



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D61/2024

In the matter between:

HOSPERSA obo NAIDOO PRIYA

First Applicant

HOSPERSA obo MTHETHWA SIFISO

Second Applicant

and

**MEMBER OF EXECUTIVE COUNCIL (MEC)
FOR HEALTH KZN**

Respondent

Heard: 5 February 2026

Delivered: 02 March 2026

JUDGMENT

PHAKEDI, AJ

Introduction and brief facts

[1] This is an opposed application brought in terms of section 77 (3) read with section 78 of the Basic Conditions of Employment Act (BCEA)¹ wherein the applicants seek an order in the following terms:

¹ Act 75 of 1997, as amended.

- '1. The Respondent is directed to adjust the first and second applicants' salary scale to first notch of salary level 10 forthwith;
2. The Respondent is directed to calculate the first and second applicants' back pay, on notch 1, salary level 10 from 1 October 2017 to date of this order, within ten days of service of this order;
3. The Respondent is directed to make payment of all amounts due to the first and second applicant, as calculated in terms of paragraph 2 above, within three days of expiry of the period referred to in paragraph 2 above;
4. The Respondent is directed to pay the costs of this application;
5. Further and/or alternative relief.'

[2] Prior to being employed by the respondent, the two employees were employed by Saint Mary's Hospital which was later converted into a public hospital under the management of the KwaZulu-Natal Provincial Department of Health, as of 1 October 2017. As a result of this conversion, both employees were formally offered employment contracts on 29 September 2017. Ms Priya Naidoo accepted and signed her contract of employment on the same day, while Mr Sifiso Mthethwa accepted and signed his contract on 1 October 2017.

[3] In terms of signed contracts, Ms Naidoo is employed in the position of Assistant Director: Human Resources on a salary level 9 and the salary notch of R404 121.00 per annum plus allowances and benefits. And the second applicant, Mr Mthethwa, is employed as Assistant Director: Finance on a salary level 9 and the salary notch of R404 121.00 per annum plus allowances and benefits.

[4] On or during March 2019, their grievance was escalated to the Department of Public Service and Administration (the DPSA). On 23 December 2019, they received a response from Professor Richard Levin addressed to Mr C. Naicker, the Provincial Manager: Public Servant Association of South Africa. In the said response, Professor Levin had recorded as follows:

'Dear Mr Naicker

RECTIFICATION OF SALARY NOTCHES AWARDED TO EMPLOYEES ON
TRANSFER FROM A PRIVATE HOSPITAL TO DEPARTMENT OF HEALTH
(KWAZULU-NATAL)

1. Thank you for your letter dated 19 March 2019.
2. To secure a permanent solution in this regard, I have advised the Head: Health (KwaZulu-Natal) to implement the following:
 - 2.1 The affected employees be awarded the first notch of salary level 10 (R417 552.00) which is the next level higher valid notch available on PERSAL Table 264, on transfer to the Department of Health, effective from 1 October 2017.
 - 2.2 The notch be adjusted on 1 April 2018 and 2019 in terms of the 2018 and 2019 DPSA salary circulars to effect the employees' 2018 and 2019 cost-of-living adjustments.

Kind regards'

- [5] The Applicants allege that they are not being remunerated according to their signed employment contracts, and the respondent has failed and/or neglected to implement the solution prescribed by the DPSA outlined above.
- [6] The Respondent is opposing this application on the basis that there is no breach of contract and the applicants are being remunerated in line with clause 6 of their signed contracts of employment. It is further submitted that the letter dated 23 December 2019 was never brought to the attention of the Respondent, as it was addressed to another Trade Union, the Public Servants Association and it only came to the attention of the Respondent when it received the current application on or during February 2024. Furthermore, the applicants in this application are not seeking to enforce any term of their contract, but the contents of the letter received from the DPSA and this is irregular.

Jurisdiction of the Labour Court

[7] Section 77(3) of BCEA provides that:

‘The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract.’

[8] In terms of this section, any claim that has to do with a dispute over a contract of employment, that could be brought in a civil court, falls within the jurisdiction of the Labour Court. It is trite that jurisdiction is decided on the pleadings filed by an applicant/plaintiff. In an application, the pleadings are constituted by the Notice of Motion and the supporting affidavits.²

[9] The SCA in *Makhanya v University of Zululand*³ stated that the pleadings of a case were definitive:

‘...the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly...’

[10] The Constitutional Court in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another*⁴ held that section 77(3) expands the Labour Court's jurisdiction to cover disputes arising from contracts of employment even if they are not regulated by the Act. But in that event, the jurisdiction is not exclusive. It is shared with the civil courts. In order for the applicant to succeed with his contractual claim, his right must be found in the written contract, either express or implied.

[11] The applicants in this matter are presently being remunerated in terms of clause 6 of their signed contracts of employment, which provides that:

‘REMUNERATION:

² *South African Municipal Workers Union obo Morwe v Tswaing Local Municipality and Others* (LAC) (unreported case no JA12/21, [2022] ZALAC 107; (2022) 43 ILJ 2754 (LAC) (27 September 2022) at para 5.

³ [2009] 8 BLLR 721 (SCA); [2009] ZASCA 69 at para 71.

⁴ (CCT20/18) [2019] ZACC 45 at para 23.

Your salary will be based on level 9, your salary will be R404 121.00 per annum plus allowances and benefits listed hereunder. Any overpayment or underpayment erroneously effected will be recovered or rectified when discovered.'

- [12] The applicants cannot seek to rely on a letter addressed to a third party who is not in a position of authority to implement the proposed solution. The Public Servant Association of South Africa is a trade union representing public servants and does not have powers to implement the recommendations of the DPSA. It is therefore concluded that the Applicants have failed to substantiate their claim for breach of contract as they are being remunerated according to their signed agreement with their employer.

Entitlement to a declaratory order

- [13] The basic principle in litigation is that in order to be entitled to a relief, the applicant must make out his case in his founding papers. A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others*⁵ Corbett CJ laid the following principle with regard to declaratory relief:

'An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case... But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding...'

- [14] The LAC in *Passenger Rail Agency of South Africa and Others v Ngoye and Others*⁶ held that:

⁵ 1995 (4) SA 1 (A); [1995] ZASCA 49 at 14F-I.

⁶ (JA78/21) [2024] ZALAC 18; (2024) 45 ILJ 1228 (LAC) (26 March 2024) (footnotes omitted).

[28] While there are provisions in the legislation, notably section 77(3), that endow the Labour Court with authority to adjudicate contractual claims. In my view, these provisions must be interpreted by having regard to the objectives sought to be achieved by the labour law dispensation as a whole. I do not believe that the intention of the legislature in enacting section 77(3) was to give the Labour Court jurisdiction over disputes that arise from dismissals and ULPs which should, in the first instance, be categorised as unfair dismissal disputes or unfair labour practice disputes and dealt with by the CCMA. In dealing with employment disputes, our first point of reference should be the constitutional right to fair labour practices, which is given effect in the LRA.

[29] The motive for litigants choosing to follow an alternate route to that which is set out in the LRA is seemingly to be awarded a quicker remedy than that which is available in terms of the LRA. However, it appears that litigants are not aware of the requirements that must be met to qualify for a contractual remedy such as specific performance or damages. This is potentially the reason for the proliferation in the use of contractual recourse. In this regard, I refer to what was said by this Court more than five years ago in *Toyota SA Motors (Pty) Limited v Nzuza and others*:

“...it appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and claim breach of contract seeking either specific performance or damages. I do not know the reason that has given rise to this, but the risk associated with claims made in terms of the BCEA, as in this matter before this Court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory where a dismissal is found to be substantively unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief.”

[15] I am not satisfied that the applicant has made out a case for this court to grant the relief sought in his founding papers. Section 77A(e) deals with the powers of the Labour Court and provides that:

‘the Labour Court may make any appropriate order, including an order making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation.’

Costs

[16] This is a civil matter launched in terms of section 77(3) of BCEA, which confers the Labour Court with concurrent jurisdiction with the civil courts. Accordingly, the principle of costs not following the results does not find application.⁷ I believe that the respondent's opposition to this application was warranted and reasonable.

[17] Accordingly, the following order is made:

Order

1. The application is dismissed with costs.

G C Phakedi

Acting Judge of the Labour Court of South Africa

⁷ *Skinner & Others v Nampak Products Limited & Others* (2021) 42 ILJ 838 (LAC) at para 47.

Appearances:

For the Applicant: B Zulu
Instructed by: Rajaram Mvulane Attorneys

For the Respondent: C Ngongoma
Instructed by: State Attorneys, KZN

LABOUR COURT