CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/20

In the matter between:

LOUISAH BASANI BALOYI	Applicant
and	
PUBLIC PROTECTOR	First Respondent
BUSISIWE MKHWEBANE	Second Respondent
CHIEF EXECUTIVE OFFICER IN THE OFFICE OF THE PUBLIC PROTECTOR	Third Respondent
VUSSY MAHLANGU	Fourth Respondent

Neutral citation:	*Baloyi v Public Protector and Others* [2020] ZACC 27
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Theron J (unanimous)
Decided on:	4 December 2020
Summary:	Labour Relations Act 66 of 1995 — section 157(1) — concurrent jurisdiction — unlawful termination

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal directly to this Court is granted only in relation to the High Court's holding on jurisdiction.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside.
4. The matter is remitted to the High Court to determine the merits and the costs of the first hearing.
5. The first respondent is ordered to pay the applicant's costs in this Court.

JUDGMENT

THERON J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Tshiqi J and Victor AJ concurring):

Introduction

[1] What this matter essentially raises for determination is whether the High Court has jurisdiction over an allegedly unlawful termination of a fixed-term contract of employment. The extent of the High Court's jurisdiction in respect of disputes arising in the employment setting is a vexed question on which courts and legal commentators

have long been divided. In a series of cases culminating in *Gcaba*,[1] this Court has provided guidance regarding the proper extent of the High Court's jurisdiction in relation to claims that arise in the labour context. While these judgments were specifically concerned with administrative law claims arising in the labour context, they nevertheless provide general principles to guide the determination of whether the High Court enjoys jurisdiction over a labour dispute. However, there continue to be varied approaches by the courts to when a matter falls within the exclusive jurisdiction of the Labour Court.

Background

[2] The applicant is Ms Louisah Basani Baloyi, the former Chief Operations Officer in the Office of the Public Protector, which is the first respondent. The Public Protector, Ms Busisiwe Mkhwebane, is cited in her personal capacity as the second respondent. The third respondent, Mr Vussy Mahlangu, is the Chief Executive Officer of the Public Protector. He is also cited in his personal capacity as the fourth respondent. Ms Baloyi seeks personal costs awards against Ms Mkhwebane and Mr Mahlangu.

[3] Ms Baloyi was employed by the Office of the Public Protector on a five-year contract with effect from 1 February 2019. The contract provided for a six-month probation period (ending on 31 July 2019), which could be extended for not more than twelve months. At the end of the probationary period, the Office of the Public Protector would be entitled to either terminate Ms Baloyi's employment in terms of clause 5.3 or confirm her appointment if it was satisfied with her "level of performance" in terms of clause 5.5.

[4] Ms Baloyi's six-month probation period ended on 31 July 2019. On 8 October2019, Ms Baloyi received a letter from Mr Mahlangu inviting her to make

[1] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); and *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693; 2002 (2) BCLR 113 (CC).

representations on the confirmation of her employment contract.[2] She did so in writing on 15 October 2019. On 21 October 2019, Ms Baloyi received a further letter from Mr Mahlangu, stating that the Office of the Public Protector was unable to confirm her permanent employment and that her contract would terminate on 31 October 2019. The reasons provided were that she was "not suitable for the role of COO taking into account her overall capability, skills, performance and general conduct in relation to the position".

[5] Ms Baloyi launched an urgent application in the High Court, Gauteng Division, Pretoria, on the basis that the termination of her employment was unlawful and that Ms Mkhwebane, in her capacity as the Public Protector, had not complied with her constitutional obligations in terms of section 181(2) of the Constitution. The alleged unlawfulness of the termination had two aspects: first, the termination amounted to a breach of contract and, secondly, it amounted to an exercise of public power that breached the principle of legality, a standard to which all exercises of public power are measured. Ms Baloyi founded her case on "contract, the Constitution and the Public Protector's public duties as an organ of state".[3]

[6] The relief sought by Ms Baloyi in the High Court was three-fold. Ms Baloyi approached the High Court seeking, first, a declaratory order that the decision to terminate her employment contract was unconstitutional, unlawful, invalid and of no force and effect and, secondly, flowing from that, an order setting aside the termination decision. Thirdly, Ms Baloyi sought a declaratory order to the effect that Ms Mkhwebane, in her official capacity, had failed to fulfil her obligations under section 181(2) of the Constitution.

[7] The High Court dismissed Ms Baloyi's application on the basis that it did not have jurisdiction over the dispute and that it should have been brought before the

[2] *Baloyi v Office of the Public Prosecutor* [2019] ZAGPPHC 993 (High Court judgment) at para 8.

[3] Id at para 17.

Labour Court. The High Court reasoned that Ms Baloyi's contention that her employment contract had been terminated unlawfully rested on the allegation that it was terminated contrary to the Policy on Probation and Disciplinary Policy of the Office of the Public Protector and was taken by an official without the necessary authority. It also attributed significance to the fact that Ms Baloyi's employment contract contained a clause stating that the employment relationship could be terminated at the end of the probationary period in accordance with the requirements of the Labour Relations Act (LRA).[4] The High Court also noted that Ms Baloyi's employment contract incorporated the Policy on Probation of the Office of the Public Protector, which stipulates that "following the recommendation to annul the appointment, Human Resource Division should take the necessary steps as per the provisions of the Labour Relations Act".

[8] The High Court concluded that not only did Ms Baloyi make allegations that in essence raised "a labour dispute as envisaged by the LRA", the employment contract itself "point(ed) to the LRA as the vehicle for vindicating the rights under it".[5] Relying on dicta from this Court's judgments in *Chirwa* and *Gcaba*, the High Court concluded that it was precluded from hearing the matter. The High Court did not consider whether the decision to terminate Ms Baloyi's employment was taken for an ulterior purpose, nor did it consider whether the conduct of the second respondent was otherwise unconstitutional insofar as it allegedly fell short of what is required by section 181(2) of the Constitution. It made no ruling regarding the declaratory relief.

[9] Ms Baloyi's application to the High Court for leave to appeal to the Supreme Court of Appeal was conditional on leave for direct appeal to this Court being refused. In this Court, she seeks a review of the decision to terminate her employment and an order for reinstatement (review relief). She also seeks a declaratory order that the second respondent violated her constitutional obligations under section 181(2) of the Constitution (declaratory relief). Ms Baloyi also challenges the High Court's finding

[4] 66 of 1995.

[5] High Court judgment above n 2 at paras 55 and 57.

that it did not have jurisdiction in relation to both the declaratory relief and the review relief (jurisdictional challenge).

Jurisdiction

[10] Ms Baloyi contends that this Court has jurisdiction to adjudicate on the merits of her application (concerning the review and declaratory relief) as well as her jurisdictional challenge. The respondents contend that this Court lacks jurisdiction in relation to both aspects. They submit that the jurisdictional challenge hinges on the interpretation of the applicant's pleadings in the High Court and that this turns on a question of fact insofar as the Court has been asked to determine which cause of action Ms Baloyi raised in her pleadings before the High Court. Furthermore, they argue that, even if the interpretation of pleadings were a "residual question of law", it would not raise a constitutional matter. The respondents submit further that this Court is also not called upon to interpret the LRA since the parties are *ad idem* as to the interpretation of the applicable statute and even the interpretation of the leading cases.

[11] Ms Baloyi's jurisdictional challenge turns on a question of law. Simply put, Ms Baloyi asks this Court to answer the following question: does section 157(1), read with section 157(2) of the LRA, extend the Labour Court's exclusive jurisdiction over an alleged unlawful termination of a fixed-term contract of employment? This raises a constitutional issue because it involves the interpretation of section 157(1) of the LRA, read with section 157(2). The interpretation of the LRA axiomatically raises a constitutional issue.[6]

[12] The declaratory relief sought calls for adjudication on whether Ms Mkhwebane, in her capacity as the Public Protector, has complied with her constitutional obligations and the review relief requires this Court to determine whether the Public Protector, who performs an essential constitutional function, has abused her power and, in doing so,

[6] *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (NEHAWU) at para 15.

breached the Constitution and the principle of legality. This Court's jurisdiction is therefore engaged in relation to the substantive relief sought by Ms Baloyi (comprising the review and declaratory relief) as well as her jurisdictional challenge.

Leave to appeal

[13] Should leave to appeal be granted in relation to either or both the jurisdictional challenge and the merits? In general, whether leave to appeal should be granted depends on a number of factors, including whether the matter raises only factual issues, the public interest in the matter and the applicant's prospects of success.[7] This Court has held that a direct appeal should similarly be allowed if it is in the interests of justice to do so, taking into consideration "whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success".[8]

[14] The respondents offer several reasons for why a direct appeal to this Court should not be entertained, including: that Ms Baloyi has not raised a legal issue, let alone a constitutional one; that this Court should have the benefit of a decision by the Supreme Court of Appeal; that Ms Baloyi's prospects of success are poor; and that in relation to the declaratory relief there are disputes of facts that are not capable of being resolved without the leading of oral evidence and which should not be resolved by this Court as a court of first and last instance.

The jurisdictional challenge

[15] At the outset, it must be noted that, in principle, it would be in the interests of justice to grant leave to appeal in relation to Ms Baloyi's jurisdictional challenge. The challenge raises an important constitutional issue, which this Court has yet to rule on.

[7] *S v Jacobs v* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at para 57.

[8] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 21.

It is also readily apparent that Ms Baloyi has reasonable prospects of success, taking into consideration the dicta from this Court weighing in her favour. In *Chirwa*, the majority of this Court stated that "the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations",[9] which directly contradicts the rationale underpinning the High Court's judgment and the respondents' submissions.

[16] There are also several factors that weigh in favour of granting Ms Baloyi leave to appeal directly to this Court in relation to her jurisdictional challenge. For example, the constitutional issue raised by Ms Baloyi's jurisdictional challenge has been answered by the Supreme Court of Appeal on a number of occasions,[10] but has not been expressly addressed by this Court.[11] This Court therefore has the benefit of judgments by the Supreme Court of Appeal on this issue.

The merits

[17] Ms Baloyi contends that a direct appeal in relation to the merits should be allowed because the matter has been fully ventilated on the papers, the papers contain sufficient facts to justify the relief sought and, finally, because the matter is urgent and a referral back to the High Court would lead to "unnecessary and unneeded delay". I disagree. The merits of Ms Baloyi's application were not ventilated in the High Court and Ms Baloyi's submissions on the urgency of these aspects of her application, while not entirely without merit, do not justify this Court adjudicating upon these issues as a

[9] *Chirwa* above n 1 at para 60.

[10] *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; 2019 JDR 1750 (SCA) at para 9; *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at paras 11 and 18; *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2*;* 2010 (3) SA 601 (SCA) (*McKenzie*) at para 7; *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144; 2010 JDR 1423 (SCA) at para 23; and *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (1) SA 49 (SCA) (*Fedlife*) at para 4.

[11] In *Fredericks*; *Chirwa*; and *Gcaba* (above n 1), this Court considered whether the High Court has jurisdiction over administrative law claims in the employment setting. In each of those cases, the claimant had not attempted to enforce contractual rights – he or she had attempted to enforce administrative-law rights. In the present application, this Court is asked to consider the High Court's jurisdiction over contractual claims arising in the employment setting.

court of first and last instance. This Court should not grant leave to appeal in relation to the merits.

[18] The respondents point out that, even if this Court were to entertain and uphold only the direct appeal on the jurisdictional challenge, that would only result in the matter being remitted to the High Court for adjudication on the merits. The argument continues that Ms Baloyi will therefore derive no practical or financial advantage from being granted direct leave to appeal in relation to the jurisdictional challenge only.

[19] It is true that if this Court were to entertain Ms Baloyi's appeal in relation to the jurisdictional challenge only, and find in her favour, she would be obliged to approach another court to take the matter further. But the respondents' submissions on this score ignore the fact that, if this Court refuses to adjudicate on the jurisdictional challenge, Ms Baloyi will have no option but to approach the Labour Court for an adjudication on the merits of her application. However, if this Court allows her jurisdictional challenge to proceed and finds in her favour, she will be at liberty to approach either the Labour Court, or the High Court, the forum she chose to approach in the first place. Moreover, the respondents have not shown that an order in relation to the jurisdictional challenge only would cause them any prejudice. The jurisdictional challenge will either be considered by this Court or, in the event that leave to appeal directly to this Court is refused, by the Supreme Court of Appeal, to which Ms Baloyi has applied for leave to appeal, conditional upon leave being denied by this Court.

[20] In sum, it is in the interests of justice to allow a direct appeal in relation to the jurisdictional challenge, but not to allow a direct appeal in relation to the merits. The merits of Ms Baloyi's application should be determined by a lower court once the jurisdictional challenge has been answered by this Court. Ms Baloyi's jurisdictional challenge involves an important constitutional issue on which this Court is well placed to make a determination and resolving the jurisdictional challenge now will likely save both parties time and costs.

Applicable legislative framework

[21] The crisp question that this Court is called upon to answer is whether the High Court erred in holding that it lacked jurisdiction to hear Ms Baloyi's claim. In assessing the merits of this conclusion, it is necessary briefly to outline the legislative framework that is relevant to the interplay between the respective jurisdictional bounds of the High Court and the Labour Court.

[22] The High Court has jurisdiction to adjudicate any matter, except those matters that: (i) fall within the exclusive jurisdiction of this Court in terms of section 167(4) of the Constitution; (ii) this Court has agreed to hear directly in terms of section 167(6); or (iii) have been assigned by legislation to another court with a status similar to that of the High Court.[12] The Labour Court, which the respondents contend is the proper forum to hear Ms Baloyi's claim, is designated as a court with a status similar to that of a High Court.[13]

[23] The legislation in terms of which an assignment would be made in the context of the present matter is the LRA.[14] Section 157(1) of the LRA provides for the exclusive jurisdiction of the Labour Court in all matters that – in terms of the LRA or other law – are to be determined by the Labour Court. In doing so, it fulfils one of the stated purposes of the LRA, which is to establish the Labour Court and the

[12] Section 169(1) of the Constitution reads:

> "The High Court of South Africa may decide—
>
> (a) any constitutional matter except a matter that—
>
> (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
>
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
>
> (b) any other matter not assigned to another court by an Act of Parliament."

[13] Section 151(2) of the LRA.

[14] For the reasons elucidated below, the other potentially relevant legislation in this context, the Basic Conditions of Employment Act 75 of 1997 (Employment Act), is not applicable in this matter.

Labour Appeal Court as superior courts, with "exclusive jurisdiction to decide *matters arising from the Act*".[15] Section 157(1) reads:

> "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."

Sections 68(1),[16] 77(2)(a),[17] 145[18] and 191[19] of the LRA proffer examples of matters that "are to be determined by" the Labour Court and are therefore, by virtue of section 157(1), within the exclusive jurisdiction of the Labour Court. This Court has found, moreover, that the High Court's jurisdiction in respect of employment-related disputes is ousted only where the dispute is one for which the LRA creates specific remedies, including, for example, unfair dismissal disputes.[20]

[24] Crucially, section 157(1) does not afford the Labour Court general jurisdiction in employment matters and, as a result, the High Court's jurisdiction will not be "ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations".[21]

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[15] Preamble to the LRA.

[16] Section 68(1) provides: "[i]n the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction [to grant certain interdicts and orders]".

[17] Section 77(2)(a) provides that furtherance of protest action that does not comply with the requirements for permissible protest set out in section 77(1), "[t]he Labour Court has exclusive jurisdiction to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action".

[18] Section 145(1) provides that parties alleging defects in any arbitration proceedings in the CCMA "may apply to the Labour Court for an order setting aside the arbitration award". Section 145(3) provides further that the Labour Court "may stay the enforcement of the award pending its decision" and section 145(4) provides for the powers of the Labour Court in the event that the award is set aside. See also *Gcaba* above n 1 at para 70.

[19] Section 186 of the LRA deals with unfair dismissals, which, in terms of section 191, must be referred to arbitration following a failed attempt at conciliation and which will ultimately be for review by the Labour Court. See also *Gcaba* at para 29.

[20] *Gcaba* above n 1 at para 73.

[21] *Fredericks* above n 1 at para 40. See also *Fedlife* above n 10 at para 25, in which Nugent JA held that "section 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees". The approach endorsed in *Fredericks* and *Fedlife*

[25] The Basic Conditions of Employment Act (Employment Act),[22] which constitutes one such "other law", echoes the provisions of section 157(1) of the LRA in its section 77(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."

[26] By virtue of section 157(1), the Labour Court will enjoy exclusive jurisdiction over any matter "in terms of" the Employment Act. Matters governed by or concerning the enforcement of a provision of, the Employment Act accordingly fall within the ambit of the Labour Court's exclusive jurisdiction. The Labour Court and the Labour Appeal Court have held on a number of occasions that "the provisions of section 77(1) do no more than confer a residual exclusive jurisdiction on the Labour Court to deal with those matters that the [Employment Act] requires to be dealt with by the court".[23]

[27] However, both the LRA and the Employment Act expressly recognise that there are certain matters in respect of which the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

> "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) . . .
>
> (c) . . . ."

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was also followed in various judgments of the High Court, including *Jacot Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T) at 600E-G and *Runeli v Minister of Home Affairs* 2000 (2) SA 314 (TkH) at 323-4.

[22] 75 of 1997.

[23] See *Lewarne* above n 10 at para 7.

[28] Section 77(3) of the Employment Act provides, similarly, that 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 condition of employment constitutes a term of that contract". That disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the Employment Act, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1)—

> "does not prevent any person relying upon a provision of [the Employment 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."

[29] It is plain from these sections that the parameters of the scope of the exclusive jurisdiction of the Labour Court is not cast in Manichean terms. Section 157(1) of the LRA does not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction. It only provides that they are to be found elsewhere in the Act. In some instances, their location is clear: for example, sections 68(1), 77(2), 145 and 191. In others, it is left to the courts to determine whether a matter is one that arises in terms of the LRA and is, in terms of that Act, or another law, to be determined solely by the Labour Court.

[30] The reason for this delineation is that the Labour Court and the Labour Appeal Court were "designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining".[24] While accepting that section 157(1) does not confer exclusive jurisdiction on the Labour Court in every employment-related matter, this

[24] *Motor Industry Staff Association v Macun N.O.* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) at para 20.

Court, in *Chirwa*, made it clear that the Labour Court and other specialist tribunals created under the LRA are uniquely qualified to handle labour-related disputes:

> "The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolutions mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes."[25]

[31] The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of section 77(3) of the Employment Act and section 157(2) of the LRA adds to, rather than diminishes, their jurisdiction.[26] In doing so, it affords litigants an additional right to approach either court where a dispute falls within the ambit of those sections.

[32] In order to determine whether the High Court lacked jurisdiction to adjudicate Ms Baloyi's claim, it is necessary to determine whether the claim is of such a nature that it is required, in terms of the LRA or the Employment Act, to be determined exclusively by the Labour Court.

The nature of Ms Baloyi's claim

[33] In *Gcaba*, this Court made clear that an assessment of jurisdiction must be based on an applicant's pleadings, as opposed to the substantive merits of the case. It held:

> "In the event of the Court's jurisdiction being challenged . . . the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks 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

[25] *Chirwa* above n 1 at para 47.

[26] *Gcaba* above n 1 at para 71; *Motor Industry Staff Association* above n 23 at para 20; *Mbayeka v The MEC For Welfare, Eastern Cape* 2001 JDR 0017 (TkH) at para 19.

> 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."[27]

[34] Ms Baloyi contends that the cause of action underlying the review relief flows from both public law and contract. The contractual basis for the review relief is that her contract was terminated out of time, well after her probation period had ended and in conflict with its terms relating to termination. In particular, she points out that her contract made it clear that, if the employer neither confirmed, nor terminated her contract at the end of the stipulated probation period, the appointment would be deemed to be confirmed. She also notes that certain policies of the Office of the Public Protector, which were incorporated into her contract by reference, were not complied with.

[35] The public law basis for the review relief has two parts. The first is that Mr Mahlangu lacked the requisite statutory authority to terminate Ms Baloyi's employment. The second is that the decision to terminate her employment was made *mala fide*, with an ulterior motive and contrary to the stated employment policies of the Office of the Public Protector. In short, Ms Baloyi alleges that her employment was terminated because Ms Mkhwebane and Mr Mahlangu wanted to "get rid of" her after she raised concerns about their "unlawful and deeply concerning" conduct.

[36] Finally, the constitutional aspect, which is the basis for the declaratory relief, is Ms Mkhwebane's alleged non-compliance with the obligations imposed on her office by section 181(2) of the Constitution. She submits that the abovementioned instances of unlawfulness and/or unconstitutionality clearly generate a cause of action wholly independent of the LRA. The High Court judgment expressly acknowledges that Ms Baloyi disavowed any reliance on her rights under the LRA.

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[27] *Gcaba* above n 1 at para 75.

The competence of the High Court to hear Ms Baloyi's claim

[37] The High Court held that the matter is essentially a labour dispute arising from an employment relationship that falls within the Labour Court's exclusive jurisdiction. For the reasons that follow, the High Court erred in reaching this conclusion.

[38] It is trite that the same set of facts may give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued is prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly. Had Ms Baloyi sought to pursue a claim of unfair dismissal, she would have been required, in terms of section 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court.

[39] Crucially, however, where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so. Put differently, the fact that a cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that particular cause of action. The respondents cite the dictum of the Labour Appeal Court that "[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established under the LRA for their resolution".[28] In this case, they submit that, because Ms Baloyi has a claim meeting the definitional requirements of an unfair labour practice or unfair dismissal claim, she is obliged to pursue that claim in the Labour Court. In this regard, the respondents also place reliance on this Court's statement in *Steenkamp*[29]

[28] *Hendricks v Overstrand Municipality* [2014] ZALAC 49*;* (2015) 36 ILJ (LAC) at para 30.

[29] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC).

that "[a] cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanism of the LRA to obtain a remedy provided for in the LRA".[30]

[40] The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right). The following dictum of the Supreme Court of Appeal in *Makhanya*,[31] which squarely addressed a contractual cause of action in the employment context, is apposite in this regard:

> "The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices. . . . Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract.
>
> When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."[32]

[41] The approach endorsed in *Makhanya* aligns with a series of judgments from the Supreme Court of Appeal that have confirmed that a contractual claim arising from

[30] Id at para 137.

[31] *Makhanya* above n 10. See also *Gcaba* above n 1 at para 73.

[32] *Makhanya* above n 10 at paras 11 and 71.

breach of a contract of employment falls within the ordinary jurisdiction of the High Court, notwithstanding the fact that the contract is one of employment.[33]

[42] Finally, it is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action.[34] When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the court's competence to hear the matter.

[43] In this matter, the High Court based its finding on a holistic assessment of whether the dispute was located "within the compass of labour law" instead of determining whether the *specific causes of action* relied on by Ms Baloyi fall within the jurisdiction of the High Court or the Labour Court (or both). This approach is based on a misinterpretation of this Court's judgment in *Chirwa,* where it was expressly found that the jurisdiction of the High Court is not ousted merely because a dispute falls within the sphere of employment relations.[35]

[44] The exclusive jurisdiction of the Labour Court is engaged where legislation mandates it, or where a litigant asserts a right under the LRA or relies on a cause of action based on a breach of an obligation contained in that Act. As held in *Gcaba*, disputes that fall within the exclusive jurisdiction of the Labour Court are "labour and employment-related disputes for which the LRA creates specific remedies".[36] The corollary of a litigant's reliance on an LRA *right* is, of course, reliance on an LRA *remedy*.

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[33] *Lewarne* above n 10 at para 9; *McKenzie* above n 10 at para 7; *Manana* above n 10 at paras 11-3; *Fedlife* above n 10 at paras 4-5 and 24.

[34] *Gcaba* above n 1 at 75. See also *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

[35] See *Chirwa* above n 1 at para 60.

[36] *Gcaba* above n 1 at para 73.

[45] In sum, the mere fact that a dispute is located in the realm of labour and employment does not exclude the jurisdiction of the High Court. As this Court held in *Gcaba*:

> "[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. . . . If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because 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."[37]

[46] Indeed, contractual rights exist independently of the LRA. As the Supreme Court of Appeal has on numerous occasions emphasised, section 23 of the Constitution does not deprive employees of a common law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for "unfair dismissal" provided for in the Act.[38] Chapter VIII of the LRA is "not exhaustive of the rights and remedies that accrue to an employee upon termination of a contract of employment".[39]

[47] Matters "concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract", are expressly noted in section 77(3) of the Employment Act as falling within the *concurrent* jurisdiction of the High Court and the Labour Court. The question whether contractual claims arising from employment contracts fall within the concurrent jurisdiction of the High Court and the Labour Court has not explicitly arisen before this Court. However, as noted above, the Supreme Court of Appeal has explained on numerous occasions, with reference to the reasoning of this Court regarding jurisdiction over claims based on administrative action in the labour sphere, that the High Court retains its jurisdiction in respect of

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[37] Id.

[38] See cases mentioned above n 10.

[39] *Fedlife* above n 10 at para 22.

claims arising from the enforcement of contractual rights in the employment context.[40] This finding is borne out by the plain language of section 77(3) of the Employment Act, quoted above, and sections 157(1) and 157(2) of the LRA.

[48] A claim for contractual breach, absent reliance on any provision of the LRA, can be identified on Ms Baloyi's papers. The LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof. While she may also have a claim for unfair dismissal in terms of the LRA, Ms Baloyi has elected not to pursue this claim. Nothing in the LRA, or the Employment Act, required her to advance that claim in the Labour Court.

[49] The High Court did not consider the public law basis for the review relief: that is, the claim that Mr Mahlangu lacked the requisite statutory authority to terminate Ms Baloyi's contract of employment and the claim that the termination decision was made in bad faith for the ulterior purpose of furthering nefarious political objectives.[41] The High Court also did not consider Ms Baloyi's request for declaratory relief based on Ms Mkhwebane's alleged flouting, in her capacity as the Public Protector, of her constitutional duties. However, Ms Baloyi's pleadings before this Court militate against the conclusion that the High Court was not competent to adjudicate on those aspects. As pleaded, neither of these claims fall within the exclusive jurisdiction of the Labour Court, in terms of section 157(1) of the LRA.

[50] The High Court erred in dismissing Ms Baloyi's application on the basis that it was "essentially a labour dispute" and that its jurisdiction was not engaged. Accordingly, her appeal against the High Court's finding on jurisdiction must be upheld

[40] See, for example, *Makhanya* above n 10 at paras 12-13 and 18; *Fedlife* id; *Manana* above n 10 at para 23; and *McKenzie* above n 10 at paras 7-9.

[41] It is pertinent to note that, while the High Court did not address this claim, it did note, at para 46 of its judgment, that the allegation that Ms Baloyi's employment contract was terminated for ulterior motives was distinct from the other claims, which were "essentially labour disputes".

and the matter be remitted to the High Court, Gauteng Division, Pretoria for a hearing *de novo*.[42]

Costs

[51] It is trite law that costs are awarded to the successful party, subject to certain limited exceptions.[43] The purpose underlying this principle is to indemnify the successful litigant against the expenditure incurred as a result of "having been unjustly compelled to either initiate or to defend litigation as the case may be".[44] Ms Baloyi has been successful in relation to her jurisdictional challenge and her costs should therefore be paid by the first respondent. Though Ms Baloyi has sought personal costs against the second respondent, she has not advanced any reasons for why a personal costs order would be appropriate in the circumstances.

[52] For these reasons, the following order is made:

1. Leave to appeal directly to this Court is granted only in relation to the High Court's holding on jurisdiction.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the High Court of South Africa, Gauteng Local Division, Johannesburg is set aside.
4. The matter is remitted to the High Court to determine the merits and the costs of the first hearing.

[42] A hearing *de novo* refers to a hearing where the matter is re-heard as if for the first time. No regard will be had to any of the prior findings made by the court in relation to the matter.

[43] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) at para 155.

[44] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 14, citing *Texas Co. SA Ltd v Cape Town Municipality* 1926 AD 467 at 488.

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