FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4052/09

In the matter between:-

DEON JACO LABUSCHAGNE Applicant

and

DIE MINISTER VAN VEILIGHEID EN SEKURITEIT Respondent

HEARD ON: 27 AUGUST 2009

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 22 OCTOBER 2009

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[1] There are pending workplace disciplinary proceedings against the applicant. He now seeks an order whereby the respondent is restrained by means of a prohibitory interdict, from proceeding with the hearing of the internal appeal. He was, in essence, aggrieved by his employer's refusal: firstly, to terminate his contract of employment and secondly, to furnish him with reasons for such unwelcome decision. The purpose of the interim relief sought is to bring the review proceedings of such decision which he reckons to be an administrative act.

[2] The applicant is unhappy about the way the respondent's functionaries on the ground and high up have treated him. He has numerous complaints. I shall touch on some of the alleged wrong decisions and actions. He plans to bring review proceedings under rule 53 in order to assert his administrative rights. The ultimate purpose of all these legal battles is to have his dismissal set aside. He wants to leave the South African Police Service as a retired and not dismissed officer. I turn to the facts.

[3] The applicant was born on 11 March 1970. He is now 39 years of age. He became a member of the South African Police Service on 4 January 1988. He was 17 years of age at the time. Now he holds the rank of a detective inspector in the police hierarchy. Approximately four years ago he took ill. On 1 December 2005 he was admitted to Bloem Care where he was hospitalised for eight days. His diagnosis was major depressive disorder. He was seen by a psychiatrist, Dr. M.J. Kuekue, another psychiatrist, Dr. M. Matete and an occupational therapist, Mr L. Delport, all of whom completed assessment reports that were attached to the founding affidavit as annexures "A", "B" and "C" respectively. He returned to work during January 2006.

[4] Notwithstanding his treatment, the applicant felt that that he could no longer properly function. This is how he put it:

> "9.1 Ten spyte van bovermelde behandeling was ek steeds te alle relevante tye baie angstig, het ek alle vertroue in die Suid-Afrikaanse Polisiediens verloor, was my geheue ernstig aangetas, het ek aan konstante depressie gely en was my slaap sowel as my eetlus aansienlik aangetas....."

He then took a sick leave.

[5] On 20 December 2006 he applied for ill-health retirement. He received no response from the respondent's commissioner in connection with this first application – annexure "D". He re-applied on 20 January 2008. The second application is marked annexure "E".

[6] His thirty six day sick-leave became exhausted, but he did not return to work. He felt he could not cope with any police duties anymore, as stated by his experts. On 1 August 2008 his salary was officially stopped. A month later, on 1 September 2008, to be precise, he was officially informed that his ill-health retirement application had been

unsuccessful. The applicant was then called upon to resume his duties on 10 September 2008. The author of the letter (annexure "F") was director K.C. Moloko. The applicant was informed that, on his return, he would be placed in an alternative, suitable, low stress post. The undertaking to shift him from an apparently high stress post was intended to accommodate his emotional condition. I take it that his depressive emotional condition flowed from his work as a detective inspector.

[7] The applicant ignored the call up. He was dismayed by the negative outcome of his retirement application.

> "Ek bevestig dat ek het nie op **10 September 2008** my **werksaamhede** hervat nie, aangesien my emosionele en gesondheidstoestand in so mate verswak het dat ek nie meer kans gesien het om te werk nie en was die moontlikheid nie uitgesluit dat ek irrasioneel sou kon optree nie. In die verband verwys ek weereens die Agbare Hof na bovermelde verslae."

[8] On 6 February 2009 he was served with particulars of the charges. The first charge of misconduct was that he failed to resume duties after the expiry of his sick-leave on 18 May 2008 – annexure "G1". The second charge of misconduct

was that he disobeyed a lawful written order on 4 August 2008 to resume duties – annexure "G2". The written particulars were not accompanied by the required written notice as to the venue, date and time where the disciplinary hearing was to be held. The applicant heard through the grapevine that his disciplinary enquiry was to be held on 10 March 2009. He then immediately appointed Attorney Leané du Plooy, to represent him. At his request, the hearing was rescheduled for 20 March 2009. On that day he was found guilty of both workplace transgressions. The sanction imposed on him was one of outright dismissal.

[9] Subsequently the applicant noted an appeal. While the internal appeal was still pending, the applicant, *via* his attorney, addressed a letter dated 27 July 2009 to the respondent's commissioner. He asked for the reasons relative to the latter's refusal to let him retire on the ground of ill-health. He reckoned that administratively such a decision was unjust, unreasonable and unfair in that it was in conflict with the findings of experts as set out in the two psychiatric assessment reports and the occupational assessment report. This then is the synopsis of the founding affidavit.

[10] About two weeks later the applicant launched the current proceedings. The application was filed on Wednesday 13 August 2009 and served at 17h05 as an urgent application and set down for hearing at 09h30 on Thursday 14 August 2009. On that day the matter served before my brother Hancke J. The respondent sought an postponement so that he may prepare the answering papers, something he could not afford to have done in less than 18,5 hours, night hours included. Hancke J determined the formal deadlines, temporarily put the pending internal appeal on hold, reserved the costs and postponed the matter for two weeks.

[11] In his answering affidavit the respondent resisted the grant of an interdict and the related orders sought by the applicant. The respondent denied that the applicant's health had deteriorated; that the respondent was to blame for the delay in the processing of the applicant's retirement application; that the applicant was not a suitable candidate for any alternative post in the employ of the South African Police Service; that the applicant's remuneration was unfairly withheld; that he was incapable of performing any meaningful police work; that the applicant qualified to be retired on the ground of ill-health; that the applicant was

severely impaired; that the respondent's commissioner provided the applicant with an incomplete transcript of the disciplinary hearing; that there was any connection between the disciplinary enquiry and his collective right for reasons in terms of paragraph 8.7.1 PILIR; that the respondent has refused to give such reasons to the applicant relating to his application for retirement (annexure "R10" read with annexure "R7"); that the applicant will be precluded from bringing review proceedings should the disciplinary proceedings be concluded prior to such review proceedings and that an interdict was necessary to safeguard his rights to have the decision on the retirement application reviewed.

[12] In his answering affidavit the respondent resisted the grant of the orders sought by the applicant on substantive and procedural grounds. Besides resisting the matter on the merits, the respondent also raised a number of preliminary points of law. For reasons which will appear below, I considered it unnecessary to hear the merits and directed the respective lawyers to confine their arguments to the points *in limine*.

[13] In his replying affidavit the applicant replied that there was no substance in any of the points *in limine* raised by the respondent.

[14] On behalf of the respondent, Mr. Gough contended that there was no measure of urgency involved in the application; that the court had no jurisdiction to direct the respondent to furnish reasons for his decision; that the non-joinder of the respondent's commissioner was a serious, albeit curable, omission and that the applicant had not exhausted the internal remedies.

[15] I deal first with the objection relative to material remedies. The applicant, as an employee, was aggrieved by the decision of the respondent, as an employer. The applicant wanted his employer to retire him from active police service on the grounds of ill-health. His diagnosis was chronic major depressive disorder, according to Dr. M.J. Kuekue, the psychiatrist – annexure "A", p. 48 of the record. The emotional disorder was, according to the psychiatrist, of such magnitude that it severely impaired his occupational functions.

[16] The functional incapacity of an employee, on the grounds of ill-health or injury, is a matter provided for in section 10 Schedule 8: Code of Good Practice: Dismissal. The schedule forms part of the Labour Relations Act, 66 of 1995. Section 10(1) reads:

> "**10 Incapacity: Ill health or injury**
>
> (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an *employee* is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the *employee* is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of *dismissal*. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured *employee*. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the *employee* to accommodate the *employee's* disability."

[17] The decision which has precipitated these proceedings, was contained in a letter dated 1 September 2008 – annexure "F". Its author was Director K.C. Moloko, Section Head: Medical Administration, SAPS Head Office, Pretoria. The relevant portions thereof read as follows:

> "**ILL-HEALTH RETIREMENT: NO 0426701-0 INSPECTOR D J LABUSCHAGNE**
>
> At para 2. This office has considered the findings and recommendations of the Health Risk Manager as well as reports from the treating doctor and it was decided that the employee must resume his or her duties in an alternative, suitable low-stress post on or before 2008-09-10.
>
> At para 3. The reason for the decision taken in paragraph 2 is to conform to requirements as stipulated in Labour Relations Act, 66 of 1995: Schedule 8 par. 10 & 11, and to grant the employee the opportunity to optimize his treatment as follows:
>
> At para 7. Kindly note that this office considers the employee's application for Ill-Health Retirement as finalized, however, the employee must receive support from the Employee Assistance Services. A report from EAS as well as the Commander regarding work performance in the alternative post

must be submitted to Head Office within three months after resuming duties."

[18] In par.3 of the letter the author referred to the relevant provisions of the aforesaid labour legislation. He made specific reference to sections 10 & 11 of Schedule 8. The essence of the respondent's defence was that the matter was a pure labour dispute and as such must be determined within the confines of the applicable resolutions taken by the Public Service Coordinating Bargaining Council (RSCBC) which governs the employment relationship between the respondent's state, as the employer, and the applicant, as its employee.

[19] In **KOTZE v NATIONAL COMMISSIONER, SA POLICE SERVICE & ANOTHER** (2008) 29 ILJ 1869 (T) at par. 7 Fabricius AJ correctly pointed out that the resolutions of the said Bargaining Council not only deal with a great variety of matters such as the ill-health retirement, but also with certain special procedures designed to resolve the labour disputes in terms of the collective agreements between the State, as an employer, and a number of employee parties.

[20] Section 24(1) of the LRA provides that every collective agreement, save for two specified exceptions, must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure requires the parties first to resolve the dispute through conciliation and if the dispute remains unresolved, to resolve it through arbitration.

[21] Section 28(1) of the LRA provides, among others, that the powers and functions of a bargaining council include:

> "(a) to conclude collective agreements;
>
> (b) to enforce those collective agreements;
>
> (c) to prevent and resolve labour disputes;
>
> (d) to perform the dispute resolution functions referred to in section 51;"

[22] Section 51(2) of the LRA provides that the parties to a bargaining council must attempt to resolve any dispute between themselves in accordance with the provision of the constitution of such bargaining council.

[23] The responsible bargaining council in this instance is called Safety & Security Sectoral Bargaining Council (SSSBC). Its constitution was attached to the answering affidavit as annexure “R3”. The scope of this bargaining council is the State as employer and those of its employees who are exclusively employed in the South African Police Service in terms of the South African Police Service Act, 68 of 1995, and the Public Service Act of 1994. The powers and functions of SSSBC are identical to those of a bargaining council as more fully set out in section 28 of the LRA. Section 5(b) of SSSBC constitution specifically provides that SSSBC has to implement monitor and enforce its collective agreement.

[24] The prime objectives of the SSSBC are to promote:

> “(a) labour peace in the *sector*;
>
> (b) a sound relationship between the *employer* and its *employees*;
>
> (c) collective bargaining in the *sector*; and
>
> (d) the effective and expeditious resolution of disputes in the *sector*.”

[25] The applicant was a member of a trade union, POPCRU, which was apparently a party to the said collective agreement. He consulted the trade union before he initiated these proceedings. The existence of the collective agreement was not disputed by the applicant. On 25 July 2003 the rules pertaining to the grievances of the employees in the public service were published in terms of section 11 of the Public Service Commission Act, 46 of 1997. During November 2005 a final document with the title "Policy and Procedure on Incapacity Leave and Ill Health Retirement (PILIR) was determined in terms of section 3(3)(c) the Public Service Act of 1994. The document was issued by the Minister of Public Service Administration. It consists of directions that are binding on public employers and public employees. The question of early retirement on the grounds of ill-health is comprehensively provided for in section 8 of the 2005 policy and procedure document (PILIR).

[26] Section 11 of PILIR deals with the differences, in other words, the disputes between the employee and the employer. It provides that:

"11.1 **An employee who is not satisfied by a decision by the employer may lodge a grievance** as contemplated in terms of the rules made by the Public Service Commission.

11.2 In terms of section 35 of the PSA, the employer requires **new medical evidence to defend his/her decision**. The costs of such medical evidence would be for the account of the employer. If the employee requires new medical evidence to proof the substance of his/her grievance, the cost will be for the employee's account.

11.3 **If an employee refuses to accept the adapted duties or to move to alternative employment, which is more suitable for his/her incapacity, the employer may, subject to due process being followed, terminate the services of the employee concerned.**"

[25] The section is procedurally prescriptive. It requires that a public employee aggrieved by a public employer's decision, must accept the adapted duties or move to alternative post, but he may lodge a grievance provided he first complies. Once such grievance has been lodged, the public employer concerned is obliged to seek new medical evidence. It is impermissible for an aggrieved employee to simply ignore the employer's order that he resumes his work on the ground that such decision is in stark contrast to the medical finding

and recommendation of his experts and to take steps against the public employer contrary to the prescripts of the section or to embark on a course of litigation outside the confines of the applicable resolutions of the bargaining council – **KOTZE v NATIONAL COMMISSIONER, SA POLICE SERVICE**, *supra*, at par. 6. A dissatisfied employee, who acts contrary to the agreed procedure, imperils his contract of employment – section 11.3.

[26] The purpose of section 11 is to foster genuine attempt to resolve any labour dispute internally. It is a binding procedural requirement. It has to be complied with before legal proceedings are instituted in the Labour Court. See **LAWSON v CAPE TOWN MUNICIPALITY** 1982 (4) SA 1 (C); **MALULEKE v MEC FOR HEALTH AND WELFARE, NORTHERN PROVINCE** 1999 (4) SA 367 (TPD) at 372; **NTAME v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE, AND TWO SIMILAR CASES** 2005 (6) SA 248 (E) at par. [31].

[27] It will be readily appreciated, therefore, that besides the constitution of SSSBC, the grievance rules – annexure “R5” - as well as the policy and procedure blueprint – annexure

"R4" – provide specific and elaborate machinery for the resolution of labour disputes on a specialised domestic front. Such procedures are of a peculiar character. They are characterised by conciliation failing which arbitration endeavours to prevent and to resolve labour disputes in order to promote the objectives of the bargaining council as spelt out in section 4 SSSBC constitution.

[28] In crafting and adopting a domestic procedure of such a particular kind, SSSBC gave effect to section 51(2)(a) which as we have seen, requires parties to a bargaining council to attempt to resolve any dispute between them in accordance with the provisions of such bargaining council constitution. The provision is consistent with the spirit of section 28(1). To ignore this provision and to obviate the domestic procedure ordained by the collective agreement, would seriously undermine if not absolutely frustrate the very purpose of a dedicated internal dispute resolution procedure.

[29] It follows from the aforegoing that the applicant should first have referred the dispute to the said bargaining council which has a comprehensive dispute resolution mechanism governing cases of ill-health retirements sought by anyone

who falls within its sectoral scope. I am, therefore, satisfied that the applicant has indeed failed to exhaust binding internal remedies which were available to him before he resorted to the course of litigation. **KGOTSO v THE FREE STATE PROVINCIAL GOVERNMENT & ANOTHER** [2006] 7 BLLR 664 (LC) per Francis J. The point *in limine* was therefore well-taken. I would therefore uphold it.

[30] As regards the preliminary objection that the court has no jurisdiction to entertain the matter, it was held that if the court lacked jurisdiction, there was no need for the court to go into the merits. The jurisdiction must be determined prior to the determination of the merits of the matter – **MAKHANYA v UNIVERSITY OF ZULULAND** [2009] 8 BLLR 721 (SCA).

[31] The applicant relies heavily on his constitutional rights in support of his assertion or contention that this court has jurisdiction to hear the matter. He asserted in paragraph 64 of his founding affidavit that the respondent's failure to furnish him with reasons for refusing his application for early retirement on the grounds of his ill-health amounted to an administrative act. He obscurely asserted, so it seemed to me, that the respondent's decision therefore infringed his

constitutional right to just administrative action as enshrined in section 33 of the 1996 RSA Constitution.

[32] The gist of his argument, therefore, is that in this matter a provincial high court has concurrent jurisdiction with the Labour Court in terms of section 157(2) LRA, 66 of 1995. The violation of the applicant's fundamental right, so argued Mr. Coetzer, arose from the specific dispute over an administrative act performed by the State in its capacity as an employer, as represented by the respondent in these proceedings.

[33] The matter which gave rise to these proceedings was the employer's decision relative to the employee's application for retirement. The applicant's ultimate aim is to have such decision reviewed and set aside. His request for the employer's reasons was geared at furthering that ultimate aim. He contended that he needed such reasons in order to ascertain and draft his grounds of review. Does the refusal to grant such an application constitute a reviewable exercise of public power? Put differently: Does such refusal amount to violation of an administrative right?

[34] On behalf the respondent, Mr. Gough argued that the public employer's refusal to grant the retirement application of a public employee on medical grounds did not boil down to an administrative act. He submitted that the decision was therefore not subject to review by a civilian court of general jurisdiction such as a provincial division of the high court.

[35] The crux of this particular preliminary question is whether a decision in respect of an employee's retirement, is an exclusive matter as envisaged in section 157(1) or whether such decision is a concurrent matter as envisaged in section 157(2) of the LRA, 66 of 1995.

[36] Perhaps it is helpful to refer to section 33 of the 1996 RSA Constitution which provides:

> "**33 Just administrative action**
>
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[37] The national administration legislation has already been enacted to give effect to the fundamental administrative rights referred to in the aforegoing paragraph. Section 3 of the Promotion of Administrative Justice Act, 2 of 2000, lays down a statutory procedure which everyone whose rights have been adversely affected by an administrative action, has to follow in order to obtain written reasons which prompted a public official to take such a decision. I hasten to point out that not every decision by a particular public official or the State in general qualifies to be labelled an administrative act.

[38] Where, for instance, a premier of a province decides to transfer from one department to another a public servant employed as a director, the nature of such decision is not administrative but rather contractual – **KGOTSO v FREE STATE PROVINCIAL GOVERNMENT & ANOTHER**, *supra*. If, however, the same premier decides to have the private residential property of the same public servant expropriated in order to create thereon an orphanage for homeless children, the nature of such decision will not be contractual but administrative. The employment relationship between

the parties will not be a relevant consideration in the latter scenario as in the former scenario.

[39] In **KGOTSO v FREE STATE PROVINCIAL GOVERNMENT & ANOTHER**, *supra*, at par. [15] Francis J correctly held that:

> "The nature of the dispute raised by the applicant is one as between an employer and an employee. In relation to matters such as transfers, the relevant Premier is the 'executing authority' who is in effect placed in the position of the employer as the representative of the State. Disputes relating to matters such as transfers involving the applicant and the Premier are accordingly disputes between an employee and the employer as defined in the constitution of the General Public Service Sectoral Bargaining Council ('the Bargaining Council')."

[40] However, the same cannot be said of the second scenario. Any dispute between the premier and the director pertaining to the expropriation will accordingly be a dispute between the premier in his or her administrative capacity as an organ of the State *vis-a-vis* the public servant or director in his ordinary general capacity as a citizen.

[41] The decision of the respondent's commissioner or his delegate entailed the exercise of a contractual and not an administrative power. Accordingly it cannot be reviewed and nullified under section 6 of PAJA, No. 3 of 2000. Ultimately the primary relief sought cannot be granted since the decision taken by the respondent's commissioner entailed the exercise of contractual power. The dispute was over labour rights and not administrative rights. Clearly, therefore, the respondent's commissioner, as a public employer, was not legally obliged to furnish reasons for the decision, which was not administrative in character.

[42] Although the applicant is precluded from enforcing his labour rights in the ordinary courts of general jurisdiction, he is not without a remedy. He is entitled to challenge the employer's refusal to terminate his employment in the special labour law *fora* including the Labour Court itself.

[43] The decision of the respondent's commissioner or his delegate entailed the exercise of the contractual and not an administrative power and cannot be reviewed under the relevant provisions of PAJA. Therefore, I cannot grant a primary or shall I rather say the ultimate relief sought by the

applicant. That being the case, it follows, without saying, that I cannot grant the interim relief. Also the Labour Court was the appropriate civilian court of special jurisdiction in which the review proceedings should be launched – **KRIEL v THE LEGAL AID BOARD & OTHERS** [2009] ZA (SCA) 76 at paragraph 21. Also see **CHIRWA v TRANSNET LTD AND OTHERS** 2008 (4) SA 367 (CC) at par. [65].

[44] In the letter dated 24 July 2007, the applicant's attorney, Ms Leané du Plooy of Goodrich & Franklin, warned the respondent's functionary, superintendent Makaleng, that:

> "If we don't receive the reasons within five (5) working days we will bring an application in the High Court for the review of Insp. Labuschagne's application for Ill Health Retirement."

It is crystally clear from this passage that the applicant intends to initiate review proceedings in this court. There is a dispute as to whether the reasons were given or not, but even if it were proven that there were not, the respondents refusal to do so would still not be reviewable in terms of section 6 of PAJA, 3 of 2000. Therefore the ultimate relief the applicant contemplates to seek, by way of rule 53 review,

cannot be granted. Such remedy does not cover alleged violation of employment rights. There is yet no review proceeding before this court. Therefore the finding relating to the nature of the power exercised, does not dispose of the current matter.

[45] Now I turn to the interim relief instantly sought. The launching of these proceedings to interdict the respondent from finally disposing of the disciplinary process, was based on misconception of the correct legal position. The misconception is evidenced by the following extracts from the applicant's founding affidavit where he stated:

> "52.
>
> Dit blyk egter tans dat my enigste moontlike remedies, ten opsigte van my gelese skade, in alle waarskynlikheid beperk sal word tot 'n vergoeding van hoogstens twaalf maande wat natuurlik 'n substansiële monitêre invloed om my finansiële posisie sou hê.
>
> 53.
>
> Indien my aansoek om hersiening aangehoor sou word alvorens die dissiplinêre stappe teen my afgehandel sou word (m.a.w. terwyl ek nog in diens is van die Suid-Afrkaanse Polisiediens) sal ek uit die aard van die saak geregtig wees op 'n maandelikse

ongeskiktheidspensioen vir ‘n onbeperkte periode indien ek mediesongeskik verklaar sou word.”

[46] The applicant knew and appreciated that he had certain internal remedies and that ultimately the Labour Court was the correct court where he could enforce such remedies in terms of the contract of employment. This much is perfectly clear from paragraph 51 of the founding affidavit. From the reading of the aforegoing paragraphs it becomes very clear that the applicant labours under the mistaken belief that he stands a better chance of receiving more financial benefit if he can successfully have the decision reviewed and nullified before the workplace disciplinary process has been completed than he would afterwards. He apprehends that the workplace appeal forum should uphold his dismissal, he would cease to be an employee and that such a decision would adversely restrict the quantum of his compensation should his review application in the Labour Court later succeed. He chose to evade the collective dispute resolution proceedings and to bypass the Labour Court, because he reckoned that should his review application be successfully adjudicated by the high court he stood a chance of been awarded a monthly disability grant for an indefinite period

instead of a once-of lump sum compensation equal to his monthly salary multiplied by a limited period of twelve months only.

[47] He loses sight of the fact that, on review, the respondent's employer might be ordered by the Labour Court to reinstate him. In the event of reinstatement, the applicant will then have the opportunity as an active employee of persuading the respondent's commissioner that he is no longer medically or psychologically, if you will, capable to remain in any form of adapted or alternative active service in the South African Police Service. Almost invariably the Labour Court hears review applications of persons long after their workplace appeals have been dismissed by their employers. Such review applicants are not adversely affected by the mere fact that their dismissals had already been confirmed on internal appeal and they are no longer regarded as employees by their former employers.

[48] The irony of the instant case is that the applicant seeks to halt the internal process which he himself set in motion. I was referred to no decision in which such a procedure was sanctioned. I cannot see how sanctioning it now will benefit

the applicant. Put differently, I cannot see how denying such a relief can prejudice the applicant.

[49] The applicant needs to appreciate that he cannot be granted ill-health retirement and all its ancillary benefits on his own say-so alone. When the employee lodges a grievance, the employer is entitled to investigate his alleged emotional condition with the aid of his own experts in order to verify the employee's incapacity. Sitting on the bench of a civilian court of general jurisdiction, no judge can do justice to such intricate medical issues on papers alone, without the benefit of hearing *viva voce* evidence. **KOTZE v THE NATIONAL COMMISSIONER**, *supra*.

[50] Since the applicant in the instant case cannot bring the review application in the High Court to have the decision that stemmed from the exercise of a contractual power nullified, his only available avenue is to enforce his employment rights in the Labour Court. Accordingly any interim proceedings sufficiently linked to such main proceedings, has to be instituted in the same court that will eventually grapple with such main proceeding. It is improper to go about the course of litigation as was done in the instant case. In **GOLIATH v**

MANGAUNG LOCAL MUNICIPALITY AND OTHERS [2008] ZAFSHC paragraph [117] my sister Molemela JA held that the applicant could not bring interdictory proceedings in the High Court and the main proceedings in the Labour Court. I am in respectful agreement.

[51] The refusal by the respondent's commissioner to grant the applicant's application for ill-health retirement being no administrative action, the violation of which constitutes a concurrent matter in terms of section 157(2), this court has no power to compel the respondent to give reasons in connection with the dispute which arose from the exercise of a contractual power – **KOTZE'S**-case, *supra*. That being the case it follows without saying that the interim relief cannot be granted. The Labour Court has exclusive jurisdiction in terms of section 157(1) read with section 158(1)(g) – **KRIEL'S**-case, *supra*.

[52] In the circumstances I am inclined to uphold the respondent's objection that this court has no jurisdiction. The point *in limine* is well taken. The applicant's argument failed to persuade me to find otherwise. Therefore, the application stands to be dismissed by virtue of the two points

in limine that I have dealt with in this judgment. In the light of this it becomes unnecessary to deal with the remaining points *in limine* raised by the respondent.

[53] It now remains to consider what an appropriate costs order should be in this case. On the one hand, Mr. Coetzee asked me to grant the application with costs against the respondent. On the other hand, Mr. Gough urged me to dismiss the application with costs against the applicant. I have already found that the applicant should have followed the avenue of dispute resolution mechanism as outlined in the collective agreement. Had he done so, none of the parties would have incurred the high costs of litigating in this court. In the circumstances I can find no just and equitable reason for depriving the respondent of the costs of this matter. Such costs were occasioned solely by the applicant's abortive endeavour to have the dispute adjudicated in the wrong forum for all the wrong reasons. The costs, including the wasted costs, occasioned by the postponement of 14 August 2009, shall be borne and paid by the applicant in favour of the respondent.

[54] Accordingly I make the following order:

54.1 The application is dismissed *in toto*.

54.2 The respondent's commissioner is at liberty to proceed with hearing of the internal appeal as noted by applicant.

54.3 The applicant is directed to pay the respondent's costs.

M.H. RAMPAI, J

On behalf of applicant:	Adv. J.C. Coetzer Instructed by: Goodrick & Franklin Inc BLOEMFONTEIN
On behalf of respondent:	Mr. Gough Instructed by: State Attorney BLOEMFONTEIN

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