THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20810/2014

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**FIRST APPELLANT**
SAMUEL MOLOPE	**SECOND APPELLANT**
JOHN DLAMINI	**THIRD APPELLANT**
LORRAINE BAITSIWE	**FOURTH APPELLANT**
WALTER THELEDI	**FIFTH APPELLANT**
MOSES MIYA	**SIXTH APPELLANT**

And

MOHAU WILLIAMS MOKGATLA	**FIRST RESPONDENT**
NOMFEZO MDINGI	**SECOND RESPONDENT**
DION MAKHURA	**THIRD RESPONDENT**
PHUMLILE SHANGE	**FOURTH RESPONDENT**
SELLO SELEPE	**FIFTH RESPONDENT**
LANCE VEOTTE	**SIXTH RESPONDENT**
ZAKHELE KHUMALO	**SEVENTH RESPONDENT**
WYCLIFF MABUSELA	**EIGHTH RESPONDENT**
KENNEDY NKOSI	**NINTH RESPONDENT**
KGOSI MAKWATI	**TENTH RESPONDENT**
THABISILE MANQELE	**ELEVENTH RESPONDENT**
NTOKOZO NZUZA	**TWELFTH RESPONDENT**
MAMPETI MALETE	**THIRTEENTH RESPONDENT**

Neutral Citation: *SAMWU v Mokgatla* (20810/2014) [2016] ZASCA 24 (18 March 2015).

Coram:	Maya AP, Wallis, Mbha, Dambuza and Mathopo JJA
Heard:	**18 February 2016**
Delivered:	**18 March 2016**

Summary: Labour Law – concurrent and exclusive jurisdiction of the Labour Court and the High Court – dispute based on non-adherence to disciplinary procedures provided in the constitution of a trade union – s 158(1)*(e)* of the Labour Relations Act 66 of 1995 – matter within exclusive jurisdiction of the Labour Court.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Vally J, sitting as court of first instance):

1 The appeal succeeds with costs.
2 The order of the high court is set aside and is replaced with the following:
'The application is dismissed with costs.'

JUDGMENT

Dambuza JA (Maya AP, Wallis, Mbha and Mathopo JJA concurring):

[1] The issue for determination in this appeal is whether the High Court and the Labour Court have concurrent jurisdiction in respect of disputes emanating from s 158(1)*(e)* of the Labour Relations Act 66 of 1995 (LRA). The appeal comes before us with leave of the Gauteng Local Division of the High Court, Johannesburg (Vally J). It lies against its judgment declaring unlawful and setting aside the suspension and expulsion of the respondents from their membership and employment with the first appellant, the South African Municipal Workers Union (SAMWU).[1] The court a quo dismissed a special plea raised by the appellants, that it lacked jurisdiction to consider the application by the respondents for their reinstatement to SAMWU.

[2] The second to sixth appellants (appellants) were national office bearers of SAMWU, whilst the 13 respondents and 3 others (together the 16 applicants in the court a quo) were its provincial office bearers.[2] During 2012 and 2013 a suspicion arose amongst certain members of SAMWU, including the respondents, that the appellants were involved in acts of financial mismanagement, corruption and misappropriation of SAMWU's funds. The suspicion was triggered by the failure of

[1] Some of the respondents were expelled whilst others had their membership suspended.
[2] Some of the letters of suspension specify the positions held by the members concerned, others do not.

SAMWU's finance committee to provide financial reports for the year 2013. The allegation was that the root cause of the problem was the failure by the appellants to provide the necessary financial information, including records of their expenditure. The allegations of corruption resulted in a meeting of SAMWU's Central Executive Committee (CEC) being convened in April 2014. At that meeting, a motion was proposed that the appellants be removed from office. However no resolution was passed on the issue. A decision was postponed pending consultation, by provincial office bearers, with their constituencies. It is whilst the motion stood postponed that the respondents were removed from office by the appellants. The reasons given for the suspension and expulsion of the respondents were that they had spread malicious information about, were 'unruly' or disruptive towards, and 'undermined' the national office bearers.

[3] The respondents then brought an application, in the court a quo, challenging their removal. They contended that the prescribed disciplinary procedures, particularly clauses 3.5.3, 6.5.6, 7.3.9 and 16.4 of SAMWU's constitution, were flouted when the decision to remove them from office was taken.[3] In opposing the application for reinstatement, the appellants raised, inter alia, a point *in limine* that in terms of s 157(1) of the LRA the High Court lacked jurisdiction to hear the application.

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[3] The relevant clauses of the SAMWU constitution provide:
'3.5.3 Members may be expelled or suspended from membership through a decision in terms of a disciplinary procedure of the union in section 16 of this constitution.
. . .
6.5.6 One or more of the elected office bearers may be removed from office in the event that a majority of the Council voting by ballot should so decide. A motion to institute such ballot shall be passed by at least 20 per cent of those entitled to vote. Both ballots must be preceded by full motivation.
. . .
16.4 Discipline of Executive Committee Members
16.4.1 A [Regional Executive Committee] or [Provincial Executive Committee] and the [National Executive Committee] shall have the right to censure its members verbally or in writing in any meeting or suspend such member for the duration of the meeting and to institute a disciplinary hearing by the [Provincial Disciplinary Committee].
16.4.2 Such committees may if it considers it necessary suspend such member from further participation in its meetings pending the outcome of such hearing.
16.4.3 The [Provincial Disciplinary Committee] may determine to exercise any of the measures set out in 16.2.4 or 16.2.6 or 16.3.3.
16.4.4 A person so disciplined shall have the right to appeal to the [National Disciplinary Committee].
16.4.5 In any case referred to the [Provincial Disciplinary Committee] by any of the above structures the structure shall have the right to have two of their members to present their case.'

[4] In dismissing the special plea of lack of jurisdiction, the court a quo accepted that s 157(1) confers exclusive jurisdiction on the Labour Court in respect of matters that, in terms of the LRA or any other law, are to be determined by the Labour Court. However, the learned judge found that s 158(1)*(e)*(i) affords litigants a choice of fora in which to bring disputes arising from non-compliance with the constitution of a trade union. The learned judge classified such disputes as founded in both common law and the LRA, and found that the latter did not deprive litigants of the right to approach the High Court to assert their common law rights. In the court a quo the respondents had disavowed any reliance on s 158(1)*(e)* of the LRA. They contended that their case was founded on their common law right to enforce the provisions of the constitution of the trade union. In finding that the enforcement of the provisions of the constitution of the trade union was a purely common law issue, the judge a quo relied on a long line of judgments, including *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (1) SA 49 (SCA); *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 ILJ 1957; [2005] 12 BLLR 1169 (SCA); *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA); *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113; (2002) 23 *ILJ* 81 and *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC).

[5] Prior to the hearing of this appeal, the attention of the parties was drawn, through the Registrar of this court, to a judgment of this court in *Motor Industry Staff Association v Macun NO & others* [2015] ZASCA 190; (2016) 37 ILJ 625; [2016] 3 BLLR 284 (SCA) which was handed down on 30 November 2015. In response to the Registrar's letter, the appellants' attorneys advised that the appellants persisted with the appeal and that they intended to ventilate the issues fully for various reasons, including alleged attempts by the respondents to enforce the order of the court a quo. Before us, Mr Raath who appeared on behalf of the appellants, asserted that the jurisdictional issue remained live for determination; that the respondents had not abandoned the judgment granted in their favour by the court a quo; that the jurisdictional issue as considered by this court in *Macun* was distinguishable from that raised in this appeal; and that the appellants had incurred a considerable amount of costs in this matter.

[6] The respondents did not appear before us. Mr Raath handed up, from the bar, a letter dated 13 August 2015 from the respondents' erstwhile attorneys, Mathopo Attorneys, who withdrew as the respondents' attorneys of record on 30 November 2015. In that letter Mathopo Attorneys advised that the respondents had decided to terminate their membership with SAMWU. They would therefore not be participating in the appeal. According to the letter, the respondents' stance was motivated by:

'the appellants' previous conduct of not complying with court orders and having proceeded to convene provincial congresses to elect new leadership without inclusion of the respondents. Furthermore the respondents [had] taken the view that it would not be in the interests of justice to pursue this [appeal] as the judgment [would be] academic and of no use to both parties'.

The respondents' attorneys thus proposed that all pending matters between the parties be withdrawn, and that each party pay its own costs.

[7] I agree with the submission on behalf of the appellants that the judgment and order of the court a quo remains extant, with definite legal consequences.[4] The contents of the letter from Mathopo Attorneys does not constitute an abandonment of the order granted in favour of the respondents. For these reasons the appeal remains live before us.

[8] In *Macun*, the appellant had contended that in terms of s157(2) of the LRA the High Court enjoyed concurrent jurisdiction with the Labour Court to consider a challenge, by way of review proceedings, to the extension to non-parties of a bargaining agreement concluded in terms of s 66 of the LRA. The argument was that the Minister of Labour, in purporting to extend the collective agreement to non-parties, acted beyond the powers conferred upon her in terms of s 32 of the LRA. The challenge to the decision of the Minister was thus based on the principle of legality in respect of which it was argued that both the Labour Court and the High Court had jurisdiction. In rejecting that argument this court held that the protections, both procedural and substantive, that relate to collective bargaining are sourced in the LRA. The High Court therefore lacked jurisdiction.

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[4] For example, the respondents may still institute a claim for damages for their proved wrongful and unlawful dismissal based on the judgment of the court a quo. See in that regard, *Mathews & others v Young* 1922 AD 492.

[9] Subsections 157(1) and (2) of the LRA provide the following:

'(1) 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.

(2) 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.'

[10] Section 158(1) of the LRA provides for the 'Powers of the Labour Court' in the following terms:

(1) The Labour Court may–

(a) make any appropriate order, including–

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in *this Act*;

(vi) an award of damages in any circumstances contemplated in *this Act*; and

(vii) an order for costs;

(b) order compliance with any provision of *this Act* or any *employment law*;

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a *dispute* between a registered *trade union* or registered *employers' organisation* and any one of the members or applicants for membership thereof, about any alleged non-compliance with-

(i) the constitution of that *trade union* or *employers*' *organisation* (as the case may be); or

(ii) section 26(5)*(b)*;

(f) subject to the provisions of *this Act*, condone the late filing of any document with, or the late referral of any *dispute* to, the Court;
(g) subject to s 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;
(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;
(i) hear and determine any appeal in terms of s 35 of the Occupational Health and Safety Act . . . (Act 85 of 1993); and
(j) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.'

[11] While ss 157(1) and (2) relate, broadly, to the jurisdiction of the Labour Court, s 158(1) both lists specific remedial powers[5] and provides substantive jurisdictional bases of that court.[6] It is apparent from the judgment of the court a quo that when considering the issue of jurisdiction, the learned judge compared the wording: ' … *are* to be determined by the Labour Court', in s 157(1), with: 'The Labour Court *may* …' in s 158(1). He then concluded that as a result of the word 'are' in s 157(1), the provisions of that section preclude the jurisdiction of the High Court, while the effect of the word 'may' in s 158(1) is to 'afford [litigants] the opportunity to take their disputes to the Labour Court, but that does not mean that that forum is the only one that can grant them the remedy they seek'. He thus found that the two courts enjoy concurrent jurisdiction under s 158(1)*(e)*(i). The same approach was adopted by Koen J in *Value Line CC & others v Minister of Labour & others* (2013) 34 ILJ 1404 (KZP), wherein the learned judge concluded that s 158(1)*(g)* did not provide for matters of substantive jurisdiction and that the jurisdiction of the High Court was therefore not excluded in matters provided for thereunder.

[12] But, what the court a quo missed, as did the court in *Value Line,* are the fundamental guiding principles underlying the determination of the jurisdiction of the respective courts over disputes provided for under the LRA. These were laid down by the Constitutional Court in *Chirwa v Transnet Ltd & others* [2007] ZACC 23; 2008 (4) SA 367 (CC) and *Gcaba* (above). In para 123 of *Chirwa* the Constitutional Court said:

[5] S 158(1)*(a),(b)(c)(d)* and *(f)*.
[6] S 158(1)*(e)* and *(g)*.

'While s 157(2) remains on the statute book it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of s 157(2) and harmonise them with those of s 157(1) and the primary objects of the LRA is to give s 157(2) a narrow meaning. The application of s 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This, of course, is subject to the constitutional principle that we have recently reinstated, namely, that "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard"'. (Footnote omitted.)

[13] And in *Gcaba*, the Constitutional Court held the following in para 56:

'. . . another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees'. (Footnotes omitted.)

[14] In *Macun*, this court lamented the persistent attempts by practitioners to fashion cases to suit their clients' choice of forum. Navsa JA emphasised that s 157(2) must be narrowly construed in the light of the primary objectives of the LRA to establish a comprehensive framework regulating labour relations.[7] In relation to s 158(1)*(g)*, the learned judge found that the relevant question in determining whether the Labour Court's jurisdiction was exclusive depended on whether it was a

[7] Paragraph 18.

review of the exercise of a power under the LRA. In other words, did the case fall within s 158(1)*(g)?* If so, the Labour Court's jurisdiction was exclusive. The same principle is applicable here. If the case falls within s 158(1)*(e)*(i), as it does, then the jurisdiction of the Labour Court is exclusive.[8] The decision in *Macun* is therefore decisive of the outcome of this appeal. There is no reason to differentiate between one ground of jurisdiction under s 158(1) and another.

[15] In this case the respondents specifically pleaded in their application before the court a quo that the appellants should have complied with the relevant clauses of SAMWU's constitution. Therefore the basis upon which the High Court's jurisdiction was challenged is expressly provided for in s 158(1)*(e)*(i) of the LRA. The disavowal by the respondents, during argument, of any reliance on the LRA is irrelevant. As the Constitutional Court held in *Gcaba,*[9] jurisdiction is determined on the basis of the pleadings. Consequently the appeal must succeed.

[16] I do not think that this case warrants that the appellant be awarded the costs of two counsel.

[17] The following order is accordingly made:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and is replaced with the following:

'The application is dismissed with costs.'

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N DAMBUZA

JUDGE OF APPEAL

[8] Paragraph 23.

[9] Paragraph 75.

APPEARANCES:

For the Appellant:	R J Raath SC (with him R Venter)
Instructed by:	Maenetja Attorneys, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein
For the Respondent:	No appearance