IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO.: D610/2023

Not Reportable

In the matter between:

NHLANHLA WELLINGTON KHUMALO Applicant

and

KZN TOURISM AUTHORITY First Respondent

KZN – MEMBER OF THE EXECUTIVE COUNCIL

ECONOMIC DEVELOPMENT, TOURISM AND

ENVIRONMENT AFFAIRS Second Respondent

Heard: 26 October 2023

Delivered: 15 November 2023

JUDGMENT

MSIZI, AJ:

[1] The applicant approached this court on an urgent basis for an order in the following terms:

(i) That the decision of the first respondent to suspend him as the Acting Chief Executive Officer of the KwaZulu-Natal Tourism is declared *ultra vires*, unlawful and is set aside;

(ii) That the first respondent be ordered to return him to work with immediate effect;

(iii) That any consequential actions from such suspension be set aside;

(iv) First respondent to pay the costs of this application on a scale as between attorney and client including cost of counsel.

[2] It is common cause that the applicant was appointed as the Acting Chief Executive Officer of the first respondent on 1 November 2022. He was still acting in that position when the first respondent suspended him on 26 September 2023. The letter of his suspension was written by the chairperson of the Board of the first respondent. The letter stated that he is suspended on full pay pending the outcome of a disciplinary enquiry. It also ordered that he should leave the offices of the first respondent forthwith and to hand over to the Board Secretary all the property, keys and codes of the first respondent.

[3] In response to this suspension, the applicant's attorneys wrote a letter to the first respondent challenging his suspension on the following grounds:

(i) That legislation confers the power to appoint a chief executive officer of the first respondent upon the Executive Member of the Department of Economic Development, Tourism and Environmental Affairs, the second respondent in the matter. Therefore, the Board lacks authority to discipline the applicant. Having done so, applicant contends the first respondent and its Board acted *ultra vires* its powers. The consequence is that its purported exercise of its powers in suspending him is thus *ultra vires*, invalid and unlawful. They then demanded the lifting of the suspension and return of the applicant to work.

[4] Needless to say, this demand did not yield any positive response from the first respondent, hence this application. Instead, on 11 October 2023, the chairperson of the Board issued an internal memorandum to the staff of the first respondent announcing the appointment of a new Acting Chief Executive Officer.

[5] In his affidavit, the applicant states that in terms of the KwaZulu-Natal Tourism Act of 1996, it is the second respondent who is vested with the power and authority to suspend members of the first respondent. Therefore, the Board exceeded its powers by suspending him.

[6] In support of the urgency, the applicant averred the following in his founding affidavit:

(i) That the conduct of the Board is highly prejudicial to his interests and he has acted without any undue delay in bringing this application;

(ii) The relief he seeks is interim, he has thus shown that he has a *prima facie* right which is to remain as the Acting Chief Executive Officer entitling him to a right to a lawful labour action and protection against unlawful action. This is the foundation of his *prima facie* right to the relief sought.

(iii) His suspension is further prejudicial to his interests, reputation and further career prospects. Furthermore, the charges against him are unfounded. Thus, he will suffer irreparable harm as a result of the suspension.

(iv) There is no other satisfactory relief to the interim relief he seeks.

[7] The application is opposed primarily on the basis that it lacks urgency; the relief sought is a final interdict and the applicant has not established the essential facts to support such relief.

[8] After the hearing of the application and in the course of preparing the judgment on the matter, I realised that given the case pleaded by the applicant, I should ask that both parties to address me on whether this court had jurisdiction to

entertain this application. As a result, I requested them to file written submissions addressing the court on this point. These were filed by both parties on 13 November 2023.

[9] In **Gcaba v Minister of Safety and Security**,[1] the Constitutional Court stated that jurisdiction is determined on the basis of pleadings and not on the substantive merits of the case. The case that is pleaded by the applicant is that of unlawfulness and not unfairness. There is nothing placed before the court by the applicant in the founding affidavit that points to any provision of the LRA nor any fact that confirms jurisdiction on the court to determine and dispute that relies on the unlawfulness of the conduct of the first respondent.

[10] In **Shezi v South African Police Service**,[2] the question that arose was whether the court has jurisdiction to entertain a claim for final relief where an applicant seeks relief on the basis of what is alleged to be unlawful conduct on the part of the employer, without locating the claim in a cause of action justiciable by this court. The court held:

"*[11] In so far as the applicant's cause of action is the alleged unlawfulness of the respondents conduct, the question is whether the court has jurisdiction to make such a determination. In Steenkamp & Others v Edcon Ltd (National Union of Metalworkers of SA intervening) 2016 (3) SA 251 (CC) ... the*

[1] **Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC) at para 75**, **and Chirwa v Transnet Ltd 2008 (4) SA 367(CC) at para 75.**
[2] **Shezi v South African Police Service (2021) 42 ILJ 184 (LC).**

appellants contended that their dismissals by the respondent were unlawful and invalid because their employer had not complied with time periods established by s 189A of the LRA prior to issuing notices of termination of employment. The majority of the Constitutional Court rejected this contention, on the basis that this court has no jurisdiction to determine the lawfulness of a dismissal. ...

[12] The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness "

[11] The court consequently concluded as follows at para [23]:

"[23] To the extent that the applicant's case is one that challenges the lawfulness of her employer's conduct in the form of an alleged breach of regulation 9, this court has no jurisdiction to entertain the claim."

[12] In **Botes v City of Johannesburg Property Company SOC Ltd**,[3] the applicant was regarded as a senior employee and the terms of the Local Government: Disciplinary Regulations for Senior Managers were made applicable to her. Botes was placed on precautionary suspension by the Board of the Johannesburg Property Company. She approached this court effectively challenging the authority of the board of the company to place her on

[3] **Botes v City of Johannesburg Property Court SOC Ltd**, (**2021) 42 ILJ 530 (LC).**

precautionary suspension. Her pleaded case is exactly similar to that pleaded by the applicant in this case. Like the applicant *in casu*, Boates challenged the lawfulness of the decision to place her on suspension.

[13] The court then considered whether it had jurisdiction to entertain the application. It had this to say:

*"[8] On the alleged conduct of the board of the CJPC, the following possible causes of actions arises – (a) an unfair labour practice within the contemplation of **section 186** of the **Labour Relations Act[5]**; (b) common law breach of contract claim; (c) breach of section 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution) – remediable by review under the Promotion of Administrative Justice Act**[6]** (PAJA); (d) breach of section 1 (c) of the Constitution – remediable under section 158 (1) (h) of the LRA – legality/rationality review.*

[9] Fact that a party has various possible causes of action does not suggest that he or she can be remedied even if his or her pleadings sets out one specific cause of action. The Labour Court is a creature of statute and it derives its powers from the LRA and any other law that gives it jurisdiction. Primarily the jurisdiction of the Labour Court arises from section 157 of the LRA. Section 157 (1) specifically provides that the Labour Court has exclusive jurisdiction in respect of matters that elsewhere in the LRA or in terms of any other law are to be determined by the Labour Court. In terms of the LRA, matters relating to suspensions within the contemplation of section 186 (2) (b) are to be determined by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council and not the Labour Court – section 191 (1) (a)

(i) (ii) read with 191 (5) (a) (iv) of the LRA. Botes disavowed the remedies in the LRA.

[10] There can be no doubt that the dispute of Botes is justiciable in the CCMA or at a bargaining council. This not being an appeal or a review this Court in its discretion may refuse to determine the dispute of Botes because it is not satisfied that an attempt was made to resolve the dispute through conciliation

– section 157 (4) (a). The scheme of the LRA is predicated on amicable dispute resolution mechanism. It is for that reason that this Court and other dispute resolving fora lacks jurisdiction if the dispute has not been referred to conciliation.

[11] Section 157 (2) is reserved for alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from employment and from labour relations or constitutionality of any executive or administrative act or conduct or threat thereof by the State in its capacity as an employer and application of any law for the administration of which the Minister of Employment and Labour is responsible. This jurisdiction is shared with the High Court.

[12] What requires emphasis is that the Labour Court may gravitate to subsection 157 (2) only where subsection 157 (1) does not give it jurisdiction. Only then would it seek a shared jurisdiction. Where the LRA gives jurisdictions to other statutory fora, it is fundamentally wrong for the Labour Court to approbate to itself jurisdictional powers under subsection 157 (2) simply because (a) a fundamental right as entrenched is violated or threatened with violation; and

(b) the threat arises from employment and labour relations. A number of other legislations exists to champion the fundamental rights in chapter 2 of the

*Constitution. For example, the Employment Equity Act**[7]** (EEA) guarantees the right to equality. In terms of the EEA certain disputes are justiciable in the CCMA or bargaining council. If section 157 (2) is not given a restrictive and purposive interpretation some of the disputes could be taken over by the Labour Court. Section 157 (5) makes the point above.*

[13] Pleadings aside, the conduct complained of may be astutely tucked under section 157 (2) because it affects the fundamental right to fair labour practices

– section 23 (1) of the Constitution of Botes. In my view, it shall be inappropriate for this Court to assume jurisdiction when the LRA – a statute passed to give effect to the rights in section 23 of the Constitution – provides that unfair labour disputes in relation to unfair suspensions should be justiciable under section 191 by the CCMA or bargaining council. Without entertaining the debate around lawfulness and fairness, if the legislature wished to clothe any of the dispute resolving bodies including the Labour Court with powers to entertain the lawfulness of a suspension, the legislature could have said so. The conclusion I arrive at is that the claim of Botes cannot be entertained under section 157 (2). An act of placing an employee on a precautionary suspension is not an executive or administrative act. On Botes' version, the board is incapable of exercising powers emanating from the regulations. Only a municipal council has that capability. In any event the regulations fall under the administration of the Minister of Local Government and not of Department of Employment and Labour."

[14] The court, *continued as follows*:

"*[15] As pointed out earlier the jurisdiction of the Labour Court arises from section 157. Section 158 deals with the powers and not jurisdiction of the Labour Court. In other words, the Labour Court may exercise any powers in section 158 if it has jurisdiction to entertain a matter. That simply means that the Labour Court is not empowered to for instance declare as being unlawful and or interdict actions that do not resides under its jurisdiction. As it can be observed, Botes invokes some of the available powers of the Labour Court – declaratory order – section 158 (1) (a) (iv) and interdict – section158 (1) (a) (ii) of the LRA. Unfortunately, where the Labour Court lacks jurisdiction it cannot exercise those powers.*

*[16] The case pleaded by Botes is that of unlawfulness and not unfairness. To that end I fully endorse the view expressed by my brother Van Niekerk J in Shezi v SAPS**[8]**, when he said:*

"12. The effect of this judgment [Steenkamp v Edcon] is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness."

[15] In its further submission filed on 13 November 2023 the applicant submitted:

"3] The crux of the Applicant's case is founded on the underlying contract which is to ensure until a determined event, that of acting as a Acting Chief Executive Officer of the KwaZulu-Natal Tourism Board until the appointment of a Chief Executive Officer or the passing of the KwaZulu- Natal Tourism and Audio Visual Agency Bill, 2003(the Bill) whichever comes first.

4] It is on the basis of the employment contract that has placed the Applicant at hands (sic) of this court as this court is endowed with jurisdiction over employment.

5] the conduct complained of, which is in violation of his contract, ***is a Board acting beyond its powers in suspending him,*** *which power is exclusively the reserve of the MEX in terms of the KwaZulu- Natal Tourism Act matters. This being the Act does not make a distinction between members of the Board.*

6] It is accordingly submitted that the question to be determined by this honourable court is whether the Board acted beyond its powers in suspending the Applicant and such action is susceptible to be set aside.

7] The determination of unlawfulness is ancillary and will be a natural consequence of a determination as per paragraph 6 above and not necessarily the basis of such finding.

8] it is accordingly submitted that the court can make a finding on the main issue of this case as per paragraph 6 above without pronouncing on the unlawfulness or otherwise of such action of the Board."

[15] Unfortunately, this response does not change the complexion of the applicant and fails to advance it in any way. The applicant described his cause of action in the founding affidavit as follows:

"8.1 I am advised that in terms of the Act t is the second respondent that is vested with the power and authority to suspend the members of the Authority.

8.2 that the Chief Executive Officer and by extension the ACEO, being a member of the Authority and only the second respondent can suspend him/her.

8.3 that the Board acted beyond its powers in suspending me and that its action is unlawful in this regard and stands to be set aside, and it is on these grounds that I come to seek rescue by this court. [own underlining]

8.4 even if it was to be said that the Board has the power to suspend (which is denied), I am further advised that generally suspension is warranted where there is a possibility that the person suspended may interfere with investigations.

8.5 from the indicative charges (which I maintain are unfounded) it is clear there are no indications that my being at work will interfere with investigations accordingly the suspension is not warranted."

[16] This of course, has to be read with the relief sought in the notice of motion, which is that the decision of the first respondent to suspend him as the Acting Chief Executive Officer of the KwaZulu-Natal Tourism is declared *ultra vires*, unlawful and is set aside. [own emphasis]

[17] In Botes, the court explained the reasons why the Labour Court could not entertain her application. It held:

*"[17] Although the Labour Court is a Court of law and equity – section 151 (1) of the LRA, when it comes to jurisdiction, like any administrative body, its' jurisdiction arises or is predicated on certain jurisdictional facts – that is section 157 of the LRA. Plainly, the Labour Court cannot exercise jurisdiction if section 157 does not allow it. Jurisdiction sits on two pillars. Firstly, there must be jurisdictional facts (section 157). Secondly the power itself (section 158). In Kimberly Junior School and another v Head, Northern Cape Education Department and others**[9]** the Supreme Court of Appeal said the following, which mutatis mutandis apply with equal force to Courts that are creatures of a statute:*

'Under common law, necessary preconditions that must exist before an administrative power can be exercised are referred to as "jurisdictional facts". In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all.'

[18] Similar to the case of Botes, in supplementary submissions filed on her behalf, an attempt was made to rely on section 77(3) of the Basic Conditions of Employment Act, equating unlawfulness with a breach. In rejecting this attempt the court explained that much as this court accepts that at a general level where a party breaches a contract that party is said to be acting unlawful. Furthermore, by definition unlawfulness means the quality of failing to conform to law, acting contrary to accepted morality or convention, illegal or illicit.[4]

[19] In Lt-General Phahlane v SAPS AND others[5] the court held:

[4] See para 17.
[5] Case J736/20 delivered on 7 August 2020

[6] …. In other words, a party referring to this court for adjudication must necessarily point to a provision of the LRA or some other law that provies for disputes to be determined by this court……"

[20] Accordingly, this Court is convinced that it does not retain jurisdiction in this matter. Therefore, the application ought to be dismissed for want of jurisdiction.

[21] Given that the applicant should have followed up its case on the basis pleaded, in it should not have brought its issue to this court at all. I am of the view that in terms of the law and fairness he should thus pay the costs of the application.

[22]. In the circumstances I make the following ruling:

1. the application is dismissed with costs.

N Msizi

Acting Judge of the Labour Court

Appearances:

For Applicants: Mr V Lubelwana instructed by Sifiso Chili & Associates

For Respondent: Mr S M Luthuli instructed by Taleni Godi Kupiso Inc