sanction against the remainder of the Employees as per the Attendance Registry, excluding the abovementioned Employees, to be dismissal with effect from 26 August 2023."

[17]. Pursuant to the findings of the chairperson of the disciplinary hearing, the appellant dismissed the respondents with effect from 26 August 2023.

The application by the respondents

[18] On 11 September 2023 the respondents brought an urgent application (the application) in this Division for an order in the following terms:

- "1 That condonation be granted to the [respondents] for non-compliance with the time limits as provided for in Rule 6 and that the matter be heard as one of urgency in terms of Rule 6(12).
- 2 The decision of the [appellant] to terminate the [respondents'] employment contracts with effect from 26th August 2023 be declared to be unlawful.
- 3 The [respondents] be reinstated to their employment with effect from the date of the termination of their employment contracts, with back pay and all benefits.
- 4 The [appellant] be prohibited from terminating the [respondents'] employment contracts without complying with its internal policy procedures.
- 5 The [appellant] be interdicted from terminating the [respondents'] employment contract on the averments made in the urgent applications served before Justice Phehane on the 25 and 27 of August 2023, respectively – unless the court orders are successfully appealed.
- 6 The [appellant] to pay the costs, including counsel on attorney and client scale.
- 7 Any further alternative relief.
- 8 Costs against the [appellant] on client and attorney scale."

[19] In this application the respondents' contentions can be summarised as follows:

- a. The respondents approached the court *a quo* to declare the appellant's termination of their employment contracts unlawful, to obtain an order for specific performance, to reinstate the respondents' employment

contracts and further to restore the plight, dignity and constitutional rights of the respondents.

- b. The appellant should have appealed the orders of court in the 25 August Urgent Application and the 27 August Urgent Application instead of charging the respondents disciplinary. The appellant's behaviour "to regurgitate the averments that served before the court (in the said urgent applications) in a disciplinary hearing, is unlawful, unconstitutional and undermines the authority of the judiciary."
- c. The disciplinary hearing "constituted" by the appellant contravened its internal policy and "the *audi*-principle". In terms of the appellant's policy, the respondents ought to have been afforded "an opportunity to state their case including their defence and mitigation".
- d. The appellant's alleged unlawful decision caused the respondents to suffer hardship and grave and irreparable harm and constitutional rights were "implicated".
- e. In respect of jurisdiction, the respondents' position is that they sought and order to declare the termination of their employment contracts to be unlawful, that their pleaded case placed no reliance on the fairness of the termination or the provisions of the LRA. Further, that it is trite that the High Court has concurrent jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act¹ (BCEA) to adjudicate disputes emanating from employment contracts.

[20] The appellant's arguments in opposing the application can be summarised as follows:

- a. The appellant disputed the urgency of the matter.
- b. The appellant disputed the court *a quo*'s jurisdiction on the basis that the respondents' case is mainly based on the fairness of their dismissal.
- c. the court *a quo* would not have had jurisdiction to declare the termination of respondents' employment contracts unlawful based on an unreported

¹ Act 75 of 1997.

judgment of the Labour Appeal Court in the case of Tswaing Local Municipality².

- d. In respect of the merits, the appellant relied on the fact that the "policy procedure" of the appellant alleged to have been breached was neither attached to their papers nor pleaded. The exact terms of the employment contracts between the appellant and respondents alleged to have been breached were not pleaded, neither were the alleged breaches pleaded.
- e. The appellant relied on alternative remedies being available to the respondents being the right to approach the CCMA in terms of the Labour Relations Act³ (LRA).
- f. In respect of the respondents' personal financial circumstances, the appellant relied on the judgment in *University of the Western Cape Academic Staff Union & Others v University of the Western Cape*⁴ which is to the effect that loss of income as a result of dismissal is an inevitable consequence and as such provides no good ground for the granting of urgent interim relief.

[21] The court *a quo* found that it had jurisdiction to hear the application in terms of section 77(3) of the BCEA, based on the principles expressed in *Gcaba vs Minister for Safety and Security and Others*⁵ (*Gcaba*) quoted in para [50] below. The learned acting judge pointed out that, in *Gcaba*, the applicant's case as pleaded was only based on fairness, while sparsely interposed by unadorned reference to section 77(3) of the BCEA.

[22] Further, the court *a quo* heard the application on an urgent basis and found the appellant's allegation, that it does not have a policy and procedure, to be without merit. The learned acting judge referred to the fact that the employment contract attached to the appellant's replying affidavit *refers* to "policy and procedure" and that one of the charges in the disciplinary hearing referred to the respondents' conduct being contrary to the company policy that has been implemented.

²An unreported judgment of the Labour Court Case NO J1230/20.

³ Act 66 of 1995.

⁴ 199(20) ILJ 1300 LC at para [17].

⁵ [2009] 12 BLLR 1145 CC.

[23] The court *a quo* further found that the appellant was forum shopping with the objective of obtaining a court order against the respondents by reference to the 25 August Urgent Application and the 27 August Urgent Application; and as a result, concluded that the respondents made out a compelling case for the relief sought in the notice of motion and granted the order set out in para [1] above.

[24] The judgment in the application forms the subject of this appeal.

[25] The following issues arise in this appeal.

Jurisdiction

[26] The appellant disputed the jurisdiction of the court *a quo* on the basis that the respondents' case "was mainly based on fairness, while sparsely interposed by adorned references to section 27(3) of the BCEA."

[27] The appellant also relied on the judgment in *Passenger Rail Agency of South Africa & Others v Ngoye & Others*⁶ (*Prasa*) where the Labour Appeal Court remarked that:

"...it became commonplace, mostly for white collar employees, to challenge their dismissals ... on the basis of unlawfulness and/or breach of contract, rather than to dispute the fairness of the employer's action," and "this matter is yet another example of this. Here, the employees allege that their dismissals were unlawful and refrained from disputing its fairness."

[28] I will return to the appellant's reliance on *Prasa* in support of its argument that the court *a quo* lacked jurisdiction in the application, in para [58] below.

[29] The appellant further relied on the Labour Appeal Court's referral in *Prasa*, with approval, of the Constitutional Court's judgment in *Gcaba vs Minister of Safety and Security & Others*⁷ wherein it was held that, "... equally important were the pronouncement that the substance of a dispute must prevail over its form." It was explained that if substance were allowed to dominate, "astute litigants" would

⁶ 2024 (45) ILJ 228 LAC.

⁷ [2009] 12 BLLR 1145 CC.

formulate their claims very carefully to avoid the dispute resolution machinery created by the LRA⁸.

[30] The respondents' arguments are to the contrary. Their position is that their pleaded case disavowed any reliance on the LRA and the application (in the court *a quo*) is "based on the breach of employment contract".

[31] The respondents rely on *Fedlife Assurance Ltd v Wolfaard*⁹ (*Fedlife*), *Makhanya v University of Zululand*¹⁰ and *SA Maritime Safety Authority v McKenzie*¹¹ summarising the "common thread" as "that the courts will have jurisdiction to hear a dismissal dispute as long as the employee pleads the claim as one relating to unlawfulness or breach of contract, and not to unfairness."

[32] In order to determine whether, *in casu*, the court *a quo* had jurisdiction to hear the application, it is necessary to analyse the legislative framework and the judicial pronouncements thereon.

The Labour Court's exclusive jurisdiction and the Labour Court and the High Court's concurrent jurisdiction

[33] Section 157(1) of the LRA regulates the Labour Court's exclusive jurisdiction as follows:

"157 Jurisdiction of Labour Court

(i) 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 this Act or in terms of any other law are to be determined by the Labour Court."

[34] The concurrent jurisdiction of the Labour Court and the High Court is regulated in section 157(2) of the LRA as follows:

"157 Jurisdiction of the Labour Court

⁸ *Prasa* at para 6.

⁹ 2002 (1) SA 49 (SCA).

¹⁰ [2009] 8 BLLR 721 (SCA).

¹¹ 2010(3) SA 601 (SCA).

(1)...

(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, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister [of Labour] is responsible."

[35] The following sub-sections of section 77 of the BCEA are relevant in respect of the High Court's jurisdiction.

"(1) Jurisdiction of the Labour Court -

(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.

(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of section 33A, 43, 44, 46, 48, 90 and 92.

(2)...

(3) 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."

[36] The question of the concurrent jurisdiction of the Labour Court and the High Court enjoyed the consideration of the High Court, the Supreme Court of Appeal and the Constitutional Court on a number of occasions.

[37] In *Langeveldt v Vryburg Transitional Local Council and Others*¹², the Labour Appeal Court noted that, within four years of the Labour Court becoming fully

¹² (2001) 22 ILJ 1116 (LAC); [2001]5 BCLLR 501 (LAC) at para 23.

operational, a number of labour matters came before the High Courts, confronted with the question whether they had jurisdiction despite the existence of the Labour Court. Having examined fifteen decisions, the Labour Appeal Court concluded that these cases reveal the jurisdictional complexities which the provisions of section 157(2) of the LRA has created.

[38] However, the question of the concurrent jurisdiction of the Labour Court and the High Court has, over more than twenty years since *Langeveldt*, been clarified. I will deal with that clarification below.

[39] In *Fedlife* the Supreme Court of Appeal had to determine the merits of an exception to a special plea to the effect that the Labour Court has exclusive jurisdiction in a claim for contractual damages as a result of early termination of a fixed term contract. The Supreme Court of Appeal rejected the appellant's argument that Chapter 8 of the LRA codifies the rights and remedies that are available to all employees in our law arising from the termination of their employment. On the question whether the Labour Court has exclusive jurisdiction, the Supreme Court of Appeal stated the following:

"[25] Furthermore section 157(1) [of the LRA] does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee."

"[27] Whether a particular dispute falls within the terms of section 191 depends upon what is in dispute and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section, only if the 'fairness' of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about. The dispute, in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone, it does not fall within the terms of the section (even assuming that the termination constituted a dismissal as defined in chap 8)."

[40] In *Fredericks and Others v MEC for Education and Training Eastern Cape and Others*¹³, (*Fredericks*) the Constitutional Court considered the scope of the jurisdiction of the High Court to determine certain complaints arising out of an employment relationship. In the High Court (a full court) held that it did not have jurisdiction in the matter on the basis that, on a proper consideration of the LRA, its jurisdiction to consider their claims have been ousted by the relevant provisions of the LRA.

[41] On appeal to it, the Constitutional Court observed in *Fredericks*, that a starting point for a proper interpretation of section 157(1) and (2) of the LRA, is section 157(1). To the extent that the exclusive jurisdiction of the Labour Court is conferred by section 157 or any other provision of the LRA or other legislation, the High Court's jurisdiction is ousted. Deciding which matters fall of the Labour Court, said the court, requires an examination of the LRA and noted, "It is quite clear that the overall scheme of the [LRA] does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment", quoting with approval, Nugent JA's finding in *Fedlife* as follows: "(S)ection 157(1) does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between the employer and employee".

[42] In *Chirwa v Transnet Ltd and Others*¹⁴ (*Chirwa*) the question of the High Court's jurisdiction again enjoyed the consideration of the Constitutional Court. Judgments were delivered by Justices Skweyiya, Ngcobo and Langa.

[43] In *Chirwa*, Ms Chirwa was invited to a disciplinary enquiry to respond to allegations of inadequate performance, incomplete and poor employee relations. Ms Chirwa did not participate, and she was dismissed. Following her dismissal, she referred the dispute to the CCMA alleging an unfair dismissal. The CCMA was unable to resolve the dispute and recommended arbitration. Ms Chirwa did not proceed to arbitration but approached the High Court seeking an order to set aside the disciplinary proceedings and re-instatement in her former position. Ms Chirwa concluded that the third respondent (the Chief Executive Officer of the

¹³ 2002 (2) SA 693 (CC).

¹⁴ [2008] 2 BLLR 97 (CC).

Transnet Pension Fund who took the decision to dismiss Ms Chirwa) failed to comply with the mandatory requirements of Items 8 and 9 of Schedule 8 to the LRA, and hence the decision is reviewable in terms of the Promotion of Administrative Justice Act. Ms Chirwa explained that she approached the High Court for practical considerations, and it was contended on her behalf that the High Court had concurrent jurisdiction with the Labour Court in respect of her claim.

- [44] Justice Skweyiya, in analysing the exclusive jurisdiction of the Labour Court in terms of section 157(1) of the LRA and its concurrent jurisdiction with the High Court in section 157(2), noted that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations¹⁵. Distinguishing *Fredericks* (where the applicants expressly disavowed any reliance on section 23(1) of the Constitution which entrenches the right to a fair labour practice) Ms Chirwa expressly relies on those provisions of the LRA which deal with unfair dismissals and concluded that the dispute was one envisaged by section 191 of the LRA which provides a procedure for its resolution and which must, under the LRA, be determined exclusively by the Labour Court.
- [45] In a separate judgment, Justice Ngcobo noted, in respect of the scope of the operation of the provisions of section 157(1) and (2) of the LRA that "there are conflicting judicial views on how to resolve these issues" and referred to the Labour Appeal Court's conclusion that an examination of some 15 decisions of the issue clearly revealed the jurisdictional complexities which the provisions of section 157(2) of the LRA have created."
- [46] In para [92] of *Chirwa*, Justice Ngcobo criticised the view expressed in *United National Public Servants Association of SA v Digomo NO & Others*¹⁶ that, "provided the employee's claim, as formulated, does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could have been formulated as an unfair labour practice". Justice Ngcobo's difficulty with that view is that it leaves it to the

¹⁵ Ibid para 60. See also *Mgijima v Eastern Cape Appropriate Technology Unit & Another* 2000(2) SA 291 (TIC) at 309C-E. and *Mcosini v Mancotywa & Another* (1998) 19 ILJ 1413 (TK) at 1413 C-E.

¹⁶ (2005) 26 ILJ 1957 (SCA) at para 4-5.

employee to decide in which court the dispute is to be heard and expressed the view that it could not have been the intention of the legislature to bring about this consequence.¹⁷

[47] Justice Ngcobo refers to various decisions by the High Courts¹⁸ where the view was expressed that courts should look, not at how the employee has characterised the dispute, but the substance of the dispute. In *Boxer Superstores Mthatha & Another v Mbenya*¹⁹ a different view was expressed, where the Supreme Court of Appeal noted that the employee, "formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness"²⁰.

[48] After having analysed the objects and declared intention of the LRA, Justice Ngcobo concluded that:

"The manifest purpose of section 157(2) was therefore to confer constitutional jurisdiction on the Labour Court"²¹;

"Given the manifest purpose of section 157(2) the use of the word 'concurrent' is unfortunate. Concurrent jurisdiction may well give rise to forum-shopping with all its unfortunate consequences"²²;

"Section 157(2) must be given 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 Rights²³; and

"For all the reasons, I hold that the dispute between the Applicant and Transnet falls within the exclusive jurisdiction of the Labour Court. It follows therefore that the High Court did not have jurisdiction in respect of the Applicant's claim²⁴."

¹⁷ At para [92].

¹⁸ *Mgijima v Eastern Cape Appropriate Technology Unit & Another* 2000 (2) SA 2891 (Tk) at 309 C-E; *Mcosini v Maucotywa & Another* (1998) 19 ILJ 1413 (Tk) at 1413 C – E; *Jones & Another v Telkom SA Ltd & Others* [2006] 5 BLLR 531 (T).

¹⁹ 2007(5) SA 450 (SCA).

²⁰ *Id* at para 12.

²¹ *Id* at para 115.

²² *Id* at para 121.

²³ *Id* at para 123.

²⁴ *Id* at para [151].

[49] It is important to point out that Ms Chirwa, after having been dismissed following a disciplinary enquiry, referred the dispute to the CCMA, a dispute resolution mechanism in terms of the LRA. When the dispute was not resolved, Ms Chirwa did not pursue arbitration but instead approached the High Court, effectively changing her previously elected forum. In the application, the respondents did not embark on a change of their elected forum as the applicant in *Chirwa* did.

[50] The principles of the Labour Court's exclusive jurisdiction as expressed by justice Ngcobo in *Chirwa* have been reversed in *Gcaba* and *Baloyi* as set out below.

[51] In *Gcaba*, the Constitutional Court highlighted the factual and procedural similarities and differences between *Fredericks* and *Chirwa* and said: "To the extent that this judgment may be interpreted to differ from *Fredericks* or *Chirwa*, it is the most recent authority".

[52] On the question whether the High Court has jurisdiction in terms of section 157(2) of the LRA, the Constitutional Court in *Gcaba* said the following:

"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa, supra* and not the substantive merits of the case. ... Where the pleadings including in motion proceedings, not only the formal terminology of the notice of motion, but also 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 the determined exclusively by the Labour Court, the High Court would lack jurisdiction".²⁵
(Footnotes omitted) (Emphasis added)

[53] Clarifying Justice Ngcobo's reference to a court of labour and employment disputes, Justice van der Westhuizen observed in *Gcaba*; "If only the Labour Court could deal with disputes arising out of all employment relations, remedies could be wiped out, because the Labour Court (being a creature of statute with

²⁵ *Gcaba* para 75.

only selected remedies and powers) does not have the power to deal with common law or other statutory remedies".²⁶

[54] In my view, the facts in this case can be distinguished from those in *Gcaba*. In *Gcaba*, the Constitutional Court held that Mr Gcaba's complaint was essentially rooted in the LRA as it was based on the conduct of an employer towards an employee which may have violated the right to fair labour practices. Mr Gcaba lodged a grievance with the SAPS but later abandoned the process and referred the dispute to the Safety and Security Sectoral Bargaining Council. When the South African Police failed to attend the pre-arbitration meeting, Mr Gcaba withdrew the dispute from the said bargaining council and approached the High Court with an application to review and set aside the decision of the National and Provincial Commissioners of Police not to appoint him as station commissioner. Put differently, Mr Gcaba initiated a process in terms of the LRA and subsequently changed his elected forum and approached the High Court.

[55] The latest pronouncement of the Constitutional Court (and current authority) on the jurisdiction of the High Court in respect of section 157 of the LRA is *Baloyi vs Public Protector and Others*²⁷ (*Baloyi*). The appellant, Ms Baloyi, was employed by the office of the public protector as chief operations officer on a five-year contract with a six-month probation period. Three months after expiry of the probation period, she was requested to make representations on the confirmation of her appointment. After having done so, Ms Baloyi received a letter advising her that her contract would end ten days later because she had been found "unsuitable of the role of COO". Ms Baloyi launched an urgent application in the High Court, Gauteng Division, Pretoria for orders declaring the termination of her employment unconstitutional, unlawful and setting it aside. The High Court dismissed the application on the basis that it lacked jurisdiction as the application should have been brought in the Labour Court. The following sections of the judgment are relevant in this regard:

²⁶ *Gcaba* para 73.

²⁷ 2022(3) SA 321 CC.

"[21] The crisp question that this court is called upon to answer is whether the High Court erred in holding that it lacked jurisdiction to hear Ms Baloyi's claim."

"[22] The High Court has jurisdiction to adjudicate any matter, except matters that: (i) fall within the exclusive jurisdiction of this Court in terms of section 167(4) of the Constitution; (ii) this court has agreed to hear directly in terms of section 167(6); or (iii) have been assigned by legislation to another court with a status similar to that of a High Court" (by reference to section 169(1) of the Constitution)."

"[23] ... (S)ection 157(1) of the LRA provides for the exclusive jurisdiction of the Labour Court in all matters that - in terms of the LRA or any other law - are to be determined by the Labour Court. Sections 68(1), 77(2)(a), 145 and 191 of the LRA proffer examples of matters that 'are to be determined by' the Labour Court and are therefore, by virtue of section 157(1), within the exclusive jurisdiction of the Labour Court. This court has found, 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 for example, unfair dismissal disputes", referring to *Gcaba*.

"[24] Crucially, section 157(1) does not afford the Labour Court general jurisdiction in employment matters and, as a result, the High Court's jurisdiction will not be ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations."

"[31] 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, rather than diminishes, their jurisdiction."

"[32] In order to determine whether the High Court lacked jurisdiction to adjudicate Ms Baloyi'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."

"[33] In *Gcaba*, this court made it clear that an assessment of jurisdiction must be based on an applicant's pleadings, as opposed to the substantive merits of the case", quoting the extract from *Gcaba* reflected in para [50] above."

"[36] The High Court judgment expressly acknowledges that Mr Baloyi disavowed any reliance on her rights under the LRA."

"[37] The High Court held that the matter is essentially a labour dispute arising from an employment relationship that falls within the Labour Court's exclusive jurisdiction. For the reasons that follow, the High Court erred in reaching this conclusion."

"[38] It is trite that the same set of facts may give rise to several different causes of action."

"[40] The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right)."²⁸

(Footnotes omitted)

The High Court's Jurisdiction in the court a quo

[56] In the application, the relief sought by the respondents (applicants in the court *a quo*) is, amongst others, for a declarator that the termination of their employment contracts by the appellant was unlawful and for an order to be re-instated in their employment retrospectively.

[57] The aforesaid relief is based on allegations in the respondents' founding affidavit as follows:

- a. The appellant ought to have appealed the court orders in the 25 August 2023 and 27 August 2023 urgent applications (referred to in paras [10] and [11] above) instead of charging the respondents in a disciplinary hearing and on that basis the court *a quo* should have found that the conduct of the appellant in termination the respondents' employment contracts was unlawful. This ground is expanded in paras 49.13 to 16 of the respondents' founding affidavit, alleging that the

²⁸ *Baloyi* was followed by the Labour Appeal Court in *Passenger Rail Agency of SA & others v Ngoye & others* (2024) 45 ILJ 1228 (LAC), although expressing concern about the disadvantages that may flow for that approach.

appellant's behaviour is unlawful, unconstitutional and undermines the authority of the judiciary in relation to the aforesaid urgent applications.

- b. The appellant "Contravened its internal policy and the *audi* principle – in terms of its policy the [respondents] were entitled to be afforded an opportunity to state their case – including their defence and mitigation".
- c. "That the [respondents'] contracts of employment incorporate the sectoral determination – which is binding and stipulates in clause 27 that the termination of the [respondents'] contracts can be done for any cause recognised by law" followed by a submission that the respondents' contracts of employment "were terminated unlawfully and that this is not recognised by the law."
- d. "The [respondents] have now approached [the court *a quo*] to exercise their contractual remedy of a (sic) specific performance – in that they should be reinstated with all the benefits."
- e. In para 35 of their replying affidavit the respondents state that they do not place reliance on the fairness of the termination of their employment. This is confirmed in para 44 of the replying affidavit.
- f. In paras 49.17 to 22 of their founding affidavit, the respondents alleged that they suffered hardship, grave and irreparable harm as a result of the termination of their employment contracts and that they and their families "are experiencing multiple violations of a range of constitutional rights as a result of the [appellant's] conduct".

[58] In its answering affidavit, the appellant states, "It is clear from the founding affidavit that the applicant's case is mainly based on fairness, whilst sparsely interposed by an unadorned reference to section 77(3) of the BCEA". In my view, this statement is not a correct summary of the respondents' case as pleaded.

[59] The appellant, in its answering affidavit and in its heads of argument in the court *a quo*, (in challenging the court *a quo*'s jurisdiction based on section 77(3) of the BCEA) relied on a judgment of the Labour Appeal Court in *Tswaing Local Municipality and Others*²⁹ where the Labour Appeal Court held that the *jurisdiction of that court* cannot be invoked under section 77(3) of the BCEA

²⁹ Labour Court Case No. J1230/20 delivered on 17 November 2020.

where a contract of employment is terminated or cancelled, whether lawfully or unlawfully, fairly or unfairly. The court's reasoning was based on the language in the section using "concerning" in the present continuous tense and if the intention was to refer to a terminated contract it would have used a verb like concerned. In my view this judgment relates to the jurisdiction of the Labour Appeal Court and not the High Court. It is clear from the authorities analysed above that the jurisdiction of the High Court is not limited by section 77(3) of the BCEA or by section 157(2) of the LRA, save only in so far as the exclusive jurisdiction of the Labour Court is conferred by section 77(1) of the BCEA and section 157(1) of the LRA.

[60] The appellant further relied on quotations from *Prasa* where the Labour Appeal Court warned about the potential adverse consequences resulting from the concurrent jurisdiction of the Labour Court and the High Court if litigants were to plead their cases carefully to avoid the exclusive jurisdiction of the Labour Court by challenging their dismissals on the basis of unlawfulness and/or breach of contract, rather than to dispute the fairness of the employer's action. However, *Prasa* followed *Baloyi* and the quotes from *Prasa* only relates to the Labour Appeal Court's concern with the disadvantages flowing from the approach adopted in *Baloyi*. *Prasa* is therefore not authority for the appellant's submissions that the court *a quo* lacked jurisdiction in the application.

[61] The jurisdictional issue on the papers before us, is whether the jurisdiction of the court *a quo* has been ousted by virtue of the provisions of section 77(1) of the BCEA or by section 157(1) of the LRA. Both those sub-sections place certain matters within the exclusive jurisdiction of the Labour Court. The jurisdictional issue is not whether the respondents have pleaded their case (for the relief sought in the notice of motion) in a manner that brought their case within the jurisdiction of the court *a quo*. Put differently, in a manner that will establish, or engage, the court *a quo*'s jurisdiction. In dealing with the merits below, I point out that the respondents' pleadings lack essential allegations necessary for a finding in their favour by the court *a quo*. In my view, those shortcomings do not result in the court *a quo* not having had jurisdiction in the application. The effect thereof

is that the respondents' pleadings did not justify a finding in their favour on the merits.

[62] In the minority judgment of *Chirwa* Chief Justice Langa said:

"It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it. That much was recognised by this Court in *Fraser v Absa Bank Ltd*. Van der Westhuizen J, when deciding on what constitutes a constitutional issue, held as follows:

'An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgement by this Court that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.'

The corollary of the last sentence must be that *the mere fact that an argument must eventually fail cannot deprive a court of jurisdiction.*" (Footnotes omitted) (Emphasis added)

[63] The following statement by Chief Justice Lange in his minority judgment in *Chirwa* is also relevant to the manner in which the respondents pleaded their case in the application, or failed to plead facts essential for a finding in their favour on the merits:

"[Ms Chirwa] formulated her case on the basis of PAJA, and a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this Court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable."

[64] The merits of the respondents pleaded case (with which I will deal below) are not relevant in determining the court *a quo's* jurisdiction.³⁰

³⁰ See *Baloyi* para at 42.

[65] The respondents' allegation that the appellant failed to observe the *audi alteram partem* rule in respect of the disciplinary hearing is, in my view, a complaint about the lawfulness of the disciplinary process – *audi alteram partem* being a principle of our law which has allegedly not being complied with - and not in the first instance a complaint about the fairness of that process. The fact that a failure to comply with the *audi alteram partem* rule may also be, and probably is, unfair is coincidental, as decided in *Fedlife*³¹.

[66] For all the above reasons, I am satisfied that the respondents' pleaded case in the application in the court *a quo* was a claim based on an alleged unlawful termination of their employment contracts and not as a claim based on an unfair labour practice or unfair dismissal in respect of which the Labour Court has exclusive jurisdiction. The relief which the respondents sought in para 2 of the notice of motion in the application is to declare the appellant's decision to terminate their employment contracts *unlawful*, not unfair.

[67] In view of the aforesaid the court *a quo* held (correctly in my view) that it had jurisdiction to hear the application.

The merits

[68] The respondents' grounds for the relief sought in the Application have been summarised in para [57] above, which we will deal with in turn.

The appellant should have appealed the orders in its previous urgent applications instead of having charged the respondents

[69] The appellant's *25 August Urgent Application* (to declare the respondent's strike unlawful) was dismissed by the Labour Court. The appellant accepted that judgment.

[70] The appellant's *27 August Urgent Application* was not heard and struck of the roll for lack of urgency. The Labour Court did not grant an order that the appellant could have appealed.

³¹ See para at 37 above.

[71] A Rule *Nisi* was issued in the *Ex parte* application. The appellant's position is that there is no basis to have appealed that order.

[72] In my view, the respondents' position (that the appellant's decision to charge the respondents in a disciplinary hearing was done because the appellant was unsuccessful in the aforesaid three court applications) is without merit. The charges against the respondents arose out of their conduct during the strike and not as a result of the outcome (or lack thereof) in any of the three urgent applications launched by the appellant.

Contravention of the appellant's internal policy

[73] The respondents did not attach a copy of the alleged policy of the appellant to their papers. They further did not plead the terms of policy that the appellant allegedly contravened nor did they plead the alleged contravention thereof.

[74] The appellant stated in its answering affidavit that it does not have such policy.

[75] The appellant stated in its answering affidavit that it prescribes to and follows Schedule 8 to the LRA being a code of good practice for dismissal of employees.

[76] In its replying affidavit, the respondents state that, " ... the notice to calling the applicants [respondents in the appeal] to attend the disciplinary hearing *"incorporated the provisions of its internal procedure"* and that "Annexure AA1 to the Founding Affidavit [the notice to attend a disciplinary hearing] issued by the [appellant] *make (sic) reference to the internal policy which the disciplinary hearing was constituted (sic).*" (Emphasis added).

[77] The notice to attend a disciplinary hearing attached to the respondents' founding affidavit sets out the respondents' rights and obligations in respect of the disciplinary hearing. These include their rights to be represented, to state their case, the right to call witnesses and that, in the event of a failure to attend the inquiry, it may continue in their absence. These rights are stated to be "In terms of the Company's disciplinary policy and procedure."

[78] The allegations by the respondents (that the appellant's notice to attend a disciplinary hearing *"incorporated the terms of internal procedure"* and that

Annexure AA1 to the founding affidavit issued by the [appellant] contains a reference to the internal policy) plainly did not place the alleged policy or internal procedure before the court. In addition, the alleged breach of the policy and/or internal procedure has not been pleaded as pointed out above. Even on the assumption that the respondents' rights stipulated in the notice to attend a disciplinary hearing constitute the policy and procedure that the appellant allegedly breached, the respondents did not plead which of those policies have been breached and in what respects it has been breached, save only in respect of allegation that the appellant did not comply with the *audi alteram partem* rule which I deal with below.

- [79] It must follow that the respondents' application in the court *a quo* was not properly pleaded in a manner which justified granting the orders by the court *a quo* in the application.

The appellant allegedly failed to comply with the Sectoral Determination

- [80] The respondents allege that the appellant's contracts of employment incorporate the Sectoral Determination which stipulates in clause 27 that the respondents' contracts can be terminated without notice for any cause recognised by law. In this regard the respondents merely stated that their contracts of employment "were terminated unlawfully and that is not recognised by the law." The respondents did not place anything before the court *a quo* to justify a finding regarding an alleged breach, or unlawful termination, of the relevant employment contracts.

The appellant allegedly contravened the "audi-principle"

- [81] In para 49.9 of their founding affidavit, the respondents allege that the disciplinary hearing contravened "the *audi* principle" stating that the respondents were "entitled to be afforded an opportunity to state their case – including their defence and mitigation".
- [82] There are differences between the versions of the appellant and the respondents in respect of the disciplinary hearing conducted on 30 August 2023.

- a. The respondents allege that the notices were "dumped on the floor at the vicinity which the [respondents] were embarking on the strike" and that they received the notices "at night".
- b. These allegations are denied by the appellant in para 46 of its answering affidavit stating that the respondents refused to accept the notices and tore them up.
- c. It is clear from the affidavits that the respondents received the notices as they brought an urgent application to interdict the disciplinary hearing from taking place.
- d. The respondents alleged that they arrived at the venue to attend a "mass disciplinary hearing" and that "upon arrival, the [respondents] were denied access - the police and security guards chased them away."
- e. The appellant admitted that the respondents arrived at the venue where the disciplinary enquiry was held. However, they deny vehemently that the respondents were denied access and that the police and security guards chased them away. The deponent to the appellant's answering affidavit, Ms Jennifer Angelides, stated that around 17:15 on 30 August 2023 three persons entered the conference room, one of which was Mr Makwela who deposed to the respondents' founding affidavit. When he was asked whether they were ready to proceed, he indicated that the respondents sought a postponement. The chairperson of the disciplinary proceedings, Adv B Delport, refused to grant a postponement for the reasons stated in his report.
- f. Adv Delport's findings are attached to the respondent's founding affidavit and have, to the extent relevant, been quoted in para [16] above. Adv Delport stated in para 3 of his findings that, "Some of the Employees [respondents] were gathered at the premises of the Hotel but never actually attended the disciplinary hearing and remained in the lobby of the Hotel of their own free will and volition. When asked by Mrs Schoeman who was going to be the employee representatives, as there was no way to hear them all, no response was given, and they began singing and caused great uproar and disturbance in the Hotel. Due to the elected non-appearance of the remainder of the Employees, the disciplinary hearing proceeded."

[83] The respondents did not challenge the chairperson's findings, save to state in para 44 of the founding affidavit, that they received a document "*purporting* to be the chairpersons' findings."

[84] The court *a quo* made the following observations and findings:

- a. The court *a quo* referred, in para [30] of the Judgment, to the "Plascon Evans principles" but, in my view, failed to give effect to that principle in respect of the factual disputes between the parties referred to above.
- b. In para [34] of his judgment, Phahlamohlaka AJ states that:

"...the [appellant] in its own answering affidavit, admits that the applicants were removed from the venue where the disciplinary hearing was held because they were unruly."
- c. The court *a quo* accepted the respondents' version in respect of the events at the disciplinary hearing (referred to in para [16] above) which was denied by the appellant who gave its version of those events in its answering affidavit. The appellant's version corresponds with the chairperson's findings attached to the founding affidavit. The statements in the chairperson's findings stood uncontested before the court *a quo*. In view of the aforesaid, the court *a quo*'s statement that it applied the principle as expressed in *Plascon Evans Paints Ltd v Van Riebeeck Paints*³² (*Plascon Evans*) to the facts before it, cannot be upheld.

[85] In *Plascon Evans* the Appellate Division of the High Court (as it then was) clarified and qualified the rule regarding disputes of fact in motion proceedings thus:

"The main consequence is simply that, in terms of the abovementioned general rule, where the affidavits in this case raises real and bona fide disputes of fact, the [applicant] is bound to accept the respondent's version of the facts."

[86] The exceptions to this general rule were phrased as follows by the Appellate Division in *Plascon Evans*:

³² 1983(3) SA 623 (A).

"In certain circumstances denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact" and "where the allegations or denials by the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".

[87] These exceptions to the general rule do not apply in this case. Here the appellant's version of the events at the disciplinary hearing were confirmed by the report of the independent chairperson at the disciplinary hearing. The court *a quo* erred in not accepting the appellant's version of the facts in respect of the events at the disciplinary hearing.

[88] Based on the appellant's version of the facts, confirmed by the report of the chairperson of the disciplinary hearing, the respondents were given an opportunity to be heard but that they did not avail themselves of that opportunity.

Alleged hardship, and multiple violations of a range of constitutional rights

[89] The respondents filed a number of confirmatory affidavits setting out the detail of the financial hardship that they are suffering as a result of the termination of their employment contracts. The court *a quo* did not make a finding in this regard and the issue does not arise in this appeal.

[90] The alleged violations of the "range of constitutional rights that were implicated" were not pleaded in the Application, the court *a quo* did not make a finding in respect thereof and there is therefore no constitutional issue before us in this appeal.

Conclusion

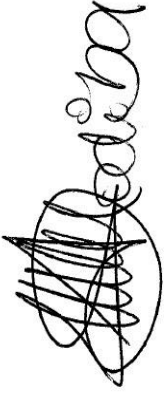
[91] For the reasons set out above, the appeal must succeed.

Order

[92] In the result, I make the following order:

- 1 The appeal is upheld.
- 2 The order of the court *a quo* is set aside and replaced with the following:

- 2.1 The application is dismissed with costs.
- 2.2 The respondents are ordered to pay (jointly and severally, the one to pay the other to be absolved) the costs of this appeal on Scale C.



pp

DHL BOOYSEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

MODIBA J (VAN OOSTEN J concurring)

[93] I have had the pleasure of reading the judgment eloquently written by my brother Booysen AJ. Although I agree with the order proposed by him, I respectfully disagree with the finding that the court a *quo* enjoys jurisdiction over the respondents' unlawful dismissal claim. I set out my reasons below.

[94] The judgment of Booysen AJ fully sets out the background facts and the history of the litigation between the parties. It quotes section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), and section 157(2) of the Labour Relations Act 66 of 1995 (LRA), which confer concurrent jurisdiction on the Labour Court and High Courts over employment matters. It also deals extensively with various judgments where courts grappled with determining the contours of the jurisdiction of these courts in terms of these statutory provisions. It is not necessary for me to repeat these exercises. I only refer to background facts, statutory provisions and applicable judgments to the extent necessary to place my reasons in context.

[95] The applicable legal principles when determining whether a matter falls within the exclusive jurisdiction of the Labour Court, thus ousting that of civil courts, have by now become well-settled. In the judgment of Booysen AJ, paragraph 75 of the Constitutional Court judgment in *Gcaba v Minister for Safety and Security and Others*³³, is quoted, where those are articulated. I summarise them below as applied in other judgments referenced in the judgment of Booysen AJ:

- a. Where section 157(2) or any other provision of the LRA or other legislation confers exclusive jurisdiction on the Labour Court, the jurisdiction of the High Court over labour matters is ousted³⁴;
- b. The jurisdiction of the High Court over a labour matter is not simply ousted because a dispute falls within the sphere of labour relations.³⁵ For the jurisdiction of the High Court to be ousted, the matter ought to fall within the exclusive jurisdiction of the Labour Court. In such a case, the court a *quo*'s jurisdiction, in terms of section 77(3) of the BCEA, may not be engaged.
- c. The fact that a claim may be founded on an unfair dismissal does not obligate a litigant to formulate his or her claim as such and to approach the Labour Court. He may approach the High Court to enforce a right that does not emanate from the LRA;³⁶
- d. Jurisdiction is determined based on pleadings and not the substantive merits of the case. Pleadings [which include a notice of motion and founding affidavit in application proceedings] must be interpreted to determine whether an applicant is asserting a claim that falls within the exclusive jurisdiction of the Labour Court. If so, then the jurisdiction of the High Court is excluded.

[96] The respondents allege that their dismissal by the appellant is unlawful. The remedy they seek is for specific performance in the form of retrospective reinstatement of their employment contracts and benefits. They seek to engage the High Court's jurisdiction in terms of section 77(3) of the BCEA. They

³³ 2010 (1) SA 238 (CC).

³⁴ *Fredericks and others v MEC for Education and Training Eastern Cape and Others* 2002(2) SA 693 (CC).

³⁵ *Chirwa v Transnet and Others* [2008] 2 BLLR 97 (CC).

³⁶ *Baloyi v Public Protector and Others* 2022 (3) SA 321 CC and *Passenger Rail Agency of SA & Others v Ngoye & Others* [2024] 45 ILJ 1228 (LAC).

expressly disavow reliance on the fairness of the termination of their employment contracts or any provision of the LRA.

[97] The respondents, in my view, have unsuccessfully attempted to engage the jurisdiction of the court *a quo* to enforce right(s) that do not emanate from the LRA. The cause of action that arises from the right to *audi alteram partem*, allegedly infringed by the appellant, is not pleaded at all. Their constitutional rights allegedly infringed by the appellant are vaguely pleaded, and the cause of action that arises from such infringement are likewise not pleaded. In fact, as I find below, they pleaded their case to specifically mask a cause of action that falls within the exclusive jurisdiction of the Labour Court, thus ousting that of the High Court, as envisaged in section 157(1) of the LRA. Their case as pleaded, implores me to heed the Constitutional Court's warning in *Gcaba* that the special status of the Labour Court ought to be protected, and that section 157(1) should not be interpreted to also confer jurisdiction on the High Court over matters falling within exclusive jurisdiction of the Labour Court.³⁷ This warning ought to extend, as I do extend it in this judgment, to an interpretation of section 77(3) of the BCEA.

[98] The respondents pleaded their claim in their founding affidavit as follows:

“7.1 The appellant ought to have appealed orders of the High Court in the urgent applications and not instituted a disciplinary action. Therefore, the court *a quo* should have found that the termination of their employment contracts [pursuant to the disciplinary action] is unlawful. This conduct [on the part of the appellant] is unlawful, unconstitutional and undermines the authority of the judiciary in relation to the aforesaid urgent applications.

7.2 The appellant contravened its internal policy, and the *audi alteram (audi)* principle when it denied the respondents an opportunity to state their case [during the disciplinary proceedings].

7.3 The respondents' employment contracts incorporate a sectoral determination in clause 27 which states that employees' contracts may only be terminated for any cause recognised by law.

³⁷ *Gcaba* at para 70-72.

7.4 They seek reinstatement of their employment contracts to restore their plight, dignity and constitutional rights.”

[99] The respondents vaguely described the constitutional rights allegedly breached. A cause of action based on breach of constitutional rights is not pleaded. Booysen AJ correctly found [at paragraph 85] that this cause of action was not properly pleaded and the court *a quo* accordingly, cannot be faulted for not determining the merits thereof.

[100] It is unclear whether the respondents’ cause of action is based on their employment contracts, the appellant’s internal policy or the sectoral determination that is referenced in their founding affidavit. They vaguely place reliance on all these instruments without pleading a cause of action that is legally recognised in our law, which would entitle them to specific performance in the form of reinstatement of their employment contracts and benefits.

[101] The alleged unlawful institution of disciplinary proceedings does not engage the court *a quo*’s jurisdiction simply for the reason that no such cause of action exists in our law. In fact, exercising a choice not to appeal an order of the Labour Court dismissing the 25 August 2023 urgent application [in which the appellant sought to interdict a threatened strike by the respondents], or failing to further pursue in the ordinary course the 27 August 2023 urgent application [in which the appellant sought an interdict to regulate a strike action by the respondents], which the Labour Court struck from the roll, is perfectly permissible in our law. Where reliance is placed in subsequent legal proceedings on an issue or facts that have already been determined, estoppel and *res judicata* are available to the respondents as a defence.

[102] As Booysen AJ found, the provisions of the internal policy allegedly not complied with, are not pleaded. A proper cause of action based on breach of the internal policy is likewise, not pleaded.

[103] In his judgment, Booysen AJ found that the court *a quo*’s jurisdiction is engaged because contravention of the *audi* principle, which is a principle of our law, is alleged. *Audi* is a fundamental principle in our law. It affords one the right to a fair

hearing, and the opportunity to respond to evidence presented against him or her. However, an allegation that the applicant has infringed the respondents' right to *audi*, without more, does not give rise to a cause of action with a remedy for specific performance. The respondents merely pleaded infringement of this right. The alleged breach [of the right to *audi*] must give rise to a pleaded cause of action that enjoys recognition in our law for the court a *quo*'s jurisdiction to be engaged.

[104] The respondents have notably not pleaded a term of their employment contract that affords them that right, which the appellant is alleged to have breached. Therefore, the conclusion that they have not engaged the court a *quo*'s jurisdiction over a legally recognised cause of action that arises from the alleged breach of their right to *audi* [outside the LRA] is inescapable. The conclusion reached by Booysen AJ, that "*audi alteram partem* being a principle in our law which has allegedly not been complied with" is inconsistent with the respondents' case as pleaded. They do not rely on this principle as of general application in our law. They only just pleaded breach of their right to *audi*, implying breach of an internal policy which forms part of their contracts of employments.

[105] In terms of section 188(1)(b) and (2) of the LRA, the respondents enjoy a statutory right to *audi* prior to their contracts of employment being terminated. These sections provide as follows:

"188 Other unfair dismissals

(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for *dismissal* is a fair reason-

- (i) related to the *employee's* conduct or capacity; or
- (ii) based on the employer's *operational requirements*; and

(b) that the *dismissal* was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*."

[106] In the absence of a specific provision in their employment contracts, or an internal policy which forms part of their contracts of employment, affording them the right to *audi* prior to their employment contracts being terminated, the respondents had no alternative but to plead a cause of action for unfair dismissal in terms of section 188(1)(b) read with section 188(2) of the LRA which affords them this right. Having done that would have brought their claim within the provision of section 157(1) of the LRA, which confers exclusive jurisdiction on the Labour Court. Vaguely alleging an unlawful termination of a contract due to contravention of the *audi* principle, does not *per se* constitute a cause of action outside the LRA, which is recognised in our law which entitles them to a claim for specific performance. The fact that they expressly disavowed any reliance on the fairness of the disciplinary process or any provision in the LRA, does not, in itself, strengthen their case on jurisdiction. Notably, the appellant's version is that it does not have the alleged internal policy and that it has adopted a code of good practice referenced in section 188(2) of the LRA. That the respondents failed to plead a cause of action arising from the alleged breach of their right to *audi* outside the LRA, which as I have found, justifies the inference that they have none.

[107] The words 'any matter concerning a contract of employment', in section 77(3) of the BCEA, do not mean that any allegation by an employee of wrongdoing by an employer engages the jurisdiction of the court *a quo*. Similarly, a mere allegation or threat of infringement of a constitutional right by an employer, does not engage the jurisdiction of the court *a quo* in terms of section 157(2)(a). A cause of action recognised in our law, which arises from such allegations must be pleaded for the court *a quo*'s jurisdiction to be engaged in terms of these statutory provisions. Otherwise, litigants may vaguely plead breach of a right outside the LRA simply to mask a cause of action that falls within the exclusive jurisdiction of the High Court as the respondents have done here.

[108] The conclusion the respondents seek to draw, that in terms of clause 27 of the sectoral determination [which forms part of their employment contracts] the appellant acted unlawfully because it did not terminate their employment contracts for a cause recognised by law, must suffer the same fate because the conduct complained of, does not flow from a recognised cause of action in our

law. The sectoral determination on which the respondents seek to rely is not even attached, neither is clause 27 quoted in their founding affidavit.

[109] I would therefore uphold the appeal with costs, set aside the order of the court *a quo* and dismiss the respondents' application with costs solely on the jurisdiction point.



LT MODIBA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree. The following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside, and replaced with the following:
"The application is dismissed with costs."
3. The respondents are ordered to pay, jointly and severally, the one paying, the others to be absolved, the costs of the appeal, on Scale C.



pp

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Counsel for Appellant:

Adv W P Bekker SC

Instructed by:

ML Schoeman Attorneys

Respondents' Attorney:

Mr ML Marweshe

Instructed by:

Marweshe Attorneys

Date of Hearing:

13 November 2024

Date of Judgment:

18 February 2025

MODE OF DELIVERY:

This judgment is handed down electronically by transmission to the parties' legal representatives by email, uploading on CaseLines and release to SAFLII. The date and time for delivery is deemed to be 18 February 2025 at 10h00.