FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES:

ERIC THOBILE MDYESHA **APPLICANT**

And

THE MINISTER OF SAFETY & SECURITY **FIRST RESPONDENT**

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES **SECOND RESPONDENT**

THE PROVINCIAL COMMISSIONER (EASTERN CAPE) OF THE SOUTH AFRICAN POLICE SERVICES **THIRD RESPONDENT**

- Case Number: **1455/07**
- High Court: **SOUTH EASTERN CAPE LOCAL DIVISION**

Date Heard: **31 July 2007**

Date Delivered:

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES-

Appearances:

- Applicant(s): **Adv De Lange**
- Respondent(s): **Adv Gqamana**

Instructing attorneys:

- Applicant(s): **Anne Swanepoel Attorneys**
- Respondent(s): **State Attorneys**

CASE INFORMATION –

- *Nature of proceedings :* **Application for re-instatement**

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: **1455/07**

In the matter between:

ERIC THOBILE MDYESHA

APPLICANT

and

THE MINISTER OF SAFETY & SECURITY **FIRST RESPONDENT**

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES **SECOND RESPONDENT**

THE PROVINCIAL COMMISSIONER (EASTERN CAPE) OF THE SOUTH AFRICAN POLICE SERVICES **THIRD RESPONDENT**

JUDGMENT

DAMBUZA J:

1. The applicant seeks an order re-instating his employment with the Department of Safety and Security (the department) with immediate effect. He also seeks an order that the respondents pay the costs of this application. The application is brought on an urgent basis.

2. The applicant has cited the Minister of Safety and Security (first respondent), the National Commissioner of the South African

Police Services (SAPS) (second respondent) and the Provincial Commissioner of the SAPS in the Eastern Cape Province (third respondent). The application is opposed.

3. The background to the application is that the applicant's employment with the department was terminated following a disciplinary hearing held in Mthatha during October 2006. Subsequent to his dismissal from the department on 9 November 2006, the applicant lodged an appeal on 17 November 2006 against the decision to dismiss him from his employment with the department. During March 2007, whilst the appeal against the applicant's dismissal was still pending, the applicant launched proceedings in the Labour Court, challenging his dismissal and seeking an order that his services with the department be reinstated. In April 2007 this court ordered that the applicant's salary and benefits attaching to his employment with the department be re-instated pending finalization of the appeal. The order was granted pursuant to another application instituted by the applicant against the three respondents. On 17 July 2007 the applicant instituted these proceedings.

3. This application is founded on the delay or failure by the department to finalize the appeal lodged by the applicant in November 2006. the applicant contends that as a result of this delay he in finalizing the appeal has and continues to result in gross infringement of the applicant's fundamental rights to human dignity, fair labour practices and just administrative action, all entrenched in the Constitution of South African Act, Act 106 of 1996 (the Constitution). The applicant also contends that in terms of South African Police Services Regulation 17 (9) his

appeal should have been finalized within 30 days from the lodgement thereof he is entitled, as the 30 days period lapsed some time ago, to resume his duties with the department.

4. In opposing the application the respondents raise a number of points in *limine.* The first one is that for various reasons this court lacks the necessary jurisdiction to entertain this application. The respondents also plead misjoinder in respect of the third respondent and non-joinder of the Divisional Commissioner: Training in Pretoria under whose direct authority or control the applicant falls. It is also the respondents' contention that the matter is not urgent and that in any event the applicant seeks the same relief in this application as he does in the labour court; the matter is therefore pending before the labour court (*lis pendens).* The applicant has not filed any replying affidavit and the issues raised in the respondents' answering affidavit were dealt with by Mr de Lange who appeared on behalf of the applicant, during argument.

5. As regards to merits of the application the respondents contend that the application was launched prematurely as the 30 day period envisaged under Regulation 17 (9) *(supra)* had not lapsed on the date of institution of this application.

<u>JURISDICTION</u>:

6. The respondents contend that Regulation 17 (9) whose interpretation is under consideration in these proceedings was issued in terms of a collective agreement concluded between the department and the employees' unions, SAPU and POPCRU.

Clause 3 of this agreement, so the argument goes, prescribes that a dispute pertaining to interpretation of the agreement shall be referred to the Safety and Security Sectoral Bargaining Council (SSSB) for resolution. Consequently, the correct forum for resolution of the dispute between the parties is SSSB.

7. Mr De Lange submitted on behalf of the applicant, that the agreement to refer disputes relating to the agreement and the Regulation to SSSB does not oust the jurisdiction of this court on issues pertaining to fundamental rights protected under the Constitution. Clause three of this agreement states that:

"If there is a dispute about the interpretation or application of this agreement, any party may refer the matter to the Council for resolution in terms of the dispute resolution procedure of the Council." In terms of Section 169 of the Constitution of the Republic of South Africa Act, Act 208 of 1996 (the Constitution) a High Court may decide any constitutional matter except (a) a matter that only the Constitutional Court may decide, and (b) a matter which is assigned by an Act of parliament to another court of similar status to a High Court. The matters which only the Constitutional Court may decide are set out in Section 167 (4) of the Constitution. The issues under consideration in this case do not fall within the category of matters assigned exclusively to the Constitutional Court under Section 167 (4) of the Constitution. It has further been held that although cases involving labour issues are specifically assigned to the Labour Court, where issues to be determined include that:

"In order to show . . . fair labour practice, human dignity and just

administrative action, the High Court retains its jurisdiction. Generally there is a string action. See: Sections 23, 10, 33 of the Constitution. Presumption against the ouster or contailment of the Court's jurisdiction. Even the mere fact that the Legislative may have created an extra-judicial remedy is not conclusive of the question whether the court's power has been restricted. It is in every case necessary to consider all the circumstances and then to determine whether a necessary implication arises that the court's jurisdiction is either wholly excluded or at least deferred until the domestic or extra-judicial remedies have been exhausted. See: Savis v Workmens' Compensation Commissioner 1995 (3) SA 689 (C) at 696F.

"Whenever domestic remedies are provided by the terms of a Statute, regulation or conventional association, it is necessary to examine the relevant provisions in order to ascertain how far, if at all, the ordinary jurisdiction of this court is thereby excluded or deferred. See: Welkom Village Management Board v Leteno 1958 (1) SA 490(A).

8. Applying the aforegoing principle to this case the applicant's main complaint is a delay in the dispute resolution system provided for by the regulations issued in terms of the agreement. I am unable to find any implication that the ordinary jurisdiction of the Court can or should be excluded in these circumstances.

The respondents also contend, however, that this Court lacks jurisdiction retains its jurisdiction in respect of constitutional matters. Consequently, the respondents' special plea of jurisdiction based cannot succeed on this point.

9. It was submitted on behalf of the respondents that the cause of action arose outside the area of jurisdiction of this court and the respondents have no principal place(s) of businesses within the area of jurisdiction of this court. Section 19 of the Supreme Court Act, Act 59 of 1959 provides that:

"(1) (a) A provincial or local division (TO CHECK) . . . cognisance . . .

(b) A provincial or local division (TO CHECK). . . or local division."

10. In terms of the Supreme Act as amended (See: Section 4 of the Interim Rationalisation of Jurisdiction of High Courts Act, Act 41 of 2001) the area of jurisdiction of the South Eastern Cape Division comprises of the magisterial districts of Port Elizabeth, Kirkwood, Uitenhage, Hankey, Humansdorp, Jourbertina and Steytlerville.

11. It was common cause during argument and it appears from the papers that the applicant was employed in Mthatha and that the disciplinary proceedings were held in Mthatha. Mr de Lange strenuously argued that over the period during which the applicant remains suspended, the respondents (or the department) exercise their authority over him in Port Elizabeth where he now resides. I have difficulty in comprehending the relevance of this submission. It is in conflict with the well established principle *actor sequitar forum rei.* The applicant, being the act, had to institute proceedings out of the court in which the respondents "reside" or in which the cause of action arose. Even if the department exercised control over the

applicant in Port Elizabeth, exercise of such control did not, in my view constitute a *"cause of action"* for the purposes of determining the court's jurisdiction in terms of Section 19 (a) of the Supreme Court Act. Neither does the place where the applicant was when the decision was communicated to him. The cause of action having arisen in Mthatha and there being no allegation on the papers that the respondents or any one of them reside(s) within the area of jurisdiction of this court it seems to me that this court indeed lacks jurisdiction in this matter. For this reason alone this application falls to be dismissed.

12. Mr de Lange's submission that the respondents' failure to object to jurisdiction of this court in the application instituted in April 2007 constituted consent to the jurisdiction of this court and that consequently, the respondents are now estopped from pleading lack of jurisdiction takes the matter no further. The fact that a court has jurisdiction in respect of certain legal proceedings does not confer jurisdiction on such court in respect of other legal proceedings. See Leibowitz t/a Lee Finance v Mhlana 2006 (6) SA 180SCA at 183 E-G. The applicant has an onus to prove that in this case the respondents have submitted to the jurisdiction of this court. He has not done so.

13. In any event, even if I am wrong in concluding that this court does not have jurisdiction I am of the view that the application also falls to be dismissed on the issues of urgency (or lack thereof) and *lis pendens.* Regarding urgency the applicant has failed to set out in his affidavit circumstances on which he relies to render the matter urgent and the reason why he contends that he cannot be afforded substantial relief in due course. **See: Rule 6 (12) (b) of the Uniform Rules of Court.** All

that the applicant alleges in the founding affidavit is that the matter is urgent as his fundamental rights have and continue to suffer irreparable harm. On the applicant's version the 30 day period within which his appeal should have been finalized, expired on 16 November 2005. There is no explanation as to why the applicant only instituted these proceedings almost eight months subsequent to the expiry of 30 day period. My view is that any urgency that may exist has been caused by the applicant's delay in instituting these proceedings. The applicant is, in any event, receiving his salary and benefits pending the finalization of the appeal.

14. On the issue of *lis pendens,* it is common cause that in the application pending before the labour court the applicant seeks re-instatement on grounds of procedural unfairness. He seeks the same relief in this application for the same reason. The pending appeal, also aimed at securing the applicant's reversing his dismissal by the department alleged re-instatement with the department is also based on procedural unfairness. The applicant cannot be allowed to clog up different courts seeking the same relief.

For these reasons only the application cannot succeed.

Consequently the application is dismissed with costs.

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N DAMBUZA

JUDGE OF THE HIGH COURT

Applicant's Counsel: **Adv De Lange**

Applicant's Attorneys:	**Anne Swanepoel Attorneys** **1st Floor, Africa House** **North End** **PORT ELIZABETH**
Respondents' Counsel:	**Adv Gqamana**
Respondent's Attorneys:	**State Attorneys** **29 Western Road** **Central** **PORT ELIZABETH**
Heard on:	**31 July 2007**