IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: P 30/22

In the matter between:

NANDIPHA SIPHOKAZI MBONTSI **Applicant**

And

MEC: ECONOMIC DEVELOPMENT,
ENVIRONMENTAL AFFAIRS AND TOURISM **First Respondent**

HEAD OF DEPARTMENT: ECONOMIC
ENVIRONMENTAL AFFAIRS AND TOURISM
EASTERN CAPE **Second Respondent**

Heard: 11 May 2023

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 10h00 on 15 June 2023.

JUDGMENT

JOLWANA AJ

Introduction

[1] This is an application for the review and setting aside of the second respondent's decision refusing the applicant's request to be transferred from her primary place of work as Regional Manager for Economic Development in the Alfred Nzo District. This application is said to be in terms of section 158(h) of the Labour Relations Act 66 of 1995 (the LRA) in the applicant's pleadings.

Jurisdiction

[2] In the answering affidavit filed on behalf of all the respondents, the second respondent has raised a point in *limine*. She contends that this Court has no jurisdiction to entertain the matter in that the decision under attack was taken on 28 August 2018 and/or 3 September 2018. These proceedings were only launched on 5 April 2022, more than three years later. This application was not brought before court within six weeks or within a reasonable time as required and therefore required an application for condonation for the applicant's failure to institute it within a reasonable time.

[3] It is trite that whether or not a court has jurisdiction to entertain a matter before it is determined on the pleadings filed, in particular, the notice of motion and the founding affidavit in an application. This legal position was restated in *My Vote Counts*[1] in which the Constitutional Court said:

> "A court's jurisdiction is determined on the basis of the claim in the pleadings.
>
> In *Chirwa,* Langa CJ held that:-

[1] *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at paragraph 132 and 133.

> "a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this Court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable."

[4] In a unanimous judgment, the Constitutional Court confirmed *Chirwa* and held [in *Gcaba v Minister for Safety and Security 2010* (1) SA 238 (CC)] that:-

> "Jurisdiction is determined on the basis of the pleadings, as *Langa CJ* held in *Chirwa* and not the substantive merits of the case …. 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."

[5] In determining whether or not this Court is in fact clothed with the necessary competence to determine the applicant's claim, I must therefore have regard to the applicant's pleaded case. In her founding affidavit the applicant makes the following averments:

> "29. I submit that the second respondent's decision as contained in annexure "NSM3" stands to be reviewed and set aside by this Honourable Court on account of her unreasonable and unjustifiable disregard of relevant material and/or information placed before her.

> 30. The second respondent is not empowered to change a decision taken by her predecessor in the manner she has done. It is my case that she should have approached this Court by way of a review of the decision if she wanted to challenge it. I am advised, which advice I accept to be logical and legally sound, that a functionary is not entitled to change a decision of this nature by a stroke of a pen. Further argument on this point will be made at the hearing of the matter."

[6] NSM3 is a letter addressed to the applicant by the second respondent and it is annexed to the founding affidavit. Indeed it, *inter alia*, contains a decision to decline the applicant's request to be transferred to the head office of the first respondent. That is the decision under attack which is sought to be reviewed and set aside. That letter is signed by the second respondent and is dated 13 July 2021. It follows that the reasonable time within which the review of the decision contained in NSM3 ought to be reckoned from that date. That is a period of more than eight months. Having received the answering affidavit in which the issue of this Court's jurisdiction is raised, the applicant elected not to file a replying affidavit. This was an opportunity for her to state in the replying affidavit why the application for condonation was considered unnecessary by her, as it was contended from the bar that it was not necessary for her to apply for condonation. Her submissions in that regard would have given this Court an understanding of the basis on which she contends that her review application was instituted timeously and therefore, there was no need for her to apply for condonation.

[7] An attempt was made by applicant's counsel to do some damage control by making factual submissions from the bar on the basis of which it was contended that the application was moved within a reasonable time. This is impermissible. As the point was made repeatedly in *Chirwa, Gcaba and My Vote Counts* decisions of the Constitutional Court, the jurisdiction of the court is determined on the basis of the pleadings. Had the applicant filed a replying affidavit, this Court would have been well placed to consider the averments made in the replying affidavit on the issue of jurisdiction. Submissions by

counsel from the bar, however, compelling they may be considered to be, are not pleadings and therefore cannot be considered in determining the relevant issue. The submission impermissibly sought to be made from the bar was that the application for review was instituted within a reasonable time. The question that follows logically, is what is the yardstick that must be used to determine reasonable time in the absence of the necessary averments in the pleadings. Whether or not a court has jurisdiction can only be determined on the pleadings that have been filed. Counsel sought to hoist his arguments in the Labour Court judgment in *Weder-I*[2] in which the court said:

> "8. What, then, is a 'reasonable time' in the context of s158 of the LRA? It is tempting simply to assume that it should be six weeks, by analogy to the time period provided for in s145. At the most, it cannot be more than the 180 days provided for in PAJA; in fact, given that PAJA does not apply and that the process is closely aligned to that set out in s145 and rule 7A, I would suggest that anything more than six weeks should at least trigger an application for condonation."

[8] There are a number of problems with counsel's attempt to rely on the *Weder* judgment of the Labour Court to make an argument that because the applicant instituted her review application within 180 days, therefore, it was moved within a reasonable time. Therefore, so went the argument, an application for condonation was not necessary. The first problem is that in *Weder*, the court said that PAJA and therefore the 180 days does not apply. Secondly, the court said that anything more than six weeks should trigger an application for condonation. I am at a loss as to how it was even sought to rely on the *Weder* judgment of the Labour Court to justify a contention that the 180-day period was a reasonable time and thus required no condonation application. This submission was made ignoring the fact that the Labour Court in *Weder* went on to say that anything more than six weeks should trigger a condonation application.

[2] *Weder v MEC for Health, Western Cape* [2013] 1 BLLR 94 (LC); (2013) 34 ILJ 1315 (LC)

[9] The second problem with the attempt to rely on that judgment is that when the matter was taken on appeal to the Labour Appeal Court, the Labour Appeal Court did not endorse any time period, not the six weeks period nor the 180 day period in *Weder-II*[3] in respect of applications made in terms of section 158 of the LRA. I do not understand the legal position to be that review applications under section 158 are regarded as having been instituted within a reasonable time if they are instituted within 180 days, and therefore a condonation application is unnecessary. I understand the legal position and the approach to be that each case will be determined on its peculiar facts. In any case, where a review application has not been made promptly, a condonation application is always necessary. In *Statistics South Africa*[4], Nkutha-Nkotwana J stated that:

> "It is trite that section 158(h) of the LRA does not prescribe the time limits for bringing a review application, however, it is an accepted principle that this must be done within reasonable time and six weeks has been used as a measure of such reasonableness. In the matter at hand, the delay in bringing the application is two weeks and I have considered the explanation for the delay and that is in my view, reasonable. I am accordingly, satisfied that Statistics South Africa has made out a case for the grant of condonation and the same goes for the late filing of the answering affidavit by Mr Molebatsi. I therefore grant condonation for the late filing of the review application and the late filing of the answering affidavit. The application to review is dealt with in turn."

[10] What is clear in this matter is that there has been a substantial delay in launching the review application. This is the case even if it were to be correct that, this application was made within 180 days and not more than three years later or even eight months. What makes matters worse is the steadfast refusal or neglect to make an application for the condonation of the obvious dilatoriness in instituting these proceedings. This, even after the respondents have raised the issue of condonation in their answering affidavit. This kind of

[3] *MEC For The Department of Health, Western Cape v Weder and Others* [2014] 7 BLLR 687 (LAC); (2014) 35 ILJ 2131 (LAC).
[4] *Statistics South Africa v Molebatsi and Another* (2019) 40 ILJ 2603 (LC) para 2.

litigation is totally unsatisfactory and unfortunately does not help to the applicant herself who, being a lay person could not have known about the need for a condonation application. I feel that I am duty bound to make this point as not doing so would be nothing less than remissness on the part of this Court. The difficulty with a late review application where there is no condonation application is that the court simply lacks jurisdiction to adjudicate the matter, no matter how good the merits of the review may be. Even in unopposed or undefended matters, the court may not deal with a matter where it otherwise lacks jurisdiction merely because the application or action as the case may be is unopposed or undefended.

[11] This legal position was made clear in the decision of the Constitutional Court in *MEWUSA*[5]*,* an undefended matter, in which the Court said:

> "When the Labour Court granted default judgment, the union had not lodged an application for condonation. The union contended that the referral of the dispute to the Labour Court was within the prescribed period. It seems that this contention was based on a misconception that the 90-day period was to be reckoned from the date of the ruling of the CCMA. That is not so. In this case the period had to be reckoned from the date when the certificate was issued. In the absence of a finding that there was good cause for the failure to refer the dispute within the prescribed period, the Court had no jurisdiction to adjudicate the dispute. Accordingly, the Labour Court erred in adjudicating the dispute and granting the order without an application for condonation."

[12] In all the circumstances in which on applicant's counsel's submissions from the bar, the period of the delay is about five months or so, I must point out that, that even that was an excessive delay. The applicant should have applied for the condonation of the delay in instituting the review application. Apparently on the advice of her legal representatives, which was unfortunately an incorrect advice, or at best, something that they overlooked, strangely even after the issue was raised in the answering affidavit, she did not do so.

[5] *F&J Electrical v MEWUSA obo E Mashatola and Another* 2015 (4) BCLR 377 (CC) paragraph 30.

The result is that this Court has no jurisdiction to deal with the merits of her case. Ordinarily, this should be the end of the matter, at least for present purposes, that is, until a condonation is sought, if the applicant chooses to do so, and it is granted.

The alternative relief

[13] In the applicant's notice of motion, there is an alternative prayer in which the applicant prays for the second respondent's conduct to be declared to be in breach of the agreement transferring the applicant to the first respondent's head office. There are other insurmountable difficulties even within this alternative relief. One of those many difficulties is that the basis on which this Court has jurisdiction to adjudicate that alternative relief is not pleaded. There is no indication anywhere in the applicant's papers why this Court has jurisdiction to entertain that cause of action. As I said before, the jurisdiction of the court, any court for that matter, must appear from the pleadings themselves. It cannot and should not be assumed. A court cannot make its own conclusions about why it does have jurisdiction to deal with the matter before it. It must establish its competence to deal with the matter from the pleadings themselves.

[14] Some vague reference to an agreement and its alleged breach is made in the pleadings. For instance in one paragraph in the founding affidavit in relation to the alternative cause of action, the following is said:

> "31. I state that upon signing initial approval by then Head of Department, an agreement was concluded in terms of which my work station changed to the Head office. In my respectful submissions, the second respondent's decision refusing my transfer amounts to breach of the afore-mentioned agreement, a claim which I place before this Honourable Court as an alternative to my initial complaint."

[15] The first of many difficulties with the alleged agreement is that the terms of the agreement have not been pleaded as one would have expected them to be. Very little is said about the alleged agreement which has, for some inexplicable reason, been pleaded rather lackadaisically, to put it mildly. All of this flies in the face of some of the provisions of Uniform Rule 18. For example, Uniform Rule 18 (6) reads:

> "A party who in his pleading relies upon a contract should state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleading."

[16] To the extent that the contention is that the issue of the alleged contractual agreement between the applicant and the respondents is an independent cause of action, it follows that more should have been pleaded to establish that cause of action, especially, the terms of the alleged agreement. In other words, the specific terms of the agreement should have been pleaded as well as how the respondents have acted in breach of the contract. This did not happen, again, inexplicably.

[17] Part of the problem with the very terse pleadings in this case is that the issue of the jurisdiction of the court is left hanging and at best, to conjecture. One can only assume that for the purposes of this particular cause of action, reliance was placed on section 77 of the Basic Conditions of Employment Act[6]. Section 77 provides as follows:

> "(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act except in respect of an offence specified in section 43, 44, 46, 49 and 92.
>
> (2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or

[6] Basic Conditions of Employment Act 75 of 1997.

omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic conditions of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court."

[18] This is a very comprehensive provision dedicated to address the issue of jurisdiction. It must be clear therefore that if reliance is to be placed on this provision or any other law to found jurisdiction, the basis on which this Court on the basis of that provision, does have jurisdiction has to be pleaded. No court should be left on its own devices to establish the basis on which it enjoys jurisdiction to entertain the matter before it, nor is it permissible for a court to assume that for some or other reason, not pleaded, it enjoys jurisdiction to entertain a matter before it.

[19] In *Baise*[7] Sutherland AJ stated as follows:

"The Labour Court, without expressly saying so, treated the case as a contractual dispute. By so doing, in my view, it was generous, for otherwise the application should have been dismissed out of hand for incoherence. The incoherence is patent. Several question arise. In the absence of expressly alleging that the Labour Court was to exercise

[7] *Baise v Mianzo Asset Management* (Pty) Ltd (2019) 40 ILJ 1987 (LAC) paragraph 9.

> civil jurisdiction pursuant to section 77(3) could the Labour Court properly do so? Is it appropriate for the Labour Court to peel away the husk of the allegations and deal with the *real dispute*, as is required of commissioners of the CCMA? Can such an approach be competent where unlike in the CCMA the parties before the Labour Court are required to plead? More especially, if section 158(1)(a)(iv) is expressly alleged as the competence of the Labour Court which is invoked, is it appropriate or even competent to treat this matter as a civil claim? In my view, it seems doubtful. After all, civil claims are entertained because of the concurrent jurisdiction of the Labour Court with the High Court and that competence is not susceptible to being blended with remedies sought under the LRA. Claims under both regimes can indeed be heard in a single hearing, but the claims themselves remain distinct, along with the need to discern distinct causes of action."

The basis on which this Court has jurisdiction to entertain this cause of action has not been pleaded. Nothing has been said about it at all and yet it is somehow expected to adjudicate the dispute. I am at a loss as to how could that possibly be done.

[20] The third problem with the manner in which the applicant's case has been pleaded, is that a dispute of fact is manifest. First of all, the applicant has annexed to her founding affidavit a number of documents. No attempt has been made whatsoever, to properly plead anything said or contained in those documents. They are just attached to the founding affidavit without, at times, even saying anything about them. This totally beggars belief as it is difficult to understand how documents can just be attached to the founding affidavit without properly dealing with them or the relevant portions thereof. This is another manifestation of the shoddiness with which the applicant's case had been pleaded. This any averments about such documents or the relevant portion thereof Court must frown upon this kind of ineptitude drawing pleadings.

[21] In some instances in the founding affidavit, the dispute of fact becomes manifest from the applicant's own papers. By way of an example, the following contradiction appears:

> "19. On the 28 August 2018 the then Head of Department, Mr Gxilishe, approved my application for transfer. The decision to transfer me to the Head Office was communicated to me in a letter which the then Head of Department wrote to me. I refer this Honourable Court to a copy of the approved internal memorandum which I annex hereto as annexure "NSM1."
>
> 20. I hasten to advise this Honourable Court that my transfer was approved on the above date without any conditions, apart from noting that the reason noted by Ms Mama in her non-recommendations should be forwarded to me."

[22] After making it clear that the approval of her transfer was without any conditions, applicant pleads a different case. That case now seems to be that there were three conditions which were recorded in annexure "NSM2." That annexure is a letter whose author is the same person, Mr Gxilishe, who is alleged to have approved the applicant's transfer unconditionally. The applicant in this instance explains how she met all the three conditions. The question that follows naturally from this contradiction is, is it the applicant's case that the approval was unconditional or is it that it was in fact subject to certain conditions which she met? All of this demonstrates the incorrectness of instituting motion proceedings in circumstances where a dispute of fact was apparent from the onset. In fact it is palpable even from the numerous correspondence that was exchanged between the parties. Those representing the applicant should have seen that the applicant's case needed the hearing of oral evidence and instituted the proceedings on that basis.

[23] The unsuitability of motion proceedings in a case where disputes of fact are apparent has been explained and restated over many decades since

Plascon Evans[8] which was decided almost 40 years ago. Even as recently as May 2023 the Supreme Court of Appeal saw the need to restate the applicable principles in *Cooper*[9] as follows:

> "[I]t must be acknowledged that '[m]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts' and, '[u]nless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.' Even if I were to accept that Curro's version is improbable in certain aspects, the matter is to be decided without the benefit of oral evidence. I, therefore, have to accept the facts alleged in Curro's answering affidavit 'unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers'. A 'finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence'. The test in that regard is 'a stringent one not easily satisfied'. The rationale for its stringency is this:
>
> > 'As everybody who has anything to do with the law well know, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswered charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[24] This matter is littered with palpable disputes of fact which cannot be resolved without the hearing of oral evidence. That too stands in the way of the determination of the alternative cause of action which was punted by applicant's counsel as some kind of a panacea to the fact that this Court may not have jurisdiction in respect of the review application. As indicated above, the jurisdictional difficulties even in respect of the alternative cause of action stubbornly refuse to go away. This is because the root cause of the

[8] Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 620.
[9] Cooper N.O and Another v Curro Heights Properties (Pty) Ltd (1300/2022) [2023] ZASCA 66 (16 May 2023) at paragraph 13.

applicant's problems is the manner in which her case has been pleaded even considered as a civil contractual claim. In fact the applicant's case is so poorly pleaded that it would be deserving of the not so often invoked dismissal fate provided for in Uniform Rule 6 (5) (g). This rule provides that:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision… ."

[25] The problems with the applicant's case, numerous as they are, are clearly less about the merits of her case, which cannot be properly determined at this stage but more about the manner in which it has been pleaded. I hold the view that dismissing her case either on the basis that this Court does not have jurisdiction or on the basis of the real and manifest dispute of fact would not be appropriate in this case. It would in fact be prejudicial to her in circumstances in which it might very well be that there is some merit in her case but for the manner in which it has been pleaded. However, lest I be misunderstood, I am in no way suggesting that there is any merit in her case, an issue that for the aforestated reasons, I cannot determine. That said, she is still deserving of being given an opportunity to do some serious relook at her pleadings and decide how best to plead her case.

[26] Besides, her application for condonation of the late filing of the review application, depending on the facts that may be pleaded, may very well have merit and may be granted. If that happens, her main relief may very well be determined one way or the other and thus bring the whole matter to finality. I therefore also do not consider it appropriate to refer the matter for the hearing of oral evidence either at this stage. It seems to me that doing so would be premature until the case itself is properly pleaded. Besides, even referral for the hearing of oral evidence would only be possible once the issue of jurisdiction is cleared with proper pleadings and the applicant's case is itself properly pleaded.

Costs

[27] Respondents' counsel did not insist on costs being paid by the applicant or even *de bonis propriis* in light of what has been said above. While there is nothing stopping this Court from ordering that costs be paid *de bonis propriis*, I will refrain from doing so on the basis that it looks like her legal representatives may have underestimated the depth of the issues involved when the papers were drafted. Respondents' counsel's submission was that instead of mulcting the applicant with costs in what is evidently not her fault, another dispensation for costs would be possible. His proposition, which is not without merit in the circumstances, is that the applicant's legal representatives should not be paid by her for their services for the costs of this hearing. I agree and in the exercise of my discretion I intend to make an appropriate order for costs. This brings me to the costs in respect of the hearing of the 26 April 2023. On that day the court file was in a terrible state with the papers not properly indexed and paginated. As a result the matter could not proceed. I directed that the applicant's attorneys must file an affidavit explaining why they should not be ordered to pay the wasted costs of the hearing on that day. They have filed the affidavit and their explanation is not implausible. Therefore, there shall be no order as to costs in respect of the 26 April 2023.

[28] In the result the following order shall issue:

<u>Order:</u>

1. The jurisdictional point in *limine* is upheld.
2. The matter is struck off the roll for lack of jurisdiction.

3. There shall be no order as to costs in respect of the reserved costs of the 26 April 2023.

4. The applicant shall not be required to pay her legal representatives for the costs of the hearing of the matter on 11 May 2023.

M. JOLWANA

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Adv. Nzuzo
Instructed by	Hexana Attorneys
For the Respondents:	Adv. Thys
Instructed by	State Attorneys