DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2019/06/12
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J1346/19

In the matter between:

NOKUTHULA MALINGA & 29 OTHERS **Applicants**

and

KWAZULU-NATAL PROVINCIAL DEPARTMENT OF EDUCATION **First Respondent**

DIRECTOR GENERAL OF THE KWAZULU-NATAL DEPARTMENT OF EDUCATION **Second Respondent**

MEC OF KWAZULU-NATAL PROVINCIAL DEPARTMENT OF EDUCATION **Third Respondent**

Heard: 11 June 2019

Judgment delivered: 12 June 2019

JUDGMENT

VAN NIEKERK J

[1] The applicants seek a final order, amongst other things, to set aside notices of termination of employment issued by the first respondent (the department) and reinstating those of them already dismissed with retrospective effect. The order is sought on an urgent basis.

[2] It is sufficient for present purposes to record that the applicants are all temporary educators employed by the department. They have been employed in this capacity for a number of years. The notices of termination of employment were issued by the department on the basis, in most cases, that the applicant concerned had not submitted proof of qualification to the department in accordance with a series of circulars regulating the employment of temporary educators. The applicants dispute that the circulars entitle the department to terminate their employment. On the contrary, they aver that in terms of the circulars (in particular circulars HRM 98/2010 and 99/2010), they are entitled to continued employment.

[3] The department has raised the issue of jurisdiction. In the answering affidavit, the department submits that the applicants have failed to refer their dispute to the CCMA or bargaining council with jurisdiction, and that this is fatal to their case.

[4] At the hearing, the applicants clarified their cause of action. They contend that their dismissals were unfair, but primarily, that they were 'unlawful, illegal and constitutes misconduct' (sic) in that they breached the terms of the circulars in a number of respects. In particular, the applicants aver that the author of the notices of termination had no authority to issue the notice, that the decision to terminate

their employment had not been ratified by the correct party, and that their employment as temporary educators is 'protected' as provided by HRM 98/2010 and HRM 99/2010.

[5] Under the heading 'Jurisdiction', the applicants aver the following:

> 37. The above Honourable Court has jurisdiction in this matter in that this matter falls within the ambit of the Labour Relations Act and other employment legislations. All the Applicants are domiciled and reside in the area of jurisdiction of the above Honourable Court.

[6] There is a common misconception, especially in relation to urgent applications, that this court has jurisdiction to entertain any dispute that concerns a work-related grievance, or to deal with any allegations of unfair conduct by an employer. This is not the case. Section 157 (1) of the LRA provides:

> 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.

Section 157 (2) reads as follows:

> The Labour Court has 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 of the Republic of South Africa, 1996, and arising from –
>
> (a) employment and from labour relations;
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
> (c) the application of any law for the administration of which the Minister is responsible.

[7] The Labour Court is a superior court that has authority, inherent powers and standing, equal to those of a division of the High Court, but only in relation to matters under its jurisdiction (s 151 (2)). The scope of the court's exclusive and

concurrent jurisdiction is to be determined by reference to s 157. It is self-evident that s 157 does not confer jurisdiction on this court to make orders regarding all and any employer conduct that is alleged to be unfair.

[8] An applicant seeking relief in this court must necessarily and clearly establish the basis on which that relief is sought. That would ordinarily provide a clear indication as to whether the relief sought is grounded in a matter that arises from the LRA, or in terms of any other law. It follows that the 'matter' must be identified and clearly articulated, and that its source, whether grounded in a specific provision of the LRA or any other law, must be identified. (See *Besani v Maquassi Hills Local Municipality* (2016) 37 *ILJ* 1386 (LC)).

[9] In *Gcaba v Minister for Safety and Security & others* 2010 (1) SA 238 (CC), the Constitutional Court affirmed that jurisdiction is determined on the basis of the pleadings, and not on the substantive merits of the case. In motion proceedings, this includes not only the formal terminology of the notice of motion, but also the content of the supporting affidavits. These must be interpreted to establish the legal basis of the applicant's claim.

[10] In the present instance, to the extent that the applicants rely on an alleged unfair dismissal as their cause of action and seek to have their dispute finally determined on the papers, they have not established that the dispute is one that falls within the ambit of this court's jurisdiction. Section 157 (3) provides that this court does not have jurisdiction if the Act requires the dispute to be resolved through arbitration. The applicants have not articulated a reason for dismissal, the jurisdictional determinant in unfair dismissal disputes. The letter of demand addressed to the department by the applicants' attorney makes a specific allegation of unfair dismissal, but the founding affidavit takes matter no further. In any event, even if the reason for dismissal is one that renders the dispute justiciable by this court, a referral to conciliation is a jurisdictional prerequisite to the adjudication. In *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and others* (2015) 36 ILJ 363 (CC), the Constitutional Court recently said the following:

> [34] Where no certificate has been issued because there was, for example, no conciliation meeting, but a period of 30 days from the date when the council received the referral has elapsed, the statute conspicuously does not provide that the expiry of the 30-day period is sufficient proof that an attempt was made to conciliate the dispute. It is, in my view, in that situation that the Labour Court may, in terms of section 157 (4) (a), refuse to determine the dispute. This provision cannot assist in a case where the dispute was not even referred to conciliation. Section 157 (4) (a) underlines the importance the LRA places upon the need for attempts to be made to try and resolve the dispute through conciliation before resorting to other methods of resolution.

And further:

> [40] Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes.

The court may in appropriate circumstances grant interim relief in respect of an unfair dismissal dispute where it has no jurisdiction to grant the final relief sought, but this is not the nature of the present application.

[11] In so far as the applicants' cause of action is predicated on an allegation of unlawfulness, the Constitutional Court has recently held that in some circumstances at least, this court has no jurisdiction where a dismissed employee contends that his or her dismissal was unlawful and invalid, as opposed to unfair. As the majority of the Constitutional Court said in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC) at paragraph 132, there is no reference in the LRA to a right not to be unlawfully dismissed, nor are there processes or procedures for the enforcement of such a right. *Edcon* concerned a claim that the dismissals concerned were unlawful and invalid because the employer had acted in breach of s 189A (8). The employer conceded that it had breached the provision concerned, but contended that although this may have rendered the resultant dismissals unfair, the LRA did not contemplate invalid dismissals, nor did it empower this court to grant orders declaring a dismissal invalid and of no force and effect. The court upheld this

position, noting that s 191 of the LRA sets out the dispute procedure to be followed to resolve unfair dismissal disputes, but nowhere is there a procedure to be used for the validity or lawfulness or otherwise of a dismissal (see paragraph 131).

[12] But it does not follow, as Ms Reddy, who appeared for the department contended, that this court has no jurisdiction in respect of a dispute where the lawfulness or validity of a termination of employment is challenged. *Edcon* concerned a conceded breach of the LRA. In essence, the Constitutional Court held that the LRA establishes its own remedies for breaches of its provisions, confined as they are to fairness. But this court is accorded jurisdiction in respect of other statutes, where the lawfulness, legality or validity of employer or employee action may well be placed in issue. For example, s 77(3) of the Basic Conditions of Employment Act provides that this court has concurrent jurisdiction with the civil courts to determine disputes that concern contracts of employment. Such disputes may well contemplate declarations of invalidity sought consequent on a breach of contract. Further, s 157 (2) provides that this court has 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 and dealing from employment or labour relations. Section 158 (1) (h), although incorporated in the section conferring powers on this court is jurisdictional in nature, and entitles public sector employees to seek the review of employment-related decisions by state.

[13] In the present instance, the applicants' pleadings disclose no more than an averment that the department has acted in breach of its own circulars and that in consequence, the termination of the applicants' employment is unlawful. The applicants claim is not one in contract, nor is a claim of a breach of a fundamental right nor is it a review. In short, there is no cause of action anchored in the LRA or any statute that for the purposes of s 157 (1) of the LRA confers exclusive or concurrent jurisdiction on this court. In these circumstances, this court has no jurisdiction to entertain the present application.

[14] Finally, in relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of law and fairness. I accept that although the decision to file the present application may have been misguided, the applicants have not acted frivolously or with any degree of malice. In these circumstances, the requirements of the law and fairness are best satisfied by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr. S Singede, Mahlokwane Attorneys

For the respondent: Ms. V Reddy, Norton Rose Inc.