



- (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: JR2548/2023

In the matter between:

GORDON MZWANDILE YEKELO

Applicant

and

DEPARTMENT OF INTERNATIONAL RELATIONS

Respondent

AND COOPERATION

Heard: 4 August 2026

Delivered: (This judgment was handed down electronically by emailing a copy to the parties. The 9 September 2026 is deemed to be the date of delivery of this judgment).

Summary: Review of the finding of the chairperson of an internal departmental disciplinary hearing — application brought in terms of s 145 of the Labour Relations Act 66 of 1995 — whether the decision is an arbitration award issued under the auspices of the CCMA or a bargaining council — no dispute referred to conciliation or arbitration and no arbitration held — s 145 not engaged — belated reliance on s 158(1)(h) impermissible and, in any event, misplaced where the complaint is procedural fairness of disciplinary action short of dismissal, being an unfair labour practice referable under s 191 — jurisdiction cannot be conferred by agreement — Court lacking jurisdiction — application dismissed — no order as to costs.

JUDGMENT

MHAMBI, AJ

Introduction

- [1] This is an opposed application in which the applicant, Mr Gordon Mzwandile Yekelo, seeks to review and set aside the finding of the chairperson of an internal disciplinary hearing, Mr Nyameko Goso, dated 15 May 2023, in terms of which the applicant was found guilty of five counts of misconduct and held personally liable for rental costs said to be owing to Phenicia Group (Pty) Ltd. The application is brought in terms of section 145 of the Labour Relations Act¹ (the LRA). The applicant also seeks condonation for the late delivery of the application.
- [2] The respondent, the Department of International Relations and Cooperation (the Department or DIRCO), opposes the application and raises, *in limine*, the jurisdiction of this Court. It contends that the decision sought to be reviewed is not an arbitration award issued under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) or a bargaining council, and that neither section 145 nor section 158(1)(h) of the LRA confers jurisdiction on this Court to entertain the application.
- [3] For the reasons that follow, I uphold the point *in limine*. This Court does not have jurisdiction to determine the application, and it falls to be dismissed on that ground. It is, in consequence, neither necessary nor appropriate for me to

¹ Act 66 of 1995, as amended.

determine the application for condonation or the merits of the grounds of review.

- [4] For convenience I refer to the parties as they are cited: the applicant is 'the applicant', and the Department is 'the respondent.'

Background

- [5] The applicant, a retired Major General of the South African National Defence Force, was appointed as the Republic's Ambassador and Head of Mission in Juba, South Sudan. He assumed duty on 19 September 2017 and concluded a written fixed-term contract of employment with the respondent on 22 September 2017. He served the full term of that contract, which expired on 15 December 2021, whereafter he was no longer in the employ of the respondent.
- [6] The misconduct with which the applicant was charged arose from his decision to bring the lease of the official residence with Phenicia Group (Pty) Ltd to an end, and to take up occupation of a new official residence at the Juba Grand Hotel with effect from 1 December 2019, without the approval of the Chief Financial Officer to whom that authority was delegated, and, so it was alleged, contrary to written instructions not to do so.
- [7] On 19 October 2020 the applicant was served with a notice to attend a disciplinary hearing on five charges of misconduct. The hearing was convened as an internal disciplinary enquiry chaired by Mr Goso. It commenced on 9 November 2020 and, after a series of postponements, was finalised on 15 May 2023, when the chairperson found the applicant guilty of all five charges and directed that he be held personally liable for the rental said to be owing.
- [8] It is common cause that the applicant did not refer any dispute concerning the disciplinary action taken against him to the CCMA or to a bargaining council for conciliation or arbitration. He instead launched this application directly, seeking to review the chairperson's finding under section 145 of the LRA. In his founding affidavit he relied upon section 145. In reply he raised,

additionally, section 158(1)(h) of the LRA and the terms of his contract of employment.

The issue

- [9] The threshold question is whether this Court has jurisdiction to entertain the application. Jurisdiction is logically anterior to both condonation and the merits: if the Court lacks jurisdiction, the enquiry ends there. I therefore address it first.

The approach to jurisdiction

- [10] This Court is a creature of statute. It enjoys only the jurisdiction conferred upon it by the LRA or by other law, and it does not have jurisdiction over every dispute arising from an employment relationship.² A party who approaches this Court for relief must identify the provision of the LRA, or of some other law, that confers jurisdiction on the Court to entertain the claim.
- [11] Jurisdiction is determined on the basis of the applicant's pleadings, the legal basis of the claim as pleaded, and not on the merits or the eventual substance of the dispute.³ In motion proceedings such as these, the jurisdictional basis for the relief sought must be established in the founding affidavit.⁴
- [12] The applicant relied, in turn, on three bases for the jurisdiction of this Court: section 145 of the LRA; section 158(1)(h) of the LRA; and the jurisdiction clause in his contract of employment. I deal with each.

Section 145 of the LRA

- [13] Section 145(1) permits a party to a dispute who alleges a defect in '*any arbitration proceedings under the auspices of the Commission*' to apply to this Court for an order setting aside the arbitration award.⁵ The section is thus concerned only with the review of arbitration awards issued under the

²*Shezi v South African Police Service and Others* (2021) 42 ILJ 184 (LC) at paras 9–10.

³*Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 75; *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 155.

⁴*Id* fn 2 at para 10.

⁵Section 145(1) of the LRA.

auspices of the CCMA or, by extension, a bargaining council. It presupposes that a dispute has been referred to, and arbitrated by, such a body.

- [14] That is not what occurred in this matter. The decision that the applicant seeks to review and set aside is the finding of the chairperson of an internal departmental disciplinary hearing. It is not an award made under the auspices of the CCMA or a bargaining council. It is common cause that no dispute was referred to conciliation or arbitration, and that no arbitration took place.
- [15] Nor does the record reflect that the enquiry was one conducted by an arbitrator in terms of section 188A of the LRA, the award of which would have been deemed to be an arbitration award susceptible to review under section 145.⁶ The enquiry was, on the papers, an ordinary internal disciplinary hearing chaired by an official of the respondent. Indeed, the Minister's correspondence of 27 June 2023 describes it as '*the internal disciplinary hearing*' and records that the applicant's remedy, if dissatisfied, lay in referring the matter to '*the competent tribunal outside the Department.*'
- [16] It follows that section 145 of the LRA is not engaged. The applicant's reliance on that section to found the jurisdiction of this Court is misconceived, and on that basis he has failed to establish jurisdiction as pleaded in his founding affidavit.

Section 158(1)(h) of the LRA

- [17] In his replying affidavit the applicant sought, for the first time, to rely on section 158(1)(h) of the LRA, which empowers this Court to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.
- [18] There are two answers to this. The first is procedural. As I have noted, the jurisdiction of the Court must be established in the founding affidavit. An applicant may not make out the jurisdictional basis of the application for the first time in reply, thereby depriving the respondent of the opportunity to meet

⁶Section 188A of the LRA. An award made pursuant to an inquiry by an arbitrator under s 188A is deemed to be an arbitration award for the purposes of s 145. The record does not reflect that the enquiry was conducted under s 188A, and no party contended that it was.

it. The belated invocation of section 158(1)(h) is, for that reason alone, impermissible.

- [19] The second answer is one of substance. Even had the point been properly raised, section 158(1)(h) does not avail the applicant. The gravamen of his complaint is that the disciplinary action taken against him was procedurally unfair, that no preliminary investigation was held, that the charges omitted a prayer for suspension and recall, that there was undue delay, that the chairperson was not independent, and that his documentary evidence was disregarded. A complaint of that character is not to be brought as a review under section 158(1)(h).⁷
- [20] Where the true cause of action is the fairness of disciplinary action short of dismissal, it meets the definition of an unfair labour practice and must be pursued through the dispute-resolution machinery that the LRA ordains for such disputes. This Court has cautioned against contrived reliance on section 158(1)(h) to review procedural decisions of the State as employer, when the real complaint is one of procedural unfairness adequately catered for elsewhere in the Act.⁸ Unfair labour practice includes the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee,⁹ and such a dispute must be referred to the appropriate council or the CCMA in terms of section 191 of the LRA.¹⁰
- [21] The applicant had, accordingly, a remedy under the LRA that he did not pursue. Section 158(1)(h) is not an open invitation to review each and every act of the State as employer, and it does not confer jurisdiction on this Court to entertain what is, in substance, an unfair labour practice dispute dressed up as a review.

⁷*Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 29.

⁸*Democratic Nursing Organisation of South Africa (DENOSA) obo Ramaroane v Member of the Executive Council for Health, Gauteng Province and Others* (2019) 40 ILJ 2533 (LC) at paras 13–15.

⁹Section 186(2)(b) of the LRA.

¹⁰Section 191(1) of the LRA.

Jurisdiction by agreement

- [22] The applicant also relied on clause 6.4.1 of his contract of employment, by which he consented to the jurisdiction of the High Court in any dispute arising from the contract or the employment relationship, coupled with the concurrent jurisdiction of this Court and the High Court under section 157(2) of the LRA.¹¹
- [23] This argument, too, must fail. Section 157(2) confers concurrent jurisdiction on this Court and the High Court only in respect of alleged or threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution arising from employment and labour relations. It is not a general gateway through which any employment dispute may be brought to this Court. The applicant's complaint is not pleaded as, and is not in substance, a constitutional-rights claim of that kind.
- [24] More fundamentally, jurisdiction cannot be conferred upon this Court by agreement between the parties where the Court does not otherwise possess it. The nature of the dispute referred must be one that this Court is competent to adjudicate; and where it is not, no consent or contractual stipulation can supply the deficiency.¹² A clause conferring jurisdiction on the High Court cannot, in any event, confer jurisdiction on this Court.

The reasonableness of the award

- [25] Because the Court lacks jurisdiction, the reasonableness of the chairperson's finding, measured against the standard in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹³ whether it is a decision that a reasonable decision-maker could not reach on the material before him,¹⁴ does not arise for determination, and I express no view upon it. I record only that a dismissal for want of jurisdiction is not a decision on the merits of the applicant's complaints, and does not preclude him from pursuing whatever competent remedy may remain available to him in the proper forum.

¹¹Section 157(2) of the LRA.

¹²*South African Motor Industry Employers' Association and Another v National Union of Metalworkers of South Africa and Others* [1997] 9 BLLR 1157 (LAC).

¹³(2007) 28 ILJ 2405 (CC).

¹⁴*Ibid* at para 110.

Condonation

[26] For the same reason, the application for condonation of the late delivery of the review does not fall to be decided. Condonation would avail the applicant nothing in a matter over which the Court has no jurisdiction.

Conclusion

[27] The application is brought under a section of the LRA that does not apply to the decision sought to be reviewed; the belated reliance on section 158(1)(h) is both impermissible and misplaced; and jurisdiction cannot be conferred by agreement. On no basis pleaded does this Court have jurisdiction to entertain the application. It must be dismissed for want of jurisdiction.

Costs

[28] In terms of section 162 of the LRA, costs in this Court are governed by the requirements of the law and fairness, and do not follow the result as a matter of course.¹⁵ Although the respondent sought costs on the attorney-and-client scale, I am not persuaded that such an order would be just. Having regard to the nature of the dispute, the applicant's long service to the Republic, and the fact that the jurisdictional defect did not occasion the respondent any undue prejudice, I consider that the interests of justice are best served by making no order as to costs.

[29] In the premises, I make the following order:

Order

1. The application is dismissed for lack of jurisdiction.
2. There is no order as to costs.

¹⁵Section 162 of the LRA; *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC).

M. H. Mhambi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv P Lebea

Instructed by : Bares & Basson Attorneys, Pretoria

For the Respondent : Adv F Storm

Instructed by : The State Attorney, Pretoria