IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD at Johannesburg

Case No JA 59/09

In the matter between

ANN NGUTSHANE Appellant

and

ARIVIA KOM (PTY) LTD T/A ARIVIA.KOM First Respondent

CHAIRPERSON OF THE BOARD (ARIVIA.KOM) Second Respondent

CHAIRPERSON OF THE SUB-COMMITTEE OF THE BOARD Third Respondent

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JUDGMENT

HENDRICKS AJA

Background

[1] The Appellant was an employee of the First Respondent Arivia Kom (Pty) Ltd t/a Arivia.Kom ("Arivia") employed with

effect from 14 June 2004 in the capacity as Human Resource Executive.

[2] During 2006, the two shareholders of Arivia, Eskom and Transnet, obtained permission under the Public Finance Management Act, 1999 from the Minister of Public Enterprises to dispose of their shares in Arivia. In addition they sought and obtained permission from the Minister of Public Enterprises to enable Eskom and Transnet to outsource its business to the entity that ultimately proves successful in bidding for and acquiring the shares. The shareholders thereafter embarked upon an elaborate tender process to dispose of their shares and to outsource the functions of Arivia to the successful bidder.

[3] With effect from 1 November 2006, Mr Pillay was seconded by Eskom to Arivia as an acting Chief Executive Officer ("CEO"). Mr Pillay was brought in to ensure that the shareholders' decision was implemented. At a meeting held, it was resolved that Mr Pillay, together with the assistance of an Exco Team, should execute the decisions of the shareholders, namely to dispose of their shares and to outsource Arivia's core function to a bidder in terms of a tender process.

[4] During September 2007 the Appellant lodged grievances against Mr Pillay on the grounds, ***inter alia***, of his attitude of harassment, victimisation, as well as race and gender discrimination towards her. She further amplified her

grievance in terms of a lengthy letter dated 17 October 2007. In particular, she wrote:-

> *"I am very troubled at the manner in which Pillay continues to treat me. I find his manner against me personally offensive and indeed his approach to me rude and obnoxious. There are several other meetings that I have not dealt with and will do so in a formal process.*
> *My view is that Pillay is intent upon ensuring my resignation from Arivia.Kom, which I at this juncture refuse to tender as I would then be defeated and this would mean that Pillay could then continue in his unprofessional and harassing manner to deal with any opinion that is not precisely in line with his own."*

[5] In response to Appellant's grievance against Mr Pillay, the First Respondent appointed an independent chairperson to investigate the grievance. The Appellant, being dissatisfied with the appointment of the said independent chairperson, contended that the chairperson was biased. As a result, the First Respondent resolved not to proceed with the process.

[6] During April 2008, a forensic audit undertaken by Gobodo Forensic Auditors was completed. In terms of the forensic audit report it was recommended that disciplinary action be taken against the Appellant for her role in awarding and concluding a contract with a third party supplier. A letter of suspension was subsequently issued and handed to the Appellant. It set out the following allegations:-

"1. Financial mismanagement;
2. Gross insubordination;
3. Failure to comply with arivia.kom's policies and procedures;
4. Gross negligence; and
5. Bribery, corruption and/or fraud."

[7] Whilst still on suspension, the Appellant made some statements concerning not only Mr Pillay, but also the board members of the First Respondent in letters that were send to various persons and organisations, including the then Minister of Public Enterprises Mr Alec Erwin. In these letters, the Appellant complained about the abuse of power by Mr Pillay and Ms Nku Heita; that there was corruption within the First Respondent; that she decided to partner with the South African Trade and Allied Workers Union (SATAWU) to challenge racism within the First Respondent, and that she was opposed to the decision of the selling of the First Respondent's shares.

[8] In a letter of 10 April 2008, written to the then Deputy President of the African National Congress (ANC), she requested that he should immediately stop the sale of shares of the First Respondent and dissolve the Board and appoint a new Board instead. The Appellant was also instrumental in securing a publication of an IT web article entitled "Arivia and Racism Dispute" in which she publicly complained that she was being victimised.

[9] On 23 May 2008 first respondent responded by way of a letter addressed to the Appellant relating to her conduct and in particular to her letters addressed to various parties as well as the IT web article. In this letter, the First Respondent indicated that the Appellant's conduct brought the company into disrepute and destroyed the trust relationship between the parties. It was pointed out to her that on her own version, she had partnered with the trade union and that this placed her in direct conflict with her interest within the First Respondent.

[10] The letter continues:-

> *"Arivia.kom embarked on a strategic course. This course of action was approved and mandated by the Minister of Public Enterprises and the shareholders of arivia.kom. You, however, clearly stated that you do not agree with this approach or direction. While you are entitled to hold a personal view, you are obligated to support the organisational course of action once it is adopted. Instead, by your conduct, you have undermined the process.*
>
> *In order to ensure that the sale process is successfully implemented, your contribution, as HR executive, will be instrumental. However, from your conduct, we are unsure whether you will be able to fulfil this important role and ensure that the interest of arivia.kom is protected. Accordingly, arivia.kom cannot place faith and trust in you any longer. The organisation has no confidence that you*

will be able to honour you fiduciary duties associated with the trust which the Shareholders and Board invested in senior management."

[11] After setting out these complaints, the First Respondent invited the Appellant to respond. The response was to be directed to a sub-committee approved by the board which was scheduled to meet on 9 June 2008. It was to decide, based on the common cause facts and relevant representations whether her conduct irreparably damaged their relationship permanently, and whether it should terminate her employment contract.

[12] The Appellant did not take up the invitation to make representations to the sub-committee. An objection was raised on her behalf by her attorneys of record about the procedure adopted by the First Respondent.

[13] As a result of the Appellant not taking up this invitation she, through her attorneys of record, failed to submit any response. After objecting to the procedure that the First Respondent intended on embarking, the Appellant's, attorney of record to note that *"in light of the above, our client will not submit any representations as instructed in your letter. To do, will be to subject herself to an unlawful and unfair conduct"*.

[14] In a letter addressed to the Appellant, she was informed that her employment would be summarily terminated. The reasons were set out thus:-

> *"6.1 The breakdown of the trust relationship as a result of your conduct;*
>
> *6.2 That we have no confidence that you will be able to honour your fiduciary duties associated with the trust which the shareholders and the Board invested in you;*
>
> *6.3 That you place yourself in direct conflict with the interest of the organisation;*
>
> *and*
>
> *6.4 That we believe that you are incompatible with the organisation, its aims and direction."*

[15] The Appellant's attention was drawn to the fact that she had a right to refer the dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA') for mediation and arbitration within 30 days from the date of the letter. This letter was written in terms of a unanimous decision and resolution taken by the First Respondent to dismiss the Appellant because of her misconduct, particularly in publishing defamatory allegations against the Board of the First Respondent and undermining their decisions.

Proceedings in the court *a quo*

[16] The Appellant eschewed her right to refer the matter to the CCMA. Instead, the Appellant approached the Labour Court, on an urgent basis, for an order in the following terms:-

[i] Dispensing with the rules and services of this court in order that the matter be heard as one of urgency in terms of Rule 8.

[ii] Declaring that the decision of the sub-committee of the board of Ariviakom (PTY) Ltd terminating applicant's employment is unlawful.

[iii] The applicant's employment is reinstated forth.

ALTERNATIVELY

[iv] Reviewing and setting aside the decision of the sub-committee of the board of Ariviakom (Pty) Ltd t/a Arivia.Kom.

ALTERNATIVE TO [iv] ABOVE

[i] Pending the review application to be launched in due course, the applicant's employment is reinstated forthwith.

[ii] Costs of suite on attorney and own client.

[iii] Further and/or alternative relief.

[17] It is clear from the notice of motion and the founding affidavit deposed to by the Appellant, that this application was styled as a review. She alleged ***inter alia*** that the decision to dismiss her was reviewable. In particular, she avers the following is her founding affidavit:-

> *"Section 158(1)(h) of the LRA, provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. I am advised that section 158(1)(h), entitles me to review and set aside the decision taken by the sub-committee of the board delegated by the board to take that decision in which my employment was terminated. Section 158 (1)(h), entitles me to rely on any grounds permissible in law. I am advised that any grounds permissible in law include the grounds contained in section 6 of PAJA. I therefore for purpose of this application and the review of the decision of the sub-committee of the board, rely on one or more of the grounds in section 6 of PAJA read together with one or more of the grounds permissible in law including those in section 145 of the LRA."*

[18] The court ***a quo,*** per Pillay J, concluded that the Labour Court did not have jurisdiction to determine the dispute and that, in essence, the correct dispute resolution processes

under the Labour Relations Act ("LRA") should have been followed; that is a referral to the CCMA.

[19] Despite this finding by Pillay J in the court ***a quo***, she proceeded to the substance of the dispute:-

> *"In so far as the Court may be wrong in declining jurisdiction, it proceeds to consider the dispute on its merits. Arivia.Kom was investigating charges of fraud and other irregularities against the employee. After her suspension the employee wrote to the Deputy President on 10 April 2008 and to, among others, the Minister of Public Enterprise, Mr Alec Erwin, on 09 May 2008."*

[20] Pillay J then evaluated appellant's case and dismissed the application. It is not clear from the judgment why the court ***a quo***, having already pronounced that the court lack jurisdiction to entertain the matter, went on and decided the merits.

[21] For the purpose of this judgment, I do not deem it necessary to deal with the merits of the matter in view of the decision reached by this court. In my view, the only issue to be determined by this court is whether the Labour Court had jurisdiction to entertain the matter.

Did the Labour Court have jurisdiction to entertain this matter?

[22] It was contended on behalf of the Appellant that the court ***a quo*** pronounced itself on a matter which had not been placed before it. The court ***a quo***, so it was submitted, adjudicated on a dismissal dispute, whereas the Appellant had raised the issue of unlawful termination of her contract of employment. Thus, so the argument ran, the court ***a quo*** sought to conduct a review of the matter, whereas the primary relief sought was a declaratory order in terms of section 158(1)(a) of the LRA. It was further submitted on behalf of the Appellant that the court ***a quo*** did not appreciate the nature of the case that the Appellant had brought to the Labour Court.

[23] There is a clear distinction, in law, between unfair dismissal and unlawful termination of the contract of employment. It is furthermore trite that unlawful termination of an employment contract is not adjudicated by the CCMA or the bargaining council because it does not have jurisdiction to adjudicate on unlawful termination of employment contracts as a cause of action. The CCMA and the bargaining council only have jurisdiction to adjudicate on disputes about unfair practice and unfair dismissals.

See:- **Fedlife Assurance Ltd v Wolfaard** (2001) 22 ILJ 2407 (SCA) at para 27.

Boxer Superstores Mthatha & Another v Mbenya (2007) 28 ILJ 2209 (SCA) para 12.

In **SA Maritime Safety v Mckenzie 2010 (31) ILJ 529 (SCA) at para 55** Wallis AJA said:-

> *"I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contract of employment generally rights flowing from the constitutional right to fair labour practises. It is uncontroversial that the LRA is intended to five effect to that constitutional right and I see no present call, certainly not in this case, for the common law to developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act). The obiter dictum in* Gumbi*, which has been reiterated without elaboration, and without apparent consideration of the matters that have been dealt with in this judgment, cannot be considered to be authoritative."*

The point of this approach is that, absent a reliance on a provision of a contract of employment, the employer must have recourse to the protections afforded by the LRA.

[24] Apart from the distinction between the contract of employment and the rights which flow from the LRA, a further distinction arises between a labour dispute involving the state as an employer which falls under the LRA, and based on the same facts, whether the dispute may be considered to fall under the Promotion of Administrative Justice Act 66 of 1995 ('PAJA').

[25] In **Gcaba v Minister of Safety and Security** [2010] (1) BLLR 35 (CC), the Constitutional Court unanimously held that a decision to dismiss a public servant does not amount to administrative action, confirming its earlier decision in **Chirwa v Transnet LTD & Others** [2008] 2 BLLR 97 (CC). In Gcaba, *supra* Van der Westhuizen J said the following 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, cognisable 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.*"

[26] A careful reading of the Appellant's founding affidavit attached to the notice of motion in the proceedings before the court ***a quo*** proves that the Appellant did not make out a

case that the court had the power to deal with the matter on the basis of the law of contract. The Appellant expressly pleaded her case in terms of section 158 (1) (A) of the LRA, read with PAJA. No breach of a contractual provision was pleaded. Indeed the word "*contract*" does not appear in the notice of motion. See: **Transnet (Pty) Ltd v Dick & Another** [2009] 7 BLLR 629 (SCA).

[27] A proper construction of the Appellant's pleadings demonstrates that she did not rely upon a contract of employment as founding the basis for her cause of action before the Labour Court. In fact, the very policy which she contended had been breached in her founding affidavit, required her to submit the dispute first to conciliation and if that failed, to arbitration under the auspices of the CCMA. What the Appellant did, was precisely what the law seeks to prevent. As stated in the **Gcaba** decision ***supra***, at paragraphs [56] and [57]:-

> *"…. if litigants are at liberty to relegate the finely tuned dispute resolutions structure as created by the LRA, a dual system of law could fester in cases of dismissal of employees. Following from the previous points, forum shopping by litigants is not desirable."*

See also:- **Ntshangase v MEC: Finance, KwaZulu Natal & Another** (2009) 12 BLLR 1170 (SCA).

Mkutamela v Nelson Mandela Metropolitan Municipality & Another (2010) 2 BLLR 115 (SCA).

National Director of Public Prosecutions v Tshavhungwa (2010) 2 BLLR 121 (SCA).

SA Maritime Safety Authority v McKenzie (2010) 5 BLLR 488 (SCA).

[28] In this case, the Appellant complained, in essence, about the fairness of her dismissal. But, in terms of the LRA the Labour Court does not have jurisdiction as a court of first instance to deal with this cause of action. Such a case must be referred to conciliation and if that fails, to arbitration.

See:- **Independent Municipal & Allied Union v Northern Metropolitan Substructure & Others** 1999 (20) ILJ 1018 (T).

Ngcobo v KwaZulu Natal Health Services (1999) 2 BLLR 148 (LC).

Mashego v Multi-Hire (Pty) Ltd (1999) 12 BLLR 1328 (LC).

PPWAWU & Others v Nasou-Via Africa (1999) 10 BLLR 1092 (LC).

NEHAWU v Pressing Metal Industries (1998) 10 BLLR 1035 (LC).

Conclusion

[29] There was accordingly no basis upon which the court ***a quo*** could have exercised jurisdiction in this matter, for as court of first instance in that there was no cause of action upon which the court could adjudicate. For this reason, the appeal stands to be dismissed. There is also no plausible reason why costs should not follow the result and to include the costs occasioned by the employment of two counsel.

Order

[30] Consequently, the following order is made:-

[i] The appeal is dismissed.

[ii] The Appellant is ordered to pay the costs of the appeal. Such cost should include the costs occasioned by the employment of two counsel.

RD HENDRICKS
Acting Judge of the Labour Appeal Court

I agree.

D Davis
Judge of the Labour Appeal Court

Appearances

For the Appellant/s	:	Adv W R Mokhare with B Ridgardt
Instructed by	:	Mogaswa Attorneys
For the Respondent/s	:	Adv N A Cassim SC with F A Boda
Instructed by	:	Cliffe Dekker Hofmeyer

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CHAIRPERSON OF THE SUB-COMMITTEE OF THE BOARD (ARIVIA.KOM) Third Respondent

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MINORITY JUDGMENT

D. VAN ZYL AJA:

[1] I had the advantage of reading the judgment of my brother Hendricks AJA and agree with the order which he proposes. I consider

however that juristification for the order may be found on a different basis. The background facts relevant to the decision of the matter are set out in the said judgment and it is not necessary to be repeated.

[2] Following her dismissal from her employment with the first respondent the appellant launched an urgent application in the Labour Court wherein she *inter alia* sought the following relief:

> **"2. Declaring that the decision of the sub-committee of the board of Ariviakom (Pty) Ltd terminating applicant's employment is unlawful.**
>
> **3. The applicant's employment is reinstated forthwith.**
>
> **ALTERNATIVELY**
>
> **4. Reviewing and setting aside the decision of the sub-committee of the board of Ariviakom (Pty) Ltd t/a Arivia.Kom.**
>
> **ALTERNATIVE TO 4 ABOVE**
>
> **5. Pending the review application to be launched in due course, the applicant's employment is reinstated forthwith."**

[3] In her founding affidavit the appellant formulated her claims as follows: **"In taking the decision to dismiss me, the first respondent patently failed to comply with both its disciplinary code and grievance policy. It will be argued on my behalf at the hearing of this matter that the decision was unlawful and should be declared invalid. It will be argued in the alternative that the decision should be reviewed and set aside."** On a reading of the affidavit the appellant's case for unlawfulness was based on an allegation that the first respondent had failed to comply with its policy relating to discipline in that: (i) there was no formal investigation conducted into the allegations of misconduct levelled against her; (ii) no disciplinary charge sheet was formulated, and (iii) she was not called to attend a formal disciplinary hearing as envisaged in the said policy. In support of her alternative claim for a review of the decision to terminate her services, dealt with under a separate heading and commencing with a statement that **"I incorporate all the allegations I have set out above…,"** the appellant relied on several grounds of review. These grounds included the procedural unfairness of the decision to dismiss her, a failure to comply with mandatory and material procedural provisions in the disciplinary code, bias, and an ulterior motive or purpose.

[4] In the Court *a quo* the respondents raised an objection *in limine* to the Court's jurisdiction to entertain the appellant's claims. Pillay J upheld

the objection essentially for two reasons: Firstly, it was concluded that the substance of the dispute raised by the appellant was the fairness of the dismissal and, with reliance on the decision in *Chirwa v Transnet Ltd and Others* 2007 (2) SA 198 (CC) in para [65], the Labour Court should not, as a Court of first instance, deal with such a dispute. The reasoning was that the Labour Relations Act 66 of 1995 (**"the LRA"**) does not confer jurisdiction on the Labour Court over a dispute about an unfair dismissal without more if the reason for dismissal is related to the employee's conduct. (Sub-sections (1)(a) and (5)(a) of section 191 of the LRA). It is first subject to compulsory conciliation and arbitration (*Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA). The second reason was that to grant the appellant relief sought in the alternative by way of review proceedings **"…will discriminate against private employees and the poor who have only the option of conciliation and arbitration, either because the law does not accord them the option to litigate, or because they cannot afford to lititgate in the Labour Court. An interpretation** [of section 158 (1)(h) of the LRA] **that avoids discrimination should be preferred."**

[5] Before dealing with the issues in the appeal it is necessary to consider the nature of a jurisdictional challenge to a claim. It is open to a litigant in action or motion proceedings to formulate a claim in whatever way he or she chooses. (*Makhanya v University of Zululand* 2009 (4)

ALL SA 146 (SCA) in para [34].) When a jurisdictional challenge is raised the question is whether the Court concerned has jurisdiction over the claim as pleaded in the relevant pleadings **"… and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts."** (*SA Maritime Safety Authority v McKenzie* [2010] 5 BLLR 488 (SCA) in para [7].) In *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) in para [75] van der Westhuizen J explained it as follows:

> **"Jurisdiction is determined on the pleadings,… 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."**

[6] A jurisdictional challenge will be raised either by an exception or by a special plea, depending on the grounds upon which the challenge arises. Where it is not dependent upon the existence of a jurisdictional fact but upon the nature of the claim, the challenge to a Court's jurisdiction will in action proceedings be raised in an exception and in motion proceedings by the raising of a question of law. (Herbstein & Van Winsen **The Civil Procedure of the High Courts of South Africa** 5th ed vol 1 at page 612) In *Makanya supra* in para [31] Nugent JA said the

following in this regard: **"The disposal of a jurisdictional challenge on exception ought to be elementary, because it entails no more than a factual enquiry, with reference to the particulars of claim, to establish the nature of the right that is being asserted in support of the claim. Sometimes the right that is asserted might be identified expressly. At other times it might be discoverable by inference from the facts that are alleged and the relief that is claimed. And if there is any doubt a court might simply ask the litigant to commit himself or herself to what the claim is before the court embarks upon the case."**

[7] It is however important to note that whether the pleaded claim is good in law or constitutes a valid claim are not jurisdictional issues and are not to be confused with a defence of absence of jurisdiction (a declinatory plea). **"A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court."** and **"It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter."** (*Makanya supra* in paras [34] and [93]. See also *SA Maritime supra* in paras [8] and [57].) To summarise, the issue raised by a jurisdictional challenge is whether the Court concerned has the power or competence to hear and determine the claim as formulated by a plaintiff or an applicant. It is not to be confused with the issue whether the claim as so formulated, discloses a valid right of action or is capable

of being sustained on the averments made in support thereof. The only similarity is that the latter issue is raised in a similar manner as a jurisdictional challenge based on the nature of the claim.

[8] Turning then to deal with the appellant's main claim for a declarator, it was argued at the hearing of the appeal that the Court *a quo* failed to appreciate the nature of the appellant's case. The submission was that appellant did not raise a dispute about the fairness of her dismissal as envisaged in section 191 of the LRA but rather formulated her claim on the basis of the **"unlawfulness"** of her dismissal. As in the Court *a quo*, counsel placed reliance on the decisions in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) 49 (SCA) and *Boxer Superstores supra*. In these cases it was held that an employee is entitled to challenge his or her dismissal either on a contractual basis under the common law, or in terms of the provisions of the LRA if it constitutes a dismissal as defined in chapter 8 of the Act. It is open to a litigant to formulate the claim so as to exclude any recourse to fairness relying solely on contractual unlawfulness. A dispute will only fall within the terms of section 191 of the LRA **"…if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about."**(*Fedlife supra* in para [27] and

Boxer Suprestores supra in para [12].) (See also *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) in para [73].)

[9] The appellant's submission is therefore that she had elected to assert a right outside the terms of the LRA, namely the right at common law to exact performance of a contract, alternatively the constitutional right to just administrative action. That both rights asserted arose from the termination of the appellant's employment contract is not an obstacle **"That two claims arising from common facts might be asserted, whether separately or in the alternative, is not unusual. Whether the assertion will succeed is another matter, but that is irrelevant to the jurisdictional question."** (*Makhanya supra* in paras [36] to [40].) On a reading of the notice of motion and the founding affidavit, it is in my view evident that the appellant intended to raise two separate and distinct claims in the alternative and arising from the same facts.

[10] Accepting the appellant's election to confine her main claim to contractual unlawfulness, in light of the respondent's jurisdictional challenge to the appellant's claims, the first issue raised by counsel's argument is whether the Labour Court has the power to consider a claim based on the contractual unlawfulness of a dismissal, and secondly, if so, whether the appellant had made out a case for the relief sought. In respect

of the first issue raised it would appear from the appellant's heads of argument that the contention is that because the Labour Court has the power in terms of section 158 (1)(a) of the LRA to make a declaratory order, the remedy sought in the present matter falls within the jurisdiction of that Court. I do not agree with this submission. The reason is simply that the power of the said Court to make certain orders must not be understood to extend its jurisdiction to matters falling outside its areas of jurisdiction. To put it differently, the power to make an order as envisaged in section 158 (1)(a) is limited to matters falling within the specific jurisdictional areas which have been created for the Labour Court by the LRA. The position is that the Labour Court does not have jurisdiction to entertain a common law claim arising from an alleged breach of contract. As stated in *Gcaba supra* at para [73] by Van der Westhuizen J, **"…the Labour Court (being a creature of Statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies."**

[11] Even if it is to be assumed in favour of the appellant that the Labour Court does have jurisdiction to entertain a dispute about the dismissal of an employee on a contractual basis, I am of the view that the appellant had failed on the merits to establish a case for the relief sought. It is clear from a reading of the appellant's founding affidavit that her

case as pleaded was that the first respondent disregarded the provisions of its own disciplinary code. If the appellant intended to base her claim on contract, it was incumbent upon her to allege and prove the terms of the contract on which reliance was placed and the breach which entitled her to the relief claimed (*Lambrecht and Another v McNeille* 1994 (3) SA 665 (A) 481 (SCA); *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) in para [16]; *Transman (Pty) Ltd v Dick and Another* [2009] 7 BLLR 629 (SCA) in paras [30] and [36], and *SA Maritime supra*). In the context of the present matter the question is whether the procedural provisions of the first respondent's disciplinary code on which the appellant placed reliance were rights granted *animo contrahendi*. The duty was on the appellant not only to plead a contractual claim, but also, if that was her case, to prove facts from which any terms could be imported into the contract (*SA Maritime Safety supra*).

[12] The difficulty facing the appellant is that it has not been alleged in her affidavit filed in support of the application that the provisions of the disciplinary code relied upon were also contractual terms, be it express, implied or tacit terms. On the contrary, the said code, which the appellant annexed to her founding affidavit, explicitly states in paragraph 4 thereof that it **"does not form part of the Arivia.Kom conditions of service…"**, and in paragraph 2(d) that the policy **"… is designed to be a guide…"** and **"Slavish**

adherence to the policy is not required provided that whatever disciplinary action is taken is fair." In fact, the appellant acknowledged in her founding affidavit that the code was designed to be nothing more than a guide. The appellant accordingly not only failed to make averments necessary to sustain the cause of action relied on, but having proceeded by way of motion proceedings, failed to prove that the provisions of the first respondent's disciplinary code relied upon constituted contractual terms, and that the first respondent's failure to comply therewith constituted a breach of contract which entitled her to the relief claimed.

[13] With regard to the alternative claim for a review of the decision to terminate her services, the appellant placed reliance in the Court *a quo* on the provisions of section 158 (1)(h) of the LRA. It provides that the Labour Court has jurisdiction to **"review any decision taken or any act performed by the State in its capacity an employer, on such grounds as are permissible in law."** As stated, Pillay J found that to interpret this section to include a review of a decision of the State in its capacity as an employer to terminate the services of its employees, would give an unfair advantage to such employees over other litigants in the Labour Court. She consequently held that the Labour Court did not have jurisdiction to determine the appellant's challenge to her dismissal by way of review proceedings.

[14] In my view it is not necessary to determine the respondent's challenge to the appellant's alternative claim on a jurisdictional basis. The respondent's objection must be upheld, not on the basis that it raised a question of jurisdiction, but rather on the basis that it requires a decision on the question whether the appellant's claim for review is capable of being sustained on the allegations made in support thereof. As stated in *SA Maritime supra* at para [57], in review proceedings an issue for decision is whether the conduct complained of constituted administrative action. This does not concern a jurisdictional issue. Rather, it requires a decision on the merits of the appellant's contention that the decision to dismiss her constituted administrative action which is subject to judicial review. In *Gcaba supra* the Constitutional Court held that employment and labour related issues do not generally amount to administrative action. Where the conduct of the State, and for that matter any other organ of State or public entity such as the first respondent, has no direct consequences for other citizens, it does not amount to administrative action (See further *Mkumatela v Nelson Mandela Metropolitan Municipality and Another* [2010] 2 (BLLR) 115 (SCA), *National Director of Public Prosecutions v Tsavhungwa* [2010] 2 (BLLR) 121 (SCA). The appellant's claim for review was therefore excipiable for failing to constitute a valid claim, or in the words of the Court in *Gcaba*

supra, she was **"unable to plead facts that sustain a case of administrative action..."** capable of review in a Court of law and her application was accordingly destined to fail on the merits.

[15] For these reasons I agree that the appeal should be dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

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D. VAN ZYL AJA

Matter heard on	**:**	**15 September 2010**
Matter delivered on	**:**	**26 November 2010**
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