IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 12/21

In the matters between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION OBO MOGALE DANIEL MORWE	**Appellant**
and	
TSWAING LOCAL MUNICIPALITY	**First Respondent**
MANOTO ISAAC MORUTI	**Second Respondent**
THE MUNICIPAL COUNCIL OF TSWAING LOCAL MUNICIPALITY	**Third Respondent**
THE EXECUTIVE MAYOR OF TSWAING LOCAL MUNICIPALITY	**Fourth Respondent**

Heard: **13 September 2022**

Judgment: **27 September 2022**

Coram: **Waglay JP, Sutherland JA and Kathree-Setiloane JA**

LABOUR APPEAL COURT

JUDGMENT

SUTHERLAND JA

Introduction

[1] This matter began life as an urgent application before the Labour Court. The relief claimed in the Notice of Motion was that:

> '1. The applicant's non-compliance with the rules of this Court be condoned and that this application be heard as one of urgency in terms of rule 8 of the rules of this honourable Court.
>
> 2. The termination of the applicant's contract of employment be declared unlawful and set aside.
>
> 3. The applicant be granted an order of specific performance in terms of section 77(e) [sic] of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") reinstating the applicant's contract of employment with immediate effect from the date of the grant of this order.
>
> 4. The second respondent [ie the municipal manager] be ordered to pay the costs of this application personally.'

[2] The application was dismissed. In the judgment, two bases were articulated for the dismissal. First, that the Labour Court lacked the jurisdiction to hear the pleaded case. Alternatively, even if it did have jurisdiction, the pleaded case was not established on the papers. In our view, the first reason was incorrect and the second reason was correct. Moreover, the application was not remotely urgent. It could have been struck off or dismissed for the second reason. The result is that the appeal must be dismissed.

LABOUR APPEAL COURT

[3] At the hearing, only the appellant was represented, although heads of argument had been filed on behalf of the respondent. A bizarre letter had been sent to this Court by the respondent. It said that the opposition to the appeal was withdrawn. It did not say that the judgment in its favour was abandoned. The consequence of that is that the appeal must be adjudicated.

The Jurisdiction question

[4] As the Notice of Motion makes clear, the claim did not engage the provisions of the Labour Relations Act[1] (LRA). That disavowal was also later expressly alleged.

[5] Jurisdiction is an issue decided on the pleadings.[2] In an application, the pleadings are constituted by the Notice of Motion and the supporting affidavits. The founding affidavit set out several averments:

> '(1) In para 19, it was averred that the contract had been 'unlawfully' terminated. The averments then went on to inappropriately state that a 'setting aside' of the termination and a 'reinstatement' was sought. This terminology belongs to a claim under the LRA not in a claim in contract. As the plain intention was to engage the jurisdiction of the Labour Court under section 77(3) of the BCEA, it is appropriate to take a charitable view and treat the averments as if they had averred that specific performance of the terms of contract which had been breached by the employer was sought. In the absence of a charitable approach the application could have been dismissed on the grounds that it sought

LABOUR APPEAL COURT

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[1] Act 66 of 1995, as amended.

[2] *Gcaba v Minister for Safety and Security and others* (2010) 31 ILJ 296 (CC) at para [75]: 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognizable by the High Court, should thus approach the Labour Court.'

relief available only in terms of the unfair dismissal jurisdiction of the Labour Court under the LRA.

(2) The pleadings continue somewhat turgidly. A written contract is averred. In regard hereto, it is averred that the contract, properly understood, conferred on the appellant employee a protection in that the contract could not be terminated without the employer first conducting a disciplinary enquiry in terms of a collective agreement which was in place.

(3) Further it is averred that on 20 October 2020, the appellant was given a letter of summary dismissal which constituted the act of breaching the contract because no disciplinary enquiry had preceded it.'

[6] The relevant foundation for the claim in contract before the Labour Court is sections 77(3) and 77A(e) of the Basic Conditions of Employment Act[3] (BCEA):

'77 Jurisdiction of Labour Court

(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.

(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.

(2) …

(3) <u>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.</u>

(4) …

(5) …

77A Powers of Labour Court

Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order –

...

[3] Act 75 of 1997.

LABOUR APPEAL COURT

> *(e)* 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;
>
> *(f)* …
>
> *(g)* dealing with any matter necessary or incidental to performing its functions in terms of this Act.' [Own emphasis].

[7] The Labour Court held that Section 77(3) must be interpreted to mean that the jurisdiction of the Labour Court is engaged only in respect of a contract of employment during its existence and once it has been terminated, that jurisdiction evaporates. At paras [9] – [10] the court held:

> '[9] … this Court shall have to live with the choice [by the appellant], supposedly made with the benefit of proper legal advice, that the termination be challenged on the principles of the law of contract. Section 77 (3) of BCEA provides as follows:
>
> > ''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".
>
> [10] In my view where a contract of employment is terminated or cancelled, whether lawfully or unlawfully, fairly or unfairly, the jurisdiction of this Court under section 77 (3) cannot be invoked. In this regard, I am fortified by the language employed by the legislature. The word 'concerning' is used as a preposition in a present continuous tense. If the legislature had in mind a matter involving a terminated contract, it could have used a verb like 'concerned'. The dictionary meaning of the word 'concerning' is '*regarding; touching; in reference or in relation to; or about'.* Therefore, in my view, at the time of the Labour Court hears and determines a matter, the contract must be still extant. My view obtains further sustenance and fortification from the phrase "*irrespective of whether any basic condition of employment constitutes a term of that contract.* Where a contract has been terminated or cancelled, its terms are no longer binding on the parties. In short a

LABOUR APPEAL COURT

> cancelled contract is incapable of being enforced unless the right to cancel is placed in dispute. The duty to hear and determine is shared with the civil Courts.' [Underlining in the original]

[8] In our view, this interpretation is incorrect. The provisions of section 77(3) must be interpreted in accordance with the well-established approach described in *Natal Joint Municipal Pension Funds v Endumeni Municipality*, at para [18].[4] The purpose, context and text of the section must be considered holistically.

[9] The notion that the phrase 'concerning a contract of employment' means that a dispute about the termination of that contract is outside the jurisdiction of the Labour Court is misconceived. The error is, in part, caused by not reading the whole text of the sub-section. The whole text, properly understood, does two things. First, it confers on the Labour Court concurrent jurisdiction with the civil courts. Second, it limits the scope of that concurrency to matters 'concerning a contract of employment'. What this must mean is that whatever a civil court could hear 'concerning a contract of employment' is what the Labour Court could hear. The word 'concerning' and the use of the present tense does not point towards the scope of jurisdiction being only in respect of contracts which it is common cause are extant. A controversy about whether or not a contract has been cancelled validly or has been breached remains a dispute 'concerning a contract of employment'. This is the ordinary grammatical meaning of the phrase and, perhaps more importantly, from the perspective of a purposive interpretation, any other understanding would result in an absurdity. The notion that the civil courts can hear matters about the disputed validity of the termination of a contract and the concurrent jurisdiction of the Labour Court did not extend to that category of dispute would make a mockery of concurrency. Common sense and experience tells us that the critical mass of litigation about breaches of contracts of employment are about the disputed validity of the termination of such agreements.

[10] Moreover, the notion of the remedy of specific performance being available only in respect of an existing contract is a misleading statement. The remedy follows on a finding that the contract has been breached and such an order compels

LABOUR APPEAL COURT

[4] 2012 (4) SA 593 (SCA) at para [18].

compliance with the obligations in terms of the contract. An act of purported termination does not unsuit an aggrieved contracting party from access to the Labour Court. The concept of specific performance, despite its effect being the equivalent of reinstatement as contemplated by section 193 of the LRA, the judicial decision is wholly discretionary in respect of the former and is constrained in the case of the latter.[5]

[11] In summary, any claim that could be brought in a civil court that has to do with a dispute over a contract of employment falls within the jurisdiction of the Labour Court.

[12] The stipulated powers of the Labour Court provided in section 77A (e) are, *prima facie*, broader than that of a civil court, but that aspect has no bearing on the interpretation issue and the scope of the Labour Court's jurisdiction over employment issues in terms of section 77(3).

[13] Accordingly, the Labour Court indeed had jurisdiction to hear the claim pleaded.

The claim of breach of contract

[14] The critical element in the cause of action pleaded by the appellant is a *right in contract* to a disciplinary hearing. There should be no confusion arising from the appellant's pleading averments that show he was afforded *audi alterem partem* before the dismissal or termination of the contract was effected: that conduct by the employer has no effect on the interpretation issue and no inference can be drawn from that act.

[15] It is plain that the alleged right must be found in the written contract, either express or implied. It is thus to the written contract that we must now turn. Clause 5 of the contract of employment provides:

> '5. Termination of Employment

[5] See: *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* (2019) 40 ILJ 2723 (LAC) at para [31]; but also, see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (AD) pp 782 - 783 (*Benson*).

LABOUR APPEAL COURT

Either you or the Council will be entitled to terminate your employment on written notice given to the other party, as follows:

5.1 If you have been employed for four (4) weeks or less, either party is required to give the other party one (1) week written notice.

5.2 If you have been employed for more than four (4) weeks, but not more than one (1) year, either party is required to give two (2) weeks written notice.

5.3 If you have been employed for more than one (1) year, either party is required to give four (4) weeks written notice.

5.4 Notice of termination of your employment may not be given:

5.4.1 during any period of leave to which you are entitled to;

5.4.2 must not run concurrently with any period of leave to which you are entitled to;

5.4.3 on any other day except the 1st day of the month, should the first day of the month fall on a public holiday, or weekend then the first working day following such day?

5.5 The Council will be entitled to terminate your employment without notice in compliance with the relevant Labour legislation, as amended, and in terms of the Human Resources Policies and Procedure Manual, which may include a disciplinary hearing, if you –

5.5.1 commit any serious or persistent breach of any of the provisions of this agreement;

5.5.2 are guilty of any serious misconduct or deliberate neglect in the discharge of your duties under this agreement;

5.5.3 are guilty of any other conduct which will justify summary dismissal at common law;

5.5.4 …

LABOUR APPEAL COURT

> 5.6 Notwithstanding the above, your employment with the Council will terminate at the end of the month in which you turn 65 (sixty five) years of age, unless you and the Council agree otherwise in writing… [Own emphasis]

[16] This clause is the principal alleged source of the right claimed. The proposition cannot be sustained. In general, provisions in agreements that express subordination to the LRA and its norms are decorative surplusage. It is impossible in law to contract out of the regulation of the LRA. In this clause, a generalised genuflection is articulated which is then qualified by the permissive rather than a peremptory allusion to an enquiry which 'may' be included. There is no policy imperative which compels a court to strain to find in a contract that procedures and remedies provided by the LRA have been incorporated. The essential contingency of an enquiry as referred to in clause 5.5 is not a sound basis to make the claim that the appellant relies upon.

[17] The Labour Court approached the issue from the perspective that 'procedural fairness' is a species of complaint that is exclusively within the realm of the LRA remedies and has no place in purely contractual disputes. There is some force to this view because the common law of contract did not evolve an intrinsic procedural fairness element. It has been the very absence of such an element which is the font of the demand for statutory labour law remedies. However, it is unnecessary in this judgment to express a firm view on this aspect. It suffices to say that a contract of employment could notionally incorporate any procedures if they are expressly included. However, in our view, on the facts of this case, this contract does not include such provisions.

[18] In *Old Mutual Ltd v Moyo*[6] (*Moyo*), the employee alleged that the contract of employment could not be terminated without an enquiry. That court found that no such right emerged from the terms of the written contract. The relevant text of the contract relied on was cited at paras [8] - [9] of the judgment:

> '[8] …

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[6] (2020) 41 ILJ 1085 (GJ).

LABOUR APPEAL COURT

"24.1 This contract of employment may be terminated as follows:

24.1.1 By either party providing six months' notice to this effect, in writing, to the other party, subject to clause 24.3. Where such notice is provided:

24.1.1.1 The employer may, at its sole discretion, elect whether the executive should work during this period of notice. Notwithstanding this, the employer shall pay the executive for the six months' notice irrespective of whether the employer has required him to work or not.

24.1.1.2 Should the executive give notice in terms of clause 24.1.1 and request that the employer waive the notice period, the employer may exercise its discretion in this regard. Should the employer agree to such waiver, the executive shall be paid only up to and including his last day of actual work.

24.1.2 Upon the executive reaching the normal retirement age as determined by the employer, or at an agreed earlier retirement age, at which point this agreement shall terminate and the executive shall commence retirement.

24.1.3 By the employer on the basis of the grounds regarded as valid in the Labour Relations Act 66 of 1995, with or without the notice period as set out in clause 24.1.

24.1.4 For any other lawful and fair reason.

24.2 Without limiting the provisions of clause 24.1 above (inclusive of clauses 24.1.1 to 24.1.4) the employer may, at any time during the currency of this agreement:

LABOUR APPEAL COURT

24.2.1 summarily terminate this agreement should the executive be guilty of misconduct which would entitle the employer, in law and/or equity, to summarily dismiss him;

24.2.2 terminate this agreement with notice should the executive not meet the employer's required performance standards;

24.2.3 terminate this agreement with notice on the basis of the executive's incapacity on the basis of ill health or injury;

24.2.4 terminate this agreement on the basis of the employer's and/or the group's operational requirements;

24.2.5 terminate this agreement with or without notice on the basis of "FAIS" requirements as set out in clause 17, or a breach in terms of clause 18 of this agreement (the FICA);

24.2.6 terminate this agreement summarily where the executive has committed a material breach of contract and/or for reasons recognised and accepted in law and equity as justifying summary termination of employment;

24.2.7 terminate this agreement without notice if the executive is in breach of any code or rules or guilty of any offence under or in respect of any financial services regulator (including, without limitation, the Financial Services Board (FSB) or any successor body, including any prudential authority)."

[9] Clause 25.1 of the employment contract is also relevant. It deals with pre-dismissal arbitration and reads thus:

"25.1.1 <u>Where allegations of misconduct or incapacity have been raised against the executive, the employer will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry, or to proceed instead via the pre-dismissal arbitration procedure, contemplated in s 188A of the Labour</u>

LABOUR APPEAL COURT

Relations Act 66 of 1995, and subject to the executive's remuneration at the time being equal to or above that stipulated in s 6(3) of the Basic Conditions of Employment Act, the executive hereby consents to such pre-dismissal arbitration in terms of s 188A of the Labour Relations Act.

25.1.2 Should circumstances arise in respect of the executive where the employer chooses to invoke clause 25.1.1 and pre-dismissal arbitration proceedings must be arranged, the employer shall decide in its sole discretion as to whether to utilise the services of the Commission for Conciliation, Mediation & Arbitration (the CCMA) or an accredited agency".' [Own emphasis].

[19] The text in the *Moyo* contract reflects the same species of ambivalence about an enquiry as that to be read in clause 5.5 of the contract relied on by the appellant. The High Court in *Moyo* held thus:

> '[59] It seems to me, with respect, that despite Mr Moyo's express disavowal of any reliance on his rights under the LRA, the court a quo viewed the interdict application through a labour-law prism, ie the perceived unfairness of Old Mutual having raised allegations of a conflict of interest and misconduct on the part of Mr Moyo, and then proceeding instead to terminate the employment contract on notice in terms of clause 24.1.1 without first affording him a hearing before the termination. However, there is no such self-standing common-law right to fairness in employment contracts. A right to be treated fairly when a contract is terminated only exists if it is expressly or impliedly incorporated in the contract.
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> [60] In *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA); (2010) 31 *ILJ* 529 (SCA) paras 32-33 and 55-58, the Supreme Court of Appeal had occasion to consider a contract of employment which provided for termination on notice. Wallis AJA held that a right to be treated fairly upon termination could only be held to exist if it is expressly or impliedly incorporated in the contract and that such a term should not be imported into a contract by developing the common law. It was held that the contract in question had been lawfully terminated on notice and

LABOUR APPEAL COURT

> there was no requirement for fairness, expressly or impliedly, incorporated into the contract.
>
> …
>
> [67] Mr Moyo's interpretation that clause 25.1.1 affords him a contractual right to a disciplinary hearing also militates against the long-standing precept of interpretation that every word must be given a meaning. A court should not conclude, without good reason, that words in a single document are tautologous or superfluous. (See *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 99; *African Products (Pty) Ltd v AIG SA Ltd* 2009 (3) SA 473 (SCA) para 13.)… Furthermore, Mr Moyo's interpretation would lead to absurdity and the unbusinesslike result that the employer would be obliged in every instance where allegations of misconduct have been raised against the executive, to hold either an internal disciplinary enquiry or pre-dismissal arbitration, even though the employer, for reasons of its own, does not wish to pursue the matter any further or to take disciplinary action.'

[20] The critical point in the case before this court, as in *Moyo*, is that although the employer *could* have held an enquiry, the contract does not, on its terms, compel the employer to do so. Thus, on this ground, the pleaded cause of action fails.

[21] An ancillary contention advanced is that clause 19.3 of the written agreement supports the claim. That clause merely states that any disciplinary action taken shall be in terms of the disciplinary code. The contention that this confers a right to an enquiry is incorrect. All that is achieved by this text is that if an enquiry is held it must conform to a stipulated procedure.

<u>The remedy of specific performance</u>

[22] There is a further acute vulnerability in the case pleaded and the relief sought in the form of specific performance. The remedy of specific performance is discretionary.[7] Given the facts alleged about the conduct of the parties explaining why they fell out, i.e. the alleged mutinous and disruptive behaviour

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[7] See: *Benson* supra.

LABOUR APPEAL COURT

of the employee, even were the employer to have been found to have been in breach of compliance with an obligation to hold an enquiry, the factors relevant to the grant of specific performance indicate that it would probably be inappropriate to do so. That would leave the appellant with the prospect of damages, a form of relief not sought in this application.

Conclusion

[23] Accordingly, the appeal must be dismissed.

[24] Both parties sought costs in their heads of argument. The application was fundamentally misconceived. In a contractual dispute under the concurrent jurisdiction of the Labour Court, the ordinary rule should apply that costs follow the result. In any event, where public money is at stake as it is in this case, it is appropriate that such costs that have been incurred ought to be recovered.

Order

1. The appeal is dismissed with costs.

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Sutherland JA

Waglay JP and Kathree- Setiloane AJA concur.

APPEARANCES:

For the Appellant: E Mokutu SC, with him, Y Ndamase

Instructed by Fihla & Associates

LABOUR APPEAL COURT

For the Respondent:	No appearance Heads of argument prepared by G Mamabolo

LABOUR APPEAL COURT