



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable
Case No: DA 15/2024

In the matter between:

ZIPHATE MBONENI CIBANE

First Appellant

NONHLANHLA PAMELA HLONGWA

Second Appellant

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL

First Respondent

RBG CHOUDREE SC N. O

Second Respondent

Heard: 27 May 2025

Delivered: 15 July 2025

Coram: Van Niekerk JA, Tokota AJA et Basson AJA

JUDGMENT

VAN NIEKERK, JAIntroduction

[1] The appeal illustrates both the dysfunctional state of the management of workplace discipline in the provincial government of KwaZulu-Natal and the inability of the judicial system to meet the statutory purpose of expeditious and effective adjudication. On 26 July 2017, at a meeting convened at the home of the first respondent, the Premier of the province, the appellants say that they were advised by the Premier that a forensic report had been presented to him, in which they had been implicated in acts of alleged misconduct with a recommendation that disciplinary proceedings be brought against them. The appellants were suspended two and a half years later, on 20 January 2020. Charges of wide-ranging misconduct, including serious breaches of the Public Financial Management Act¹, and supply chain policies, were brought against the appellants six months later, on 28 July 2020, when the appellants were given notice to attend a disciplinary enquiry.

[2] On 3 February 2021, some six months after the charges of misconduct had been brought, a disciplinary enquiry was duly convened before the second respondent, a senior counsel at the Durban Bar. On 22 February 2021, the appellants notified the second respondent that they objected to the charges, which they contended should be quashed on the grounds that there had been an unreasonable delay in bringing the proceedings to a disciplinary hearing, and that their employer had waived its right to bring the proceedings or had been estopped from doing so. On 5 July 2021, the second respondent dismissed the application and directed that the disciplinary hearings proceed.

[3] On 20 August 2021, the appellants filed an application in the Labour Court to quash the charges of misconduct brought against the appellants and to review and set aside the second respondent's ruling. The application was heard on 16 August 2022.

¹ Act 1 of 1999.

Judgment was delivered a year and three months later, on 17 November 2023, when the Court dismissed the application with no order as to costs. Leave to appeal was granted six months later, on 20 May 2024.

[4] This appeal thus serves us in lamentable circumstances. The misconduct that forms the basis of the case was allegedly committed more than 10 years ago, and the internal disciplinary enquiry into that misconduct has not yet proceeded beyond the stage of preliminary objections.

Material facts

[5] The Labour Court's judgment records the material facts. The appellants are employed as senior managers in the office of the Premier for the province of KwaZulu-Natal; the first appellant as the chief financial officer and the second as a director: supply chain management.

[6] The appellants aver that at the meeting with the premier on 26 July 2017, they had been informed that the Premier had not authorised the implementation of the recommendations made in the forensic report because he had concerns with the report. After the discussion, the Premier advised them that he would inform them in due course if steps would be taken against them. The appellants say that the impression they gained was that the Premier was dissatisfied with the way the investigation had been conducted and that he would probably not implement the recommendation that they be disciplined.

[7] The contents of the forensic report were leaked and published in the media on 10 August 2017. After the leak, the first appellant was called to a meeting with the director general of the Premier's office, when again, consequent on views expressed by the Premier, the first appellant says that he formed the firm impression that no steps would be taken against him.

[8] The charges of misconduct were served on the appellants on 28 July 2020. Most of the charges concern alleged breaches of the Public Finance Management Act and the first respondent's supply chain management policies and procedures.

[9] The appellants aver that the first respondent and the department were aware in July 2017 of the allegations of misconduct and the recommendations made in the report. They also knew that the report was in the public domain and that they had the right to charge the appellants with misconduct. The appellants aver that the failure by the first respondent to act within a reasonable time constituted a waiver of the right to take disciplinary action against them. That aside, the appellants submit that the delay in charging them was a breach of the principle of legality, with the consequence that they were, as a matter of law, entitled to an order quashing the charges against them.

[10] A disciplinary hearing into the charges brought against the appellants was convened on 3 February 2021.. The second respondent was appointed to chair the enquiry. At the outset, the appellants applied to have the charges against them set aside on account of the delay in bringing the charges, and on the basis of what they contended to be a waiver of disciplinary action against them.

The second respondent's ruling

[11] The second respondent's ruling, delivered on 5 July 2021, extends over some 37 pages and concludes that the first respondent took all reasonable steps in the circumstances on receipt of the forensic report to act in accordance with the recommendations made in that report, and that it would be in the interests of justice and the public interest to enable the employer to exercise the statutory powers conferred on it to continue the disciplinary enquiry. In regard to the waiver issue, the second respondent concluded that it was not within the Premier's powers to provide assurances or undertakings that disciplinary measures would not be taken against the appellants and that in any event, the assurances contended for by the appellants comprised nothing more than their subjective impressions in circumstances where the investigation

initiated by the first respondent had continued notwithstanding. The second respondent considered that the time that had elapsed between the release of the report and the charging of the appellants and the commencement of the disciplinary proceedings had been adequately explained and accounted for, and that the prejudice to the appellants relating to the availability of witnesses, documentary evidence and the like, was not such so as to prevent the enquiry from proceeding. The appellants would have every opportunity to present their defence should that become necessary during the inquiry.

[12] For these reasons, the second respondent dismissed the objection in *limine* that the charges against the appellants be quashed and ruled that the disciplinary hearing continue.

Labour Court's judgment

[13] In the notice of motion and founding affidavit that served before the Labour Court the appellants sought a declaratory order firstly, that *"there has been an unreasonable delay in bringing disciplinary proceedings against the First and Second Applicants ..."*, and, secondly, that *"the first Respondent has waived its rights to pursue disciplinary proceedings against the First and Second Applicants..."*. Thirdly, the appellants sought an order that the charges against them be quashed and that the disciplinary proceedings be *"permanently terminated"*. Finally, the appellants sought an order reviewing and setting aside the second respondent's ruling.

[14] The question of the Labour Court's jurisdiction to grant the relief sought was raised in the answering affidavit but not addressed in the judgment. The Labour Court accepted that the first respondent had failed to provide an adequate explanation for the delay in filing the charges of misconduct, but despite the long delay and the absence of an adequate explanation, it held that *"this case does not qualify for a permanent stay of disciplinary proceedings"*. The Court reasoned that the appellants faced charges relating to multiple breaches of the Public Finance Management Act and the department's supply chain management policies, and that given the nature of the

charges and the seniority of the appellants, *“there is a societal interest in the charges being aired in a disciplinary process”*. Further, the Court found that there was no evidence that any further delay would cause the appellants insurmountable prejudice. Regarding the issue of waiver, the Labour Court held that it was not open to a public authority to renounce a right introduced in the public interest. The Court concluded:

‘[39] To my mind, the right to discipline in the context of charges which concern multiple breaches of the Public Finance Management Act and Supply Chain Management policies by senior employees is not just for the benefit of the employer but also in the interests of the public as well. Therefore, if the Premier and/or Director General purported to waive this right, they had no right to do so in the absence of proper grounds (such as opinion from a proper authority that the case against the appellants have poor prospects of success).’

[15] The Labour Court accordingly upheld the second respondent’s ruling to dismiss the objections raised by the appellants.

Grounds for appeal

[16] The appellants contend that the Labour Court failed to adopt the correct approach when determining whether the delay in proffering charges against them was unreasonable; that the Court incorrectly found that the delay in proffering the charges was not unreasonable; that the Court failed to consider that the nature of the offence is relevant only in so far as it could justify a longer period of further investigation thus causing an understandable delay; that the Court incorrectly approached the effect of the nature of the charges when determining whether the delay was reasonable and that the Court erred in its finding that the Premier and director general did not waive the right to discipline the appellants.

Evaluation

[17] At the hearing of the appeal, we raised with counsel the question whether the Labour Court had the jurisdiction to grant the declaratory orders sought, i.e. substantive orders declaring the delay in bringing charges against the appellants to be unreasonable, that the right to pursue disciplinary charges had been waived, and the order quashing the charges.

[18] Section 157(1) of the Labour Relations Act² (LRA) provides that 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*”.

[19] In 2011, in *Booyesen v Minister of Safety and Security & others*³ (*Booyesens*) this Court reversed a decision by the Labour Court that section 157(1) read with section 185 did not confer jurisdiction on the Labour Court to intervene in incomplete disciplinary proceedings, pending the outcome of an application to review and set aside a ruling made by the chairperson of the enquiry. Booyesen was a police officer, charged with fraud, corruption and perjury. After disciplinary proceedings against him had commenced, Booyesen claimed that his medical condition precluded him from continuing to participate in the proceedings. The chairperson of the hearing ruled that subject to his continuing with his medication, Booyesen was fit to attend the hearing and that the enquiry should continue. Booyesen approached the Labour Court for an order postponing the disciplinary hearing. The Labour Court refused to grant the order sought on the basis that the Court had inherent powers only in relation to matters under its jurisdiction, “*and its jurisdiction does not include interfering with disciplinary hearings*”.⁴

[20] Booyesen appealed to this Court. The crisp issue on appeal was whether the Labour Court had jurisdiction to intervene in incomplete disciplinary proceedings.⁵ This Court decided that it did, on the basis that section 157 should be interpreted to give the Labour Court “*powers equal to that of the High Court when it comes to employment and*

² Act 66 of 1995, as amended.

³ (2011) 32 *ILJ* 112 (LAC); [2011] 1 *BLLR* 83 (LAC).

⁴ (2009) 30 *ILJ* 301 (LC) at para 42.

⁵ *Ibid* at para 33.

labour matters ...”. An article by John Grogan⁶ appears to have been particularly persuasive. The author said:

‘But it is equally difficult to fathom why, if the Labour Court has exclusive jurisdiction over labour and employment disputes, it should not enjoy the same powers in that sphere as were previously exercised by the High Court – including the power to interdict unlawful or unfair disciplinary proceedings in appropriate cases.’

[21] Without making any finding on the merits, this Court found that the Labour Court has jurisdiction to interdict any unfair conduct, including disciplinary action, subject only to exceptionality, a matter left to the discretion of the Labour Court. The order granted was that *“The Labour Court does have jurisdiction to grant appropriate relief in relation to pending disciplinary hearings”*.

[22] This ruling has been interpreted to mean that the Labour Court has the jurisdiction to interdict or otherwise intervene in incomplete disciplinary proceedings, limited only by the consideration of exceptionality. The implication is that the Labour Court may exercise powers over matters that, in terms of the LRA, are to be determined by arbitration, in particular, the fairness of internal proceedings relating to alleged misconduct or incapacity.⁷ The consequence, over the years, has been that described by Tlhotlhemaje J in *George v Nyoka and others*:⁸

‘This application is representative of the now familiar and habitual abuse of the urgent Court by employees, especially those who occupy senior positions in all spheres of government, especially in the municipalities. These employees, after being placed on prolonged periods of precautionary suspensions and when called upon to answer to the charges of misconduct, will take all means necessary in order to avoid the conclusion of those enquiries. When all the strategies deployed to avoid the hearing comes to nought, the next step is to

⁶ *Employment Law* vol 25 part 1 Lexis Nexis.

⁷ Du Toit *et al Labour Law Through the Cases* LRA 7-106(10).

⁸ [2023] 7 BLLR 654 (LC); [2023] ZALCJHB 70 (LC) at paras 1 and 4.

seek sanctuary from this Court, with contrived and legally unsustainable urgent applications, with the hope that the serious charges will vanish.

...

These antics are an antithesis of the primary purpose and objectives of the Labour Relations Act 66 of 1995, as amended (LRA), primary of which is to have labour disputes resolved expeditiously. They do not have a place either in the workplace or in this Court, if the primary objectives of the LRA are to be achieved.'

[23] Since *Booyesen*, the Constitutional Court has delivered a number of judgments that adopt a less expansive interpretation of section 157(1), and which have called into question the premise that the Labour Court has exclusive jurisdiction over all labour and employment disputes. In *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*⁹ the appellant employees contended that their dismissals by the employer were unlawful and invalid because their employer had not complied with time periods established by s 189A of the LRA prior to issuing notices of termination of employment. The majority of the Constitutional Court rejected their claim on the basis that the Labour Court has no jurisdiction to determine the lawfulness of a dismissal. The Court observed that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid:

'[106] Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: 'Unfair dismissal and unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter...

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a

⁹ (2016) 37 ILJ 564 (CC); [2016] ZACC 1.

provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA...'

[24] It is clear from this passage that outside of the scope of any statutory provision that specifically confers jurisdiction on the Court, the Labour Court has no jurisdiction, in any general sense, to make any determination of the unlawfulness of employer conduct.

[25] More recently, in *Baloyi v Public Protector and others*:¹⁰ the Constitutional Court dealt with the interpretation of section 157 and said the following:

'[23] The legislation in terms of which an assignment would be made in the context of the present matter is the LRA. 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*”. 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.”

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.

¹⁰ 2021 (2) BCLR 101 (CC); (2021) 42 ILJ 961 (CC) at paras 23–4, 29–30.

[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"...' (emphasis added)

[26] And further:

'[29] It is plain... that the parameters of the scope of the exclusive jurisdiction of the Labour Court is not cast in Manichean terms. 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, sections 68(1), 77(2), 145 and 191. In others, 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.'

[27] In the absence of any statutory provision conferring jurisdiction on the Labour Court both in respect of employer conduct alleged to be unlawful and in employment-related matters generally, there can thus be no general rule, as the judgment in *Booyesen* might be construed, to the effect that the Labour Court has jurisdiction to intervene *in medias res* to restrain any alleged illegalities, irregularities or unfairness in incomplete disciplinary proceedings.

[28] As with all matters that serve before the Labour Court, the Court's jurisdiction is ultimately a matter that must be determined from the pleadings (and not the substantive merits of the case),¹¹ and by reference to a provision of the LRA (or other legislation) that specifically confers jurisdiction on the Court in relation to the dispute disclosed by the pleadings. In the present instance, the founding affidavit discloses two discrete claims. In the first, the appellants seek declaratory orders to the effect that there was an

¹¹ See *Gcaba v Minister for Safety and Security & others* (2010) 31 ILJ 296 (CC); 2010 (1) SA 238 (CC). Where the Constitutional Court made clear that when the court's jurisdiction is challenged, the applicant's pleadings are the determining factor since they contain the legal basis of the claim under which the applicant seeks to invoke the court's competence (see para 75).

unreasonable delay in bringing the charges against them and that the first respondent had waived his rights to pursue disciplinary proceedings, with the result that the disciplinary charges fall to be quashed. The second is an application to review and set aside the second respondent's preliminary ruling on the same issues.

[29] In relation to the declaratory orders sought, the deponent to the founding affidavit, the first appellant, does not expressly disclose the legal basis for the appellants' claim, nor does he invoke any particular provision of the LRA, or any other statute, to assert jurisdiction. There are broad references to ILO Recommendation 166, the SMS Handbook and the prejudice that the appellants contend that they have suffered on account of the delay. When pressed on the basis on which the Labour Court had jurisdiction to entertain the declaratory orders sought, counsel for the appellants appealed to section 77(3) of the Basic Conditions of Employment Act¹² (BCEA). That section confers concurrent jurisdiction on the Labour Court (with the civil courts) to hear and determine any matter concerning a contract of employment. The difficulty with this submission is that the pleadings make no reference to the appellants contract of employment, even less do they assert a contractual term (or any breach of any contractual term) that might form the basis of the right that they assert. At best for the appellants, they assert that the SMS Handbook contains 'indications' that, as a matter of fairness, disciplinary action ought to be taken promptly once the employer is aware of the alleged misconduct. Contrary to what counsel submits, the pleadings disclose no claim that is founded on any term of a contract of employment, nor do the appellants seek to enforce any contractual right.

[30] In so far as the review application is concerned, it is not clear from the notice of motion or the founding affidavit on what legal basis the appellants seek to review the second respondent's ruling. Counsel relied ultimately on section 157(1)(h) of the LRA. That section empowers the Labour Court to review any decision taken or act performed by the state in its capacity as employer, on such grounds as are permissible in law. The founding affidavit does not expressly disclose the grounds for review on which the

¹² Act 75 of 1997.

appellants rely, save for broad averments that the second respondent's ruling is bad in law and a finding to which no reasonable chairperson could come on the available material. Section 158(1)(h) requires an applicant to articulate a ground for review that is 'permissible in law'. This requires the ground for review on which the applicant relies to be specifically identified and articulated. The appellants have failed to disclose any ground for review, permissible in law, on which the second respondent's ruling should be reviewed and set aside.

[31] In any event, the appellants sought to review the second respondent's ruling *in medias res*. There is a general rule against a review court entertaining a review application in these circumstances. Specifically, in a labour context, section 158 (1B) expresses the general rule applicable in the Labour Court in respect of the review of rulings issued during the course of any conciliation or arbitration proceedings conducted under the LRA. The Labour Court may not review any decision or ruling until a final determination has been made, except where the Court is of the opinion that it would be just and equitable to do so before the stage of final determination. The Labour Court ought to be even more circumspect in upholding appeals to exceptionality in the case of a review of rulings made in the course of internal disciplinary proceedings. To do otherwise would frustrate the LRA's purpose of expeditious dispute resolution.

[32] In summary: to the extent that *Booyesen* has been interpreted to establish a general rule, qualified only by exceptionality, that the Labour Court has jurisdiction to intervene in uncompleted disciplinary proceedings, this is not an interpretation that can be sustained by section 157(1) of the LRA. As with every matter that serves before the Labour Court, jurisdiction is a matter to be determined in every case by reference to the pleadings and an enabling statutory provision, in the form of the LRA or other jurisdiction conferring statute, that extends jurisdiction to the Court to adjudicate the dispute disclosed by the pleadings.

[33] The appellants failed to establish that the Labour Court had jurisdiction to grant the declaratory relief that they sought in relation to the delay in bringing charges against

them, and any waiver of those charges. In so far as the appellants sought to review and set aside the second respondent's interlocutory ruling, for the purposes of section 158(1)(h), the pleadings do not disclose a ground for review permissible in law. In any event, the Labour Court was correct to refuse to entertain the review application *in medias res*. There is thus no merit in the appeal.

[34] In so far as costs are concerned, for the purposes of section 179(1), the requirements of the law and fairness are best met by each party bearing its own costs.

[35] I make the following order:

Order

1. The appeal is dismissed.

A van Niekerk JA
Judge of the Labour Appeal Court

Tokota AJA *et* Basson AJA concur.

APPEARANCES

FOR THE APPELLANTS: M Pillemer SC
Instructed by Purdon and Munsamy Attorneys

FOR THE RESPONDENTS: N Govender SC with her H Singh
Instructed by the State attorney