

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, THOHOYANDOU**

CASE NO: 511/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u> ✓
DATE: 16.04.2026	
SIGNATURE: [Redacted]	

In the matter between:

RALEPHENYA PHEEHA MOSES: APPLICANT /PLAINTIFF

And

**THE SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LTD: RESPONDENT/
DEFENDANT**

CASE NO: 583/2020

In the matter between:

VINCENT MUNGALO:

APPLICANT /PLAINTIFF

And

THE SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LTD: RESPONDENT/
DEFENDANT

JUDGMENT

DENGE AJ

PRELUDE

[1] The virtual hearing of the application for leave-to appeal in this matter, took place on 11 November 2025. Just after the parties had wrapped up the argument, I let them know that I would need the transcript of the court proceedings so I could prepare for the writing of this judgment. Twice during November and December 2025 respectively, I received a transcript that unfortunately could not open. On 16 January 2026, Vodacom Service Provider helped to open the transcript for me. Thereafter; was I then put in a position to do the relevant preparation.

INTRODUCTION

[2] The applicants/plaintiffs brought a consolidated application for leave-to appeal to the Supreme Court of Appeal (SCA), the judgment that I handed down on 06 September 2024. The application was opposed by the respondent. Hereinafter, I shall refer to the applicants by their names, namely; Mungalo and Ralephenya and to the respondent as SACM. Whenever it will be necessitated by the context, I shall use the parties' names and or their respective appellations ('plaintiff/s' or 'defendant'), interchangeably.

LEGAL FRAMEWORK

[3] Section 17 (1) of the Superior Courts Act, number 10 of 2013 provides as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) ... “

[4] The legal representative for the defendant, Mr. Matumba submitted in argument that the proposed appeal has no prospects of success. I pause to give a brief summary of the factual background.

FACTUAL BACKGROUND

[5] Ralephenya and Mungalo are former employees of SACM; who served SACM respectively, as a unit manager and a custodial officer. They were dismissed from employment following disciplinary hearings at which they were both found guilty as charged. Ralephenya was found guilty of gross negligence following his failure to report to his supervisors, an alleged threat by a disgruntled inmate, to burn his cell, which threat the inmate executed eventually. An investigation report had suggested that he should not be charged, but the prison director decided otherwise. Ralephenya was aggrieved thereby, and expressed that he was not supposed to have been charged without first being afforded an opportunity to make representations, as to why he should not be charged. There was however no dispute that SACM had never before given an employee an opportunity to file any such representations. It is conducive to clarity to mention that if he had been given an opportunity to submit such representations; that would have taken place over and above the statement that he had furnished to the investigator wherein he admitted failure to report the said threats to his supervisor. Mungalo was found guilty for absenting himself from work without informing his manager of the fact, and also without furnishing reasons for absenting himself. He was found guilty on his guilty plea. He, however was aggrieved by SACM's failure to implement the Chairperson's sanction, that, he be issued with a final written warning, valid for 12 months. Both plaintiffs referred their respective unfair dismissal disputes to the CCMA, which ruled that its jurisdiction was ousted as the respective SACM's contracts required that the dispute be referred to arbitration. The plaintiffs' requests to be re-instated back to work while their matters were referred for arbitration were not acceded to by SACM. They then approached this Court by way of action, seeking damages for loss of earning capacity and emotional shock; which they both averred in their

respective pleadings and also testified about before me; flowed from SACM's conduct, which conduct, according to them, violated their respective rights to fair labour practice as envisaged in section 23 (1) of the Constitution of the Republic of South Africa, 1996 (the Constitution); violated their respective rights to just administrative action as envisaged in section 33 (1) of the Constitution and also violated their respective rights to a fair hearing, in terms of section 34 of the Constitution.

[6] The plaintiffs asked for the following orders, respectively: (1) that it be declared that the SACM's conduct is unconstitutional and a violation of their respective rights to fair labour practices, their respective rights to just administrative action and their respective rights to a fair hearing; and thus invalid; (2) that they respectively, be awarded damages for loss of earning capacity, in the amount of R6 912 000. 00 and R6 864 000, 00; (3) that they each be awarded damages for emotional shock, in the amount of R 800 000. 00; (4) that SACM be ordered to pay costs of action, including costs of employment of 2 attorneys and (5) granting further and or alternative relief.

[7] Importantly, as against both plaintiffs; in its plea SACM denied the alleged infringements of their constitutional rights, and put them to proof. SACM further denied that it was in fact or in law obliged to pay the respective plaintiffs the amounts claimed. Further that in the case of Mungalo; SACM denied that the conduct he was complaining about was an administrative action in terms of PAJA.

[8] Subsequently, and after listening to the evidence adduced by either side and after the parties' closing argument, I disposed of the matter __ most importantly; by upholding the *point- in limine* relating to the applicability of the subsidiarity principle, which *point-in limine* was raised on behalf of SACM, during the parties' closing argument. I had found, in that

regard, and based on the view that I had of the matter, that, instead of implicating the Constitution directly, the plaintiffs should have attacked the Labour Relations Act, number 66 of 1996 (LRA); which legislation SACM averred, and was also common cause, that, it is or was deficient _ in that, section 193 thereof provided limited remedies for unfair dismissals, in the form of re-instatement, re-employment or compensation of not more than the equivalent of 12 months' remuneration, calculated at the employee rate of remuneration on the date of dismissal, in terms of section 194 of the same Act. I further held that, the 'delictual claims' were not sustainable, therefore. Lastly, I ordered each of the plaintiffs to pay the costs of suit.

[9] In their application for leave-to appeal, against the judgment or order relating to my upholding of the said *point-in limine* and the respective cost orders, the plaintiffs raised and argued the grounds that I shall refer to briefly below.

GROUND FOR LEAVE TO APPEAL

[10] The legal representative for the plaintiffs, Mr. Ravele submitted, as a point of departure, that, the High Court conflated the plaintiffs' prayers for a declarator and their respective 'delictual' claims for damages arising from loss of earning capacity and emotional shock; also contending that, the conflation was due to the High Court not having been alive to the legal principle that, the same set of facts may give rise to several causes of action. Mr. Ravele further submitted, that, so the argument goes; had the High Court been alive to that principle, it would have found that the plaintiffs' respective damages claims were delictual claims in common law; further that it would have found that their other respective claims were for constitutional declarators _ and most importantly that, they were not claiming constitutional damages. Mr Ravele submitted that the High Court should

have granted the plaintiffs the relevant declarators and that it should have decided on their 'delictual' claims; instead of non-suiting them. He also contended that the High Court ought to have found that the plaintiffs' respective causes of action had been litigated before, in *Good Year SA (Pty) Ltd v Weitz*, [2013] ZACPEHC 49; (2014) 35 ILJ 441 (ECP) __ further that, on that ground alone, so the argument goes, there was a prospect of success that 'the Supreme Court of Appeal would intervene and set aside the High Court order.

[11] Dealing with the question whether the principle of subsidiarity found application or not; Mr. Ravele complained that the related *point-in limine* raised by Mr. Matumba was raised for the first time during argument, as it was not pleaded. Mr. Ravele contended that, the High Court ought to have held the defendant strictly to the pleadings. The same argument, which was resisted by Mr. Matumba, was also raised during the trial proceedings. I dealt with that question in paragraph [31] of my judgment; which paragraph ought to be read together with paragraphs [28] and [29] of the same judgment __ where I dealt with case-law that allows a litigant to raise a point-in limine even outside the pleadings.. It is my view, on the foregoing, that, the relevant ground has no merit.

[12] Further on the principle of subsidiarity, Mr. Ravele submitted that, the principle was of no relevance, as, so the argument goes; the pleaded case was based on delict, and that the plaintiffs were not directly relying on a fundamental right 'contained in the Constitution.' Importantly, in the same regard, Mr. Ravele contended that the plaintiffs confronted the LRA head-on and '**invoked the constitutional declarator and delictual claims as a means to show that the LRA falls short of fulfilling the obligations of Parliament.**' It was further contended in the same regard, that, 'the High Court should have found that where a gap exists in legislation, the principle of subsidiarity does not apply and that the

litigant may resort directly to common law or Constitution and or both.’ Thus, in my view partly contradicting the holding of the Constitutional Court per Jafta J in *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (**CCT 157/20**) [**2021**] **ZACC 45; 2022 (8) BCLR 985 (CC) (7 December 2021)** where; as seen from paragraphs [43] and [44] of my judgment, Jafta J dealt with the principle of subsidiarity as a hurdle standing in the way of constitutional damages. More pertinent is the extract from *Thubakgale* in paragraph [44] of my judgment that reads thus: ***“If these pieces of legislation were defective, the remedy open to the applicants was for them to challenge the validity of this legislation rather than relying directly on the Constitution.[206]”*** I shall address the common law aspect of Mr. Ravele’s said argument later in this judgment. Suffice it to say, that, the relevant legislation referred to in *Thubakgale* (above) was an effect-giving legislation, or legislation, that was meant to give effect to a fundamental right, contained in the Constitution.

[13]. One of the most notable of Mr. Ravele’s arguments in the same regard was that, in fact; unlike in for example PAJA; the legislation in respect of which section 33 (3) of the Constitution provides that ***“[N]ational legislation must be enacted to give effect to these rights ... “***; the LRA is not legislation that was enacted to give effect to the right envisaged in section 23 of the Constitution. [My underlining.] In the process, Mr. Ravele laid emphasis on the employment of the word ***‘must’*** in PAJA, as opposed to the word ***‘may’***, that is employed in the LRA. Nothing turns on that difference, in my view. First, because the word ***‘may’*** in the LRA is to do only with legislating in relation to collective bargaining. Lastly, and as Mr. Matumba has correctly argued, in my view; and further, as I held in paragraph [66] of my judgment also; one of the objectives of the LRA is to give effect to section 23 of the Constitution. It matters not, that, unlike section 33 (3) of the

Constitution, that has a sweeping provision that relates to the enactment of an effect-giving legislation; section 23 of the Constitution does not contain a similar provision. What matters is that, the same parliament that has enacted the Constitution, has not only enacted the LRA, but it has made one of the objectives of the LRA, as being to give effect to section 23 of the Constitution. For these reasons, the relevant argument by Mr. Ravele cannot stand.

[14] One of the grounds advanced by Mr. Ravele in support of the plaintiffs' application for leave-to appeal was that the High Court was *functus officio* when it decided on the question of the subsidiarity principle, as Semenya DJP had, at the beginning dismissed SACM's special plea of the Court's alleged lack of jurisdiction – thus, in my view suggesting that, I have revisited the same question that DJP Semenya had disposed of, and had not even been appealed against. As Mr. Matumba contended in argument, and correctly so, in my view; unlike DJP Semenya who dealt with the question of jurisdiction, I dealt with the question of the principle of subsidiarity that arose after I had heard the evidence on the merits. This ground, therefore cannot stand also.

[15] The whole question of the subsidiary principle was dealt with within the context of the plaintiffs' respective pleaded cases. It unavoidably called for the interpretation of the relevant pleadings. As alluded above, Mr. Ravele attempted to draw a parallel between the facts in this matter and the facts in the matter in Good Year SA (Pty) Ltd (Good Year SA) (above); both in support of his argument that each plaintiff instituted 3 different actions, and in support of his argument that the delictual claims in Good Year SA and the averred 'delictual claims' in the present matter, are or were based on similar facts or averments. In the ensuing paragraphs, I shall demonstrate why, in my view; the two matters are distinguishable, and why on the relevant advanced ground alone, there is no prospect of

success that the Supreme Court of Appeal would intervene and set aside the impugned judgment. .

[16] In *Good Year SA*, the High Court was doing with an exception that was directed at one of the two claims that actually arose out of the same set of facts. The respondent/ plaintiff was employed by the 1st defendant/applicant. During the course of the plaintiff's employment the 2nd and the 3rd defendants (who were the 1st defendant's employees, apparently) lodged a complaint against the plaintiff (of the alleged racism at the workplace) with the 1st defendant. The 1st defendant subjected the plaintiff to a disciplinary enquiry without first properly investigating the said allegations. Two charges were withdrawn, and the plaintiff was acquitted on the remaining charges, eventually. Subsequent to that, the plaintiff, among others, sued the 1st defendant for damages for loss of earning capacity, which he averred in his combined summons, he had suffered as a result of the emotional damage that had rendered him unemployable. He averred that the conduct of the 1st defendant in acting on the said false and malicious information from the 2nd and 3rd defendants without properly investigating the matter; resulted in him suffering the said damages. The 1st defendant then excepted on the basis that the Particulars of Claim lacked averments necessary to sustain a cause of action.

[17] Eksteen J dealt with all the five requisites for a conduct that found a claim under the *actio legis aquiliae*. Regard being had to the facts of the matter that is the subject of the matter at hand; I will confine myself to the element of "unlawfulness" or "wrongfulness". Dealing with the element of "unlawfulness" or "wrongfulness", Eksteen held in paragraph [19]:

“In the circumstances, particularly where a serious charge which may hold serious consequences is leveled against an employee, the Code of Good Practice: Dismissal requires of an employer to conduct an investigation into the allegations prior to the disciplinary proceedings being initiated. His failure to do so would, in my view, constitute a breach of a legal duty. In the absence of such an enquiry I do not think that there are considerations of public policy which would induce a court to deny liability in an appropriate case.”

[18] I alluded above, when I dealt with the matter of *Ralephenya* in particular, that, a pre-hearing investigation did take place. That is apart from the fact that, that was common cause between the parties. I have also expressed that it appeared that, it was not unusual for the prison director or SACM to institute disciplinary proceedings against an employee, even if the pre-hearing investigation report did not recommend that such proceedings be instituted. Seemingly, it is no wonder, in my view, that, the plaintiffs pleaded their cases in the manner they did. As I shall later demonstrate in this judgment; the plaintiffs appeared to have found themselves in an awkward situation or between the rock and a hard place. Suffice it to say, at this stage, that, the matter that is the subject of the matter at hand, is distinguishable from *Good Year South Africa*.

[19] In dealing with the general principles governing the interpretation of pleadings, the Supreme Court of Appeal held as follows in paragraph [21], in the matter of *Presidency Property Investments (Pty) Ltd and Others v Patel (2001 (5) SA 432 (SCA) [2011] ZASCA 73; 407/10 (25 May 2011)*:

“.... It may well be that a putative claim may be winkled out of a clearly pleaded cause of action sufficient to support another barely discernable cause... Such

recognition of the concealed cause would be at odds with the object of pleading, viz clear and precise definition of issues, and be an invitation to misleading formulation of claims. As such the party seeking to rely on it will necessarily require special circumstances to persuade a court to come to his assistance. In the end however he will have no leg to stand on if recognition can only be afforded to the prejudice of the opposing party or at the cost of proper investigation into the emerging issue. This is such a case."

[20] As I have expressed in my earlier judgment, the respective plaintiffs' pleadings were or are couched in a way that, there is an averred *nexus* between the averred conduct on the part of SACM, which conduct, according to them, constituted an infringement of their constitutional rights; and the averred emotional shock and loss of earning capacity, that they averred had resulted in damages.

[21] Linked to that in my view, are the plaintiffs' averments in their respective replications; as stated in paragraphs [24] and also in paragraphs [48] to [52] of my earlier judgment. In that regard; erroneously relying on the judgment of the Constitutional Court in Pretorius and Another v Transport Pension Fund and Another, **2019 (2) SA 37 (CC) (26 April 2018) ZACC**, paragraph [51], the plaintiffs averred that "a fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient." As I have reasoned in my earlier judgment, it is trite, that, the applicability of the principle of subsidiarity is not rigid. The relevant principle applies on a case-by-case basis. I then found therefore, that, the fact that the subsidiarity principle was not applied in Pretorius (above) did not necessarily mean that it was not applicable to the matter that is the subject of this judgment.

[22] In my view the plaintiffs herein clothed their respective claims in the Constitution; yet they wanted me to grant declarators and to simultaneously decide on their putative delictual claims. I am being accused of having omitted to grant the declarators; and also of having nonsuited the plaintiffs in relation to the supposed delictual claims, without even giving any reasons; so the argument goes. I venture to say, that, the plaintiffs have not been nonsuited. Seen as a whole, the matter had to be decided on the subsidiarity *point in limine*. It followed therefore, that, the putative delictual claims were not sustainable. Put differently; the matter was disposed of purely on the basis of the principle of subsidiarity.

[23] That said; the application for leave to appeal the High Court's decision to the Supreme Court of Appeal, in relation to the question of the applicability of the principle of subsidiarity, falls to be dismissed. The appeal on that question would have no reasonable prospect of success.

LEAVE TO APPEAL THE COST ORDER (S)

[24] Mr Ravele urged me to grant the plaintiffs' respective applications for leave to appeal the cost orders against them. He argued, among others, in the same regard, that, the Supreme Court of Appeal would find that Biowatch should have been applied. Mr Ravele also contended that, the only reason given by the High Court *in casu*, in denying the plaintiffs costs was that ***"the plaintiffs were conscious of the fact that they were supposed to have taken the LRA route but chose to rely on the Constitution directly and they tailored their case to suit their choice."***

[25] It is important to note that the above-quoted part of my judgment was not expressed in vacuum. I did not stop there. I also, in the same paragraph (paragraph [76]) described the plaintiffs' respective conduct as improper. I dealt with the Biowatch principle, in paragraphs [69] to [71] of my judgment. In the process I demonstrated through references to case-law dealt with in Biowatch, that, the Biowatch principle is or was not inflexible; as there may be circumstances; for example, where the litigant is frivolous or vexatious, wherein a Court may deviate from that principle. And as I have emphasized above, I found that the way that the plaintiffs conducted their respective matters was improper and thus warranted a cost order against them, individually.

[26] Although Mr. Matumba opposed the application by the plaintiffs for leave to appeal the respective cost orders; he had erroneously perceived them as having been an order that each party would bear its own costs. And according to him, such an order was unassailable. On the foregoing, I find that the application for leave to appeal the respective cost orders cannot succeed. The appeal (against the cost orders) to the Supreme Court of Appeal, would have no reasonable prospect of success.

CONCLUSION

[27] The following order issues:

27.1 Ralephenya's application for leave to appeal the whole judgment of this Court to the Supreme Court of Appeal is dismissed with costs;

27.2 Mungalo's application for leave to appeal the whole judgment of this Court to the Supreme Court of Appeal is dismissed with costs.


ACTING-JUDGE OF THE HIGH COURT
LIMPOPO LOCAL DIVISION, THOHOYANDOU

APPEARANCES

FOR THE APPLICANTS/ PLAINTIFFS : Mr. S.O Ravele, attorney with a right of appearance in the High Court, from S.O Ravele Attorneys, Louis Trichardt, Makhado - Assisted by Ms. H.R Ramuhovhi;

INSTRUCTED BY: N/A.

FOR THE RESPONDENT/ DEFENDANT: Mr. Tambani Matumba, attorney with a right of appearance in the High Court, from Tambani Matumba Attorneys Inc, 39 Songozwi Street, Louis Trichardt

INSTRUCTED BY : N/A.

DATE OF VIRTUAL HEARING : 11 NOVEMBER 2025.

DATE OF JUDGMENT: 16/04/2026

THOHOYANDOU HIGH COURT