IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J2046/2017

In the matter between:

SRIKANT SINGHALA **Applicant**

and

ERNST AND YOUNG INCORPORATED **1ST Respondent**

SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS **2nd Respondent**

Heard: **07 September 2017**

Delivered: **12 September 2017**

Summary: An urgent application where the applicant seeks an order declaring his dismissal to be unlawful and null and void *ab initio*. *Quare*: Whether the Labour Court has jurisdiction to entertain the matter. The principle established in *Steenkamp and others v Edcon Ltd (NUMSA intervening)*[1] considered and discussed. Whether the principle in

[1] [2016] 37 ILJ 564 (CC)

Solidarity and others v SABC J1343/16 delivered on 26 July 2016 (LC) **that the Labour Court retains jurisdiction on claims of invalid dismissal is still good law and ought to be followed or not. Held: (1) The Labour Court lacks jurisdiction to entertain the applicant's application. (2) The applicant to pay the costs, which includes the costs of employing two counsel.**

JUDGMENT

MOSHOANA J

Introduction

[1] Is sharing blood relations with the Gupta family a licence to join the long queue of the unemployed masses of this country? Put it differently, is blood relations with the Guptas a commercial rationale to terminate on a no fault basis? Or being dismissed simply because one shares blood relations with a particular family plagued by allegations of state capture, allegedly dressed as one for *operational reasons*, is justified in law. These are the questions that may arrest the attention of this court in due course.

[2] My attention in this judgment is to be detained by the question whether this court possesses jurisdiction, at this stage, to entertain the applicant's claim for unlawful dismissal. This is an urgent application in terms of which the applicant seeks an order declaring that his dismissal is unlawful and void *ab initio*. Consequentially, he is entitled to return to work and continue with his contractual duties until 31 December 2019. An injunction must issue preventing the respondent to terminate the applicant's employment unlawfully.

Background facts

[3] Much as the facts spelled out in the affidavits filed herein make interesting reading, it is unnecessary to recount them in any hyperbolical manner as it were, given the narrow question to be answered by this court. A brief narrative will suffice for the purposes of this judgment.

[4] On or about 23 May 2014, the applicant submitted a graduate recruitment form to the first respondent for vacation work / business experience programme. Of importance and relevance, the applicant disclosed in the application form the following facts:

> Alternative contact person: **Atul Gupta.** Relationship- **Father**.

At the end of the form, the applicant declared thus:

> I declare that the information given is correct and understand, in the event of my being employed, that any deliberate misstatement may render my contract of service null and void. I further declare that I have disclosed any and all information that is relevant to this application.

The applicant signed the application form on 23 August 2014.

[5] On or about 11 May 2015 the applicant received a letter welcoming him to the first respondent. Around the same time, the applicant signed a fixed term contract of employment. Thereby, he was appointed as a Trainee Accountant effective 1 January 2017 until 31 December 2019.

[6] The applicant only commenced employment on 27 January 2017. He was on study leave until 26 January 2017. He continued with the activities attached to his employment until around May 2017, when one

of the directors advised him of a request from one of the first respondent's clients to remove him from an audit. The basis of the request was that the client discovered that the applicant is the son of Atul Gupta and a conflict of interest may arise. At this time there were allegations of state capture engulfing the Gupta family.

[7] The applicant was removed from that client's tasks and allocated other tasks. In the meanwhile, the allegations of state capture gained momentum. The applicant's name was in one of the many "leaked emails". Allegedly he received the CV of one Matjila via email and flew with the Honourable Minister Zwane and others to Dubai. All of these developments troubled the first respondent. The first respondent was worried about its reputation and did not wish to find itself in the same situation as KPMG – another accounting firm which was dealt a serious blow due to relations with the Gupta family.

[8] Discussions ensued aimed at an amicable termination of employment. After a stalemate was reached, the first respondent commenced a section 189 of the Labour Relations Act[2] (LRA) process. Various correspondences were exchanged around the legitimacy or otherwise of the impending termination for operational requirements. Ultimately on 23 August 2017, the applicant was dismissed. Attempts were made to have the dismissal withdrawn. Those drew blank. On 1 September 2017, the applicant launched the present application. The first respondent opposed the relief sought and raised a point of jurisdiction. Since the point was dispositive of the entire application, if upheld, I heard argument on this point only.

The pleaded case

[9] The applicant's case as foreshadowed in the founding papers can be summarised thus:

[2] Act 66 of 1995 as amended.

9.1 The only reason why the first respondent dismissed him is because he is a member of the Gupta family. Accordingly, that offends the equality clause and the right not to be unfairly discriminated at. His dignity as a human being has been violated thereby.

9.2 In terms of section 157(2) of the LRA, the Labour Court retains concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from labour relations.

9.3 The discrimination on the basis of his family relationship or origin constitutes an automatically unfair dismissal in terms of section 187 (1) (g) of the LRA.[3]

9.4 The first respondent did not have a *bona fide* rationale to dismiss him in terms of section 189 of the LRA. That being the case and retrenchment being a sham, his dismissal is unlawful and inherently unfair[4]. [My own emphasis]

9.5 He has been discriminated against within the contemplation of section 6 of the EEA[5].

9.6 The provisions of sections 17(4) and 18 (5) of the Skill Development Act[6] has been breached thus rendering his dismissal unlawful and inherently unfair.

[3] Para 136 of the Founding Affidavit-But over and above same, because 1st Respondent clearly discriminated me on the basis of my family relationship or origin, it constitutes an automatic unfair dismissal in terms of section 187(1) (g) of the Labour Relations Act No 66 of 1995. This in itself, is submitted, is sufficient to establish a clear right. [My underlining and emphasis}

[4] Para137 of the FA.

[5] Para 139 of the FA.

[6] Act 97 of 1998.

9.7 He disavowed reliance on any remedies provided for in the LRA. He asserted that he rejects the unlawful termination of his contract of employment by the first respondent using a disingenuous reason in breach of his constitutional rights and accordingly he is entitled to enforce his contract of employment.

Argument

[10] Both representatives furnished the court with concise heads of argument dealing with the question whether this court has jurisdiction. Mr Fourie, for the first respondent, contended that on proper interpretation of the *Steenkamp* decision of the Constitutional Court, the Labour Court lacks jurisdiction to entertain the so-called invalid or unlawful dismissal claim. He relied heavily on the recent LAC judgments and judgments of this court which I shall deal with later hereunder.

[11] On the other hand, Mr Rossouw for the applicant placed heavy reliance on the judgment of this court dubbed the *SABC8*. Wherein my brother Justice Lagrange found that this court retains jurisdiction under the rubric of section 157(2) of the LRA. Both submitted that costs should follow the results, which costs should include the employment of two counsel according to Mr Fourie.

Evaluation

[12] The longstanding principle in motion proceedings is that an applicant stands and falls by his or her founding papers. I do not by any stretch of imagination intend to unsettle this principle.[7] When asserting a clear right, the applicant placed reliance on sections 187 and 189 of the LRA

[7] *Pilane and another v Pilane and another* 2013 (4) BCLR 431 (CC)

as well as section 6 of the Employment Equity Act[8].(EEA) He in addition sought reliance on sections 9 and 10 of the Constitution. This in my view was a halfhearted attempt to bring the matter within the realm of section 157(2) of the LRA. It has long been settled that where there is national legislation providing remedies direct reliance on the bill of rights is inappropriate.

[13] In *Chirwa v Transnet Ltd and others*[9] Ngcobo J said the following:

> Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot as the applicant seeks to do avoid the dispute-resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157 (2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA…What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.[10]

[14] Similar sentiments were echoed by Zondo J (as he then was) in *Steenkamp*.[11] From the founding papers, it is clear that the applicant alleges breaches of sections 187 and 189 of the LRA together with section 6 of the EEA. It matters not that the applicant astutely disavowed the remedies in the LRA or EEA, those remedies are available to the

[8] Act 55 of 1998.

[9] [2008] 29 ILJ 73 (CC) at para 124.

[10] *Chirwa* at paras 18 and 124

[11] At para 140.

applicant as a matter of law. It does not require a rocket scientist to observe that the applicant's case is one that is justiciable in the LRA. To my mind, it is inappropriate for a litigant to shut the door of the LRA-by disavowing its remedies and hope that such a stunt is sufficient to oust the law. The law is that the LRA is one of the legislations enacted to promote and uphold the right in section 23[12] of the Constitution. Flowing from the Constitution, every employee has a right not to be unfairly dismissed.[13]

[15] Regard being had to the provisions of section 23, it is clear that the Constitution sought to protect all the workers of South Africa using fairness as a yardstick. It could not have escaped the drafters of the Constitution that another right to protect is the right to be dismissed lawfully. It will make no sense for the Constitution to protect fair labour practice and at the same time protect the so-called unlawful or invalid dismissals. The LRA defines what a dismissal is.[14] It can be observed from the definition that threads of fairness are built in. For an example, it must be based on fairness to protect reasonable expectation to be retained as a permanent employee. All of this points to the Constitutional right to fair labour practices.

[16] In an unlawful and or invalid dismissal terrain, which to my mind is not consistent with the constitutional rights, a dismissal dissipates in the simplest of ways. Whilst in the fairness terrain dismissal as an act does not dissipate but may fail to pass the muster of fairness. To my mind this is what the constitutional democracy anticipates.

[17] To my mind when seeking to determine the jurisdiction of the Labour Court, the starting point should always be section 157(1).[15] It is therefore

[12] Section 23(1) - Everyone has the right to fair labour practice.

[13] Section 185 of the LRA- Every employee has the right not to be unfairly dismissed.

[14] Section 186 of the LRA.

[15] (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

inappropriate, in my view, to quickly jump to section 157(2) before judging whether the LRA provides some rights and remedies to which the Labour Court can exercise jurisdiction. In terms of the LRA disputes regarding automatically unfair dismissals are justiciable in this court. The prerequisite for jurisdiction is the referral to conciliation. Absent such referral, this court lacks jurisdiction. Similarly, section 10 of the EEA requires disputes about discrimination to be referred to conciliation.

[18] As far back as 2001, the LAC in *Langevelt v Vryburg Transitional Council and others*[16] said the following:

> [49] …An example of a case in which a dismissal is challenged on the basis that it is inconsistent with the Constitution would be one where it is alleged that the reason for dismissal is unfair discrimination…In such a case the complaint would be that such a dismissal is inconsistent with the provisions of s 9(1), (3) and (4) of the Constitution.
>
> [50] A dismissal the unfairness of which is based on grounds that is inconsistent with s 9(1) …of the Constitution can be said to constitute an automatically unfair dismissal as defined in s187…of the Act. Such a dismissal dispute may be referred to the CCMA… for conciliation. If attempts at conciliation fails, the employee may refer it to the Labour Court for adjudication. [My emphasis]

[19] Having said all the above, Zondo J (as he then was) in that matter came to the conclusion that the respondent had no authority to dismiss and the dismissal was unlawful, invalid and of no effect in law and fell to be set aside.[17] There the Court was applying the *ultra vires* principle. I do admit that applying the principles of administrative law, where applicable, an action *ultra vires* is no action. In an employment sphere, it would be unconstitutional to hold that a private employer like the first respondent is

[16] [2001] 22 ILJ 1116 (LAC)

[17] At para 76.

not entitled to effect a dismissal in certain instances. An employer in a private sector for that matter is constraint to effect a dismissal in a fair manner. How can a private employer be told that a dismissal that fits the definition of section 186 - termination with or without notice - is no dismissal in law?

[20] Nonetheless *Steenkamp* clearly resolved that invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect falls outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a dismissal[18].

[21] The conclusion in *Steenkamp* is simply to the effect that if a party wishes to claim invalid or unlawful dismissal, the LRA is not the legislation to look up to. It must be remembered that the Constitutional Court stated that the automatically unfair dismissal category covers as it were all egregious reasons like employees being dismissed on the grounds of race, gender, etc.[19].

[22] The applicant before me astutely attempted constitutional violation, that violation, in my view, is one contemplated in the special category of automatically unfair dismissals. In fact, the applicant was unable to astutely hide that because in the papers replete reference to unfairness and breach of some sections of the LRA is apparent. Just on the applicant's own papers, his claim arises from the LRA and as such he is confined to the remedies in the LRA despite his disavowal thereof. The LRA door is not left ajar for him but it is wide open. I for one do not understand the luxury to disavow remedies available in law. I do not think that a party has that luxury. What I can live with is a choice of remedies as opposed to disavowal. Disavowal does not only breed forum shopping but lawlessness too.

[18] *Steenkamp* at para 36

[19] At para 108-109 A-E

[23] My brother Lagrange J in the *SABC8* case asked a question whether the Labour Court has no jurisdiction to provide such remedies. It is not all together clear to me which remedies was my brother referring to. However, my understanding of the statement in the *Steenkamp* judgment is that the legislature did not make provision for unlawful and invalid dismissal instead it made provision for unfair dismissals and automatically unfair dismissals and provided remedies for such only. To my mind the judgment suggested that invalid and unlawful dismissals are foreign in the LRA. It was not a situation of acknowledging invalid and unlawful dismissals but providing no remedy for such a category. If I am correct in my interpretation therefore there is no such category in the LRA and equally no remedies in the LRA. Accordingly, the question of jurisdiction to provide non-existent LRA remedies should not arise at all. It does seem that my brother accepted that breach of a constitutional right would earn an employee jurisdiction to challenge a dismissal. To my mind an act of dismissing an employee cannot on its own violate a constitutional right. However, if the reason for dismissing an employee is one prohibited by the law, such a dismissal does not cease to exist factually as it were but may be declared to be unfair in an instance. Such must, as Zondo J (as he then was) found, be an automatically unfair dismissal.

[24] Ngcobo J has already sounded a warning in *Chirwa*. *Steenkamp* has already concluded that egregious reasons fall under the category of automatically unfair dismissal. Zondo J (as he then was) went to the extent of saying that most if not all of the reasons for dismissal that render a dismissal automatically unfair as contemplated in section 187 are the reasons that would render a dismissal unlawful and invalid[20]. To my mind nothing is left within the employment context that could be labelled as invalid or unlawful dismissal within the framework of the Constitution. An unlawful dismissal is simply an automatically unfair

[20]At para 109.

dismissal and nothing else. I do accept that in certain instances dismissal in breach of contractual rights may be set aside only to ensure compliance with the contractual rights. It must be noted that a dismissal not consistent with the disciplinary contractual rules or policy may well be procedurally unfair.

[25] I venture to suggest that setting aside such dismissals-breach of contract under section 77(3) should be a temporary measure until compliance. Instead, to my mind, the proper approach should be to set aside a dismissal as opposed to declaring that it is unlawful or invalid. If that were to be an approach, the issue of remedies (specific performance or damages) will not even arise. Perhaps what I have in mind is the old section 143[21] *status qou ante* type of a relief. Something along the lines of section 189A (13) perhaps.

[26] I am unable to agree that section 157(2) creates space and or jurisdiction in dismissal cases. The LRA has provided sufficiently for dismissals in all the categories including the invalid or unlawful dismissal. In my view employment and labour relations in the section must be referring to other matters to the exclusion of a dismissal. In any event the pleadings in this matter direct me to the LRA and nothing else. Recently in *Zungu v Premier, Province of Kwazulu Natal and another*[22] it was held that the starting point to determine jurisdiction is allegations in the affidavits[23].

[27] Quiet recently this court in *NUM and another v Impala Platinum Ltd and others*[24] somewhat confirmed that in the light of *Steenkamp* lawfulness of a suspension is infused in the fairness jurisdiction and is not a separate claim justiciable in this court. I agree with this. This conclusion to my

[21] The 1956 Act.

[22] [2017] 9 BLLR 949 (LAC)

[23] *Zungu*.at para 18

[24] Case number JR413/17 delivered on 10 March 2017

mind is consistent with the constitutional imperatives I attempted to extrapolate above.

[28] Lastly, *Steenkamp* did not just simply conclude that the legislature chose unfair and automatically unfair dismissal over invalid and unlawful dismissal. The Court went to great lengths to explain why the legislature's choice should be understood. After careful excursion of the old LRA and the authorities that dealt with it, the Court concluded thus:

> [118] I think that the rationale for the policy to exclude unlawful or invalid dismissals under the LRA was that through the LRA the legislature sought to create a dispensation that will be fair to both employers and employees…

[29] Therefore, in my judgment, I conclude that there is no room for unlawful dismissal claims even under the rubric of section 157(2) of the LRA. Similarly, an employee should not be allowed to tuck in what effectively is an automatically unfair dismissal under the wing of 'arising from employment and from labour relations'. Accordingly, I part ways with my brother in so far as he may be suggesting at paragraph 48 of the *SABC8* judgment that section 157 (2) creates room to challenge the so-called unlawful dismissals in this court. To my mind the Labour Court being a creature of the LRA lacks jurisdiction to entertain claims of unlawful dismissals. An employee like the applicant before me must pursue the remedies as per the LRA. This disavowal business should not be encouraged by this court. As pointed out above should be resisted as it brings to the fore a state of lawlessness.

[30] I now turn to the issue of the Skills Development Act[25] (SDA). The applicant's case is simply that the dismissal is invalid as it offends the provisions of the sections in the SDA. This argument mirrors the unlawful

[25] Act 97 of 1998.

dismissal argument I have dealt with above. Worse off, this one cannot even be tucked under section 157(2). Mr Rossouw conceded that a learnership agreement within the contemplation of the SDA is a tripartite agreement and has not been produced in court. For section 17 to obtain there must a tripartite learnership agreement.

[31] The first respondent's contention is simply that what was in place was a fixed term employment contract. Nonetheless, even if I were to accept that there was a learnership agreement in order to bring the applicant within the scope of section 17, the jurisdiction of this court will still be ousted by section 19[26] of the SDA.

[32] Turning to the issue of costs, both parties argued that costs should follow the results. I find no reason why I should be averse to such an argument.

Order

[33] In the results, I make the following order:

1 The application is dismissed for want of jurisdiction.

2 The applicant to pay the costs of this application including the costs of two counsel.

[26] **Disputes about learnership**

19 (1) For the purposes of this section a dispute means a dispute about-

(a)…

(b)…

(c) the termination of-

(i) a learnership agreement; or

(ii) a contract of employment of a learner.

(2) Any party to a dispute may in writing refer the dispute to the CCMA...

(5) If the dispute remains unresolved, any party may request that the dispute be resolved through arbitration as soon as possible

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv Rossouw
Instructed by:	Cavanagh and Richards, Centurion
For the Respondents:	Adv G Fourie with Adv Z Ngwenya
Instructed by:	Brian Bleazard Attorneys Saxonworld.