



- (1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2025-227946

In the matter between:

TOPS ARCADIA

Applicant

And

NATIONAL ENTERPRISES WORKERS UNION

YA AFRICA (NEWU-YA)

LENAH KEKANA

KUHLE SIGONYA

VUYOKAZI YAM

SISANDA MAGIBI

NOLITA MDLANKOMO

MARY SUZAN MOLEKO

DIEKETSENG SOBI

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Heard: 10 December 2025

Supplementary submissions received on: 19 January 2026

Delivered: 13 February 2026 (This judgment was handed down electronically by emailing a copy to the parties. 13 February 2026 is deemed to be the date of delivery of this judgment).

JUDGMENT

KROON AJ

- [1] On 10 December 2025, the Court had to consider whether to confirm or discharge a *Rule Nisi* granted as a matter of urgency on 24 November 2025 by Harvey J. The Court *mero motu* raised the question of jurisdiction. The Applicant, at the invitation of the Court, requested until 19 January 2026 to file supplementary submissions on the question of jurisdiction.
- [2] Having considered the submissions, which were duly filed on 19 January 2026, the Court, on 2 February 2026, issued an order which read as follows:
- “1. *The rule is discharged.*
2. *There is no order as to costs.*”
- [3] A request for reasons was brought to my attention on 10 February 2026.
- [4] This application has two features. The first is that it was brought *ex parte*. The second is that it metamorphosised from one seeking, *inter alia*, to interdict unprotected industrial action into one which culminated in the Court granting, as it were, common law relief which could have been granted by any civil court. Shorn of all elaboration, the order granted restrained the Second to Eighth Respondents (the Respondents), persons who, it was common cause, were no longer employees of the Applicant at the date of the hearing, from interfering with the business of the Applicant.¹

¹ Although not canvassed during the hearing, it seems that the reliance on the provisions in the Labour Relations Act No. 66 of 1995 (the LRA) were abandoned at the first hearing because either the Respondents had been dismissed by then or because the Applicant realised that it was impermissible to obtain an interdict in respect of unprotected industrial action on an *ex parte* basis (see below).

[5] The order read as follows:

- “1. Leave is granted for the matter to be heard as a matter of urgency.
- 2. A rule nisi is hereby issued calling upon the respondents to appear before this Court at **10h00 on 10 December 2025**, or as soon thereafter as the matter may be heard, to show cause why the following Order should not be made final.
 - 2.1 The Respondents are interdicted and restrained from:
 - 2.1.1 unlawfully interfering with or obstructing the conduct of the business of the applicant at its premises situated at **3[...] c/o P[...] & W[...] Street, Unit [...] A[...] P[...], G[...], A[...] (“the premises”)**
 - 2.1.2 preventing the applicant from accessing and possessing the premises; and
 - 2.1.3 causing any other person to engage in the unlawful conduct set out in paragraphs 2.1.1 and 2.1.2 above.”

[6] As mentioned, the Court, *mero motu*, raised the question of jurisdiction. It also raised, *mero motu*, concerns regarding service. As to service, the Court order was emailed to the Respondents, but there was no compliance with the requirement to obtain confirmation that the email was received by those who stood to be affected by the Court’s judgment or order. After some debate, it was agreed that the Applicant would be allowed to make further submissions on these two questions.

[7] It was against this backdrop that the Court issued a Directive on 10 December 2025. The Directive, as authored by my secretary on my behalf, read in part as follows:

**“RE: EX PARTE TOPS ARCADIA V NATIONAL ENTERPRISE
WORKERS UNION – CASE NO. 2025-227946**

...

- [2] *In the light of a question mero motu raised by the Court about the jurisdiction of the Labour Court to grant the relief sought the following Directive is issued.*
- [3] *The Court requests further submissions on the question of jurisdiction as, unlike, for example Section 68 of the Labour Relations Act of 1995 (LRA), there is no provision in the LRA granting jurisdiction to interdict unlawful conduct generally.*
- [4] *In this regard it was the Court's view that Section 158(1)(i) and (ii) concern powers to grant a remedy and are not jurisdiction conferring.*
- [5] *As to developments when it comes to the jurisdiction of the LRA, see *Cibane and another v Premier of the Province of KwaZulu-Natal and another*.²*
- [6] *Even if the Labour Court had jurisdiction at the date of the issuance of the Rule Nisi, how does the fact that the persons in question are no longer employees affect the situation and, in particular, does it or does it not render the application moot?*
- [7] *Representations should also be made regarding the concerns raised, again mero motu by the Court, about the fact that service was not in terms of the rules and whether it is necessary for an application to be made in terms of Rule 9(1)(c).*

Time Periods

- [8] *As we are in the recess, there is no critical urgency and Acting Justice Kroon asks only that notify me as to by when you will be able to comply with the Directive."*

The law on jurisdiction

- [8] Before dealing with the submissions made on behalf of the Applicant, the Court briefly turns to the legal principles that have crystallised over the years delineating the ambit and scope of the jurisdiction of the Labour Court. The following was said by Landman J more than a quarter of a century ago:

² [2025] 10 BLLR 1004 (LAC)

“This Court is a creature of statute, albeit a superior court having the status and standing of a High Court with the, statutorily conferred, inherent powers of a High Court in relation to matters within its jurisdiction. It does not have an all-embracing jurisdiction over the employer/employee relationship. Its jurisdiction is a sporadic one, interspersed in the life cycle of employment. Not only that but the moment of intervention is regulated by statute...”³ (own emphasis)

- [9] Also a quarter of a century ago, the Constitutional Court in *Fredericks v MEC for Education and Training, Eastern Cape and Others*⁴ commented that:

“As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court’s jurisdiction will only ousted in respect of matters that ‘are to be determined’ by the Labour Court in terms of the Act”. (own underlining)

- [10] In *Merafong City Local Municipality v. South African Municipality Workers Union and Another*,⁵ the Labour Appeal Court explained that the provision giving the Labour Court the power to grant an interdict was not in and of itself jurisdiction conferring.

- [11] I quote:

“[33] Section 158(1)(a) is clearly an example of the powers the Labour Court may exercise in respect of a matter falling within its jurisdiction, and it does not purport to grant the Labour Court jurisdiction, in the sense of the power to hear and determine the matter in the first place. ...” (own emphasis)

³ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & Another* [1998] 19 ILJ 638 (LC) at F-G

⁴ (2002) 33 ILJ 81(CC) at [40]

⁵ [2016] 8 BLLR 758 (LAC); (2016) 37 (ILJ) 1857 (LAC)

[12] In *Strydom v Arcelormittal South Africa*,⁶ Prinsloo J explained as follows:

“[44] Section 157 (1) provides that subject to the Constitution and section 173, and except where the LRA provides otherwise, the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by this Court. What this requires is that a party referring a dispute to this Court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this Court to adjudicate the dispute.

...

[46] It is thus incumbent on an applicant referring a matter to this Court for adjudication, to identify the provision in the LRA, or any other law, which confers jurisdiction on this Court to entertain the claim. As was confirmed in *Shezi*:

What this requires is that a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this court to adjudicate the dispute. It is thus incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction, of course, is to be determined strictly on the basis of the applicant’s pleadings; the merits of the claim are not material at this point. What is required is a determination of the legal basis for the claim, and then an assessment of whether the court has jurisdiction over it.”

[13] In *Cibane and Another v Premier of Province of Kwazulu-Natal*,⁷ the Labour Appeal Court discussed the interpretation of *Booyesen v Minister of Safety and Security and others*,⁸ commenting as follows:

⁶ (2024) 45 ILJ 931 (LC)

⁷ [2025] 10 BLLR 1004 (LAC); (2025) 46 ILJ 2587 (LAC)

⁸ [2010] ZALAC 21; [2011] 1 BLLR 83 (LAC) ; (2011) 32 ILJ 112 (LAC)

[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... (own emphasis)

[14] The Court corrected this view and at paragraph 27 held as follows:

“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.” (own emphasis)

[15] At paragraph 33 it concluded:

“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.” (Own emphasis)

[16] In *Wheatley v Commission for Conciliation, Mediation and Arbitration and Others*,⁹ the Court recently commented as follows:

“[22] In *Labour Court Manual* by Prinsloo and Van Niekerk,¹⁰ the learned authors explain that jurisdiction cannot be cheerfully assumed outside of the contours of the LRA or other legislation which vests the Labour Court with jurisdiction, emphasising that the power to grant an interdict is not, in itself, jurisdiction conferring:

“Parties should also be cautious when relying on s 158(1) of the LRA to establish jurisdiction; it describes the LC’s powers, as opposed to its jurisdiction. so, for example, the fact that the LC has the power in terms of s 158(1)(a)(ii) to grant an interdict does not mean that an interdict can be sought in respect of any dispute – the applicant must always identify the cause of action by reference to some statutory provision that confers jurisdiction on the court.”

Analysis of the submissions made on behalf of the Applicant

Content of the Applicant’s submissions

[17] It is apposite to quote from the “**APPLICANT’S ANSWER TO DIRECTIVE ISSUED ON 10 DECEMBER 2025**”¹¹ furnished on 19 January 2026:

“[3] This answer is provided exclusively to answer the questions of the learned judge as per the directive provided to the applicant attorneys on 10 December 2025.

BASIS OF THE APPLICATION

4. Originally when the application was launched it was seemingly done on the basis of stopping an unprotected and illegal industrial action since the

⁹ (2025/231674) [2026] ZALCD 1 (13 January 2026)

¹⁰ 2024, Juta and Company (Pty) Ltd, South Africa, page 7

¹¹ The submissions were unsigned and it is unclear who authored them.

respondent, constituting a union and its members were engaging in strike action without complying with the mandatory procedures under the Labour Relations Act 66 of 1995.

5. The original hearing of the matter resulted in an order being granted which was not necessarily in line with the relief sought completely, as it interdicted unlawful conduct generally instead. The interim order was nonetheless carefully crafted by this Honourable Court to address the core unlawful conduct without overreach and many prayers in the Notice of Motion were not entertained.

6. The effect of the amended order is that the conduct interdicted no longer pertains to a strike but rather conduct affecting the employees of the applicant.

JURISDICTION TO ENTERTAIN THE MATTER

7. It is true that the order which was granted does not pertain to a strike action, however when the application was launched it did in fact pertain thereto.

8. The basis of founding jurisdiction in the application was that the second to eight respondents were employees at the time, and the first respondent was and remains a union involved at the applicant's employment relationships.

9. A further ground for founding jurisdiction was that the conduct does in fact involve the protection of the employees remaining in the employ of the applicant.

10. Despite extensive research in attempt to answer the court's directive on the question of jurisdiction it appears that there is no hard and fast rule or case law dealing with when jurisdiction is founded or extinguished.

11. The court in **T.J.S v M.N.M**¹² with reliance on **Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd**,¹³ the court stated:

'[18] The time for determining the jurisdiction of the Court to entertain an action, is the time of the commencement of the action'.

12. Whether a court can subsequently lose jurisdiction appears to not be likely, given that jurisdiction is determined at the beginning, if a court has jurisdiction over the cause and over the parties, then when the matter finally,

¹² (2024/147933) [2024] ZAWHC 432 (24 December 2024)

¹³ 1969 (2) SA 295 (A) at 310 D – E

usually after years, goes to court, the court would still have jurisdiction even if the parties moved to another jurisdiction or the circumstances changed.

13. *It is true that the Labour Court only has jurisdiction over matters which it obtains jurisdiction to through the Labour Relations Act, and it would appear in this matter that when the application was launched the court did have jurisdiction and jurisdiction cannot be mooted unless the cause of action itself becomes moot, and given the relief is phrased to stop future conduct it is still very much a live issue.*

SERVICE TO BE PROPER

14. *In the interim order granted in this matter, under prayer 4 the applicant was ordered to serve the application as follows:*

‘The applicant must serve this Order, together with the founding papers, on the respondents by no later than 17h00 on Wednesday 26 November 2025 and must file a service affidavit with the Court as prescribed in the Rules.’

15. *The manner of service was not prescribed and as such it was service as directed by a court with the intention of ensuring notice of the proceedings, this took place according to the affidavit by Ms Leandra Diniz as explained in her service affidavit uploaded on Caselines under Section 06-01 to 06-20.*

16. *It would accordingly be our submission that no application is required to prescribe how service was to take place, as the service did in fact take place as required by the interim order.”*

Analysis of the Applicant’s submissions

[18] When it comes to the submissions on jurisdiction, stripped of all embroidery, the Applicant says that the Labour Court has jurisdiction because:

18.1 The cause of action concerns unlawfulness generally.

18.2 The Applicant initially advanced a case alleging unprotected industrial action.

18.3 When the *Rule Nisi* was granted, the Court assumed jurisdiction.

I deal with each contention below.

- [19] As to the first contention, revealingly, at paragraph five of the submissions, the author admits that the relief granted was unconnected from the alleged unprotected industrial action and that “...it *interdicted unlawful conduct generally instead*” (own emphasis). Our jurisprudence is now replete with case law holding that the Labour Court lacks jurisdiction to interdict unlawful conduct generally. The submission made was, in my view, fatal to any case which the Applicant could have made in respect of jurisdiction.
- [20] As to the second ground contained in paragraphs seven to nine of the submissions, the impression which is gained is that the Applicant wishes to assert a claim to jurisdiction based on a cause of action and relief which, although foreshadowed in the application, was abandoned when the matter was initially heard before Harvey J. This is impermissible. The Applicant, having disavowed any contention that it was its case that the industrial action was unprotected, is not permitted to do a *volte face* on the return day, more so without any warning to the Respondents.
- [21] The correct position is that the Applicant is bound by the terms of the *Rule Nisi* and it is disingenuous, having abandoned reliance on the provisions of the LRA relating unprotected industrial action, to then seek to resurrect these contentions on the return day. The notion of reverting back to a claim based on the existence of unprotected industrial action is also nonsensical for the obvious reason that the Respondents are no longer employees and accordingly they can no longer strike. Thus, any issue regarding alleged unprotected industrial action is now plainly moot.
- [22] There is another insurmountable hurdle facing the Applicant in this regard. If the Court had issued a *Rule Nisi* based on the alleged unprotected industrial action (it did not), it would have been a nullity and of no force or effect. The reason is that it is not permissible to obtain, *ex parte*, an order interdicting a strike. This much is apparent from section 68 of the LRA which provides that:

“68. Strike or lock-out not in compliance with this Act

...

(2) The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours’ notice of the application has been given to the respondent:

However, the Court may permit a shorter period of notice if –

(a) the applicant has given written notice to the respondent of the applicant’s intention to apply for the granting of an order;

(b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.”

[23] It is clear from the above quoted paragraph that, by necessary implication, there is a prohibition against the granting of an interdict in respect of alleged unprotected industrial action without notice or *ex parte*. Granting an *ex parte* order when it comes to industrial action would amount to granting an order contrary to a statutory prohibition. On this point, reference may be had to the Constitutional Court decision of *Cool Ideas 1186 CC v Hubbard and Another*¹⁴ in terms of which the seminal case of *Schierhout* was referenced and the Court commented as follows:

“[53] The majority in the Supreme Court of Appeal refused to make the arbitral award an order of court on the basis that to do so would amount to sanctioning an illegality and would subvert the legitimate purpose of the section by lending the court’s imprimatur to the very mischief which the statute seeks to prevent. Our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect.”¹⁵ (own emphasis)

[24] At paragraph nine, it is submitted that because persons who were affected by the unlawful conduct may have included employees, this fact, in and of itself,

¹⁴ 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC)

¹⁵ *Schierhout v Minister of Justice* 1926 AD 99 at 109. See also *Hoisain v Town Clerk, Wynberg* 1916 AD 236.

conferred jurisdiction on the Labour Court. It does not. The overwhelming weight of authority holds that the opposite proposition is true, namely that the mere fact that a dispute involves an employee does not give the Labour Court jurisdiction, all the more so where the alleged wrong being committed is being perpetrated by a third party. The Court notes further that, in this matter, the lack of jurisdiction should have been obvious given that, at the date of the hearing, when the Court was required to decide whether the order should be made final, the Respondents were no longer employees of the Applicant. The Respondents had by that time, for all intents, become general members of the public *vis-à-vis* the Applicant. To illustrate, if a gang of thugs go about robbing a retail outlet and employees are affected by the robbery because, for example, they are held up at gunpoint, should the retailer institute action against the robbers, this would not constitute a labour matter solely because some of the victims of the robbery were employees. To illustrate further, if a husband, in the throes of an acrimonious divorce, arrives at his wife's workplace with the intent of assaulting her, the Labour Court will have no jurisdiction to grant a restraining order against him pursuant to an application by the employer solely on the basis that the wife happens to be an employee of the employer.

[25] In paragraph 10 of the submissions, the author states that there is no "*hard and fast rule*" or case law on when jurisdiction is founded or extinguished. Again, this is not correct. Unlike the High Court, the Labour Court has no overarching inherent jurisdiction. Jurisdiction must be conferred on it in terms of the LRA or other legislation, such as the Basic Conditions of Employment Act (BCEA) 75 of 1997 or the Protected Disclosures Act 26 of 2000. The "*hard and fast*" rule is that the Labour Court cannot cheerfully assume jurisdiction in a vacuum. Any jurisdiction assumed must have a basis in legislation.

[26] The last submission, as contained in paragraphs 11 to 13 of the Applicant's submissions on jurisdiction, is the allegation that because the *Rule Nisi* was granted, the Court assumed jurisdiction at that point and that it was not open to the Court, on the return day, to revisit the issue of jurisdiction. Leaving

aside the fact that the question of jurisdiction was not determined, or even raised, in front of Harvey J, this submission misunderstands the legal significance of a *Rule Nisi*. A *Rule Nisi* is not a final order. It is provisional. The doctrine of *res judicata* accordingly does not find application when it comes to a *Rule Nisi*, nor would it when it comes to the interim interdict, which is also not a final order. To illustrate, in one sense a *Rule Nisi* functions like a judicial summons. It calls upon a person to appear before the Court. It sets a date for that appearance. It provides an opportunity to oppose. It initiates an adversarial process.¹⁶

[27] In summary, after the relief initially sought in respect of the alleged unprotected industrial action was abandoned, and one has regard to the contents of the founding affidavit (which does not refer to any section in the LRA save for the sections applying to strike action), the main complaint which remains intact as pursued by the Applicant is that its right to freedom of economic activity is being infringed by members of the public (the seven Respondents). Such a cause of action has nothing to do with labour law, let alone employment relations. The Labour Court is a specialist court established to deal with labour matters. Judges of the Labour Court are required to have knowledge, experience and expertise in labour law. It could not have been the intention of the Legislature that the Labour Court would have jurisdiction to restrain members of the public from interfering with the business of a shop owner. The nature of such a dispute arises out of an ordinary common law civil wrong, unconnected to the objects of and remedies available in the LRA.

[28] Regarding service, it was stated that the manner of service “...was *not prescribed*...”. Again, this is also not correct. It is clear from the order that the service must comply with the Rules,¹⁷ all the more so where an order has

¹⁶ A *Rule Nisi* does not, as commonly thought, affect or change the onus. The onus throughout remains on an applicant. The applicant in question must satisfy the Court, on the return day, that it is entitled to final relief. In that sense, the phrase “*show cause*” may be perceived to be misleading in the eyes of the layperson because the burden does not shift.

¹⁷ In this regard the order provided as follows:

been obtained *ex parte*. If the order had intended that service did not have to comply with the Rules, then it would have said so. It did not. Notwithstanding the obstacle of non-service having been raised with the Applicant, it elected not to remedy the service defects, despite being afforded an opportunity to do so.

[29] As a result, the application fails for two self-standing reasons. Firstly, procedural, because there was no proof of proper service on the Respondents and the Applicant took a decision not to remedy the defective service. Secondly, substantive, because the Applicant has not discharged the onus of demonstrating that this Court has jurisdiction to grant the relief sought. As to the latter point, as the substance of the Applicant's complaint was ultimately confined to an allegation that it had a right to conduct its business operations free of unlawful interference by any person and that right had been breached by third parties, it was then then a matter falling squarely within the jurisdiction of the High Court, and that is the Court which the Applicant should have approached.

P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr W Engelbrecht of ML Schoeman Attorneys¹⁸

*"4. The applicant must serve this Order, together with the founding papers, on the respondents by no later than **17h00 on Wednesday 26 November 2025** and must file a service affidavit with the Court as prescribed in the Rules."* (own emphasis)

¹⁸ On 10 December 2025, after Mr Engelbrecht had appeared, the hearing was reconvened and Mr X.T. Van Niekerk, as instructed by ML Schoeman Attorneys, briefly addressed the Court after a request was made to reconvene the hearing.