

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: 795/2023

In the matter between:

LOVEDALE TVET COLLEGE

Applicant

and

**THE NATIONAL EDUCATION HEALTH &
ALLIED WORKERS UNION (NEHAWU)**

First Respondent

MLULEKI JAMA

Second Respondent

NOSIMO VENFOLO

Third Respondent

YANDISA KLAAS

Fourth Respondent

MDUDUZI MZANYWA

Fifth Respondent

ZUKO SICWETSHA

Sixth Respondent

SIVUYISIWE NGETE

Seventh Respondent

MELIKHAYA MKHEPHULA

Eighth Respondent

NOMA AFRIKA MAGODONGO

Ninth Respondent

PHINDILE MGALELA

Tenth Respondent

ANELISA MEMA

Eleventh Respondent

ASANDA MTWA	Twelfth Respondent
FANELWA SAUL	Thirteenth Respondent
MQOKELELI GANTSHO	Fourteenth Respondent
EUGENE WITBOOI	Fifteenth Respondent
MNCEDISI FIGLAN	Sixteenth Respondent
WANDISILE NTUSANA	Seventeenth Respondent
THULISWA MAXHELA	Eighteenth Respondent
LUTHANDO NJAMINI	Nineteenth Respondent
NOSIMPHIWE PAKADE-NTUSANA	Twentieth Respondent
THE GROUP OF EMPLOYEES AND THOSE WHO MAKE COMMON CAUSE WITH THEM INFRINGING THE RIGHTS AND INTERESTS OF THE APPLICANT	The Remaining Respondents

JUDGMENT

Govindjee J

[1] The Lovedale TVET College is a Public College duly established under the Further Education and Training Colleges Act, 2006 ('the College').¹ NEHAWU, the first respondent, is engaged in strike action throughout the country, in which the

¹ Act 16 of 2006.

remaining respondents participate. The College frames the basis for the relief it seeks as follows:

‘The applicant does not purport to prevent any lawful strike action but seeks to interdict illegal conduct which unlawfully is interfering with the business and service delivery objectives of the applicant, and other individuals who are referred to below...the respondents have been moving between the two campuses, disrupting the business of the applicant, its staff and service delivery in the manner set out below...the purpose of this application is to interdict the respondents from conducting themselves in an illegal and unlawful manner in order to restore safety on the campuses of the applicant, and to restore the ability of the applicant to carry out its core function, namely the teaching of students on its campuses...all teaching and all learning at the Campus of the applicant in both King William’s Town and Zwelitsha has come to a standstill as the safety of all persons involved cannot be guaranteed...the applicant has a clear right...to persist with its business, peacefully and without interruption, and that all employees and students and staff have a right to work and render the services that they have contracted either to receive or to provide...it is the applicant’s intention to ensure that strike action does not interfere with the business of the applicant, its other employees and the constitutional rights of all concerned...’

[2] The relief sought is couched in the form of a rule nisi interdicting conduct ‘that obstructs or frustrates the effective rendering of educational services and administration services’ by the College or the ‘ability of the applicant’s employees to do their work’. NEHAWU takes the point, without filing opposing papers on the facts, that this court lacks jurisdiction based on the exclusive jurisdiction of the Labour Court, in terms of s 68 of the Labour Relations Act, 1995² (‘LRA’) to grant relief in respect of unprotected strikes.³

² Act 66 of 1995.

³ S 68(1) provides that: ‘In 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 –

(a) To grant an interdict or order to restrain –

[3] Section 157 of the LRA deals with the jurisdiction of the Labour Court and, in the context of determining a High Court's concurrent jurisdiction in respect of matters arising from employment and labour relations, has resulted in at least four relevant judgments of the Constitutional Court, which itself describes the issue as vexed.⁴ The section is framed as follows:

'(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...

[4] To the trilogy of well-known initial judgments of the Constitutional Court dealing with the question ('*Fredericks*',⁵ '*Chirwa*'⁶ and '*Gcaba*'⁷) has recently been added the decision in *Baloyi*, and the judgment of Theron J, on behalf of a unanimous court, which has further elucidated the appropriate approach.⁸ This court relies heavily on that judgment in arriving at its conclusion.

[5] It is clear that the jurisdiction of this court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations, as in the

i. any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

ii. ...

(b) ...

⁴ See *Baloyi v Public Protector and Others* [2020] ZACC 27 ('*Baloyi*') para 1.

⁵ *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6.

⁶ *Chirwa v Transnet Limited* [2007] ZACC 23.

⁷ *Gcaba v Minister of Safety and Security* [2009] ZACC 26.

⁸ While *Fredericks*, *Chirwa* and *Gcaba* considered whether the High Court has jurisdiction over administrative law claims in the employment setting, *Baloyi* dealt with the High Court's jurisdiction over contractual claims arising in the employment setting.

present instance.⁹ Leaving aside cases where the jurisdiction of the Constitutional Court is engaged, this court has jurisdiction to adjudicate any matter except if it may be said that the matter has been assigned by legislation to another court with a similar status to the High Court, such as the Labour Court.¹⁰

[6] The Labour Court and Labour Appeal Court have been established by the LRA as superior courts with 'exclusive jurisdiction to decide *matters arising from the Act*.'¹¹ It is so that a s 68(1) application for an interdict or order constitutes an example of a matter that is 'to be determined by' the Labour Court so that that court enjoys exclusive jurisdiction. The High Court's jurisdiction may indeed be ousted in respect of an employment-related dispute where the dispute is one for which the LRA has created a specific remedy, such as the s 68(1) interdict to restrain participation in a strike not in compliance with the LRA. The reason for this is described in *Baloyi*, namely that the LC and LAC 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'.¹² It is so that those courts have been held to be 'uniquely qualified' and a 'one-stop shop' to address labour-related disputes.¹³

[7] But the High Court's jurisdiction is not ousted by s 157(1) only because a dispute is one that falls within the overall sphere of employment relations.¹⁴ Section 157(2) confirms the concurrent jurisdiction of the Labour Court and this court in respect of 'any alleged or threatened violation of any fundamental [constitutional] right...arising from employment and from labour relations'.¹⁵

⁹ *Chirwa* op cit fn 6 para 60.

¹⁰ S 169(1) of the Constitution provides as follows:

'The High Court of South Africa may decide –

(a) any constitutional matter except a matter that –

i. ...

ii. is assigned by an Act of Parliament to another court of a similar status similar to the High Court of South Africa ...'

¹¹ Preamble to the LRA.

¹² *Motor Industry Staff Association v Macun N.O.* [2015] ZASCA 190 as cited in *Baloyi* para 30.

¹³ *Baloyi* op cit fn 4 para 30; *Chirwa* op cit fn 6 para 47.

¹⁴ *Fredericks* op cit fn 5 para 40.

¹⁵ This adds to, rather than diminishes, the jurisdiction of the Labour Court and Labour Appeal Court: *Gcaba* op cit fn 7 para 71.

[8] The real question is whether the present claim is of such a nature that it is required, in terms of the LRA, to be determined exclusively by the Labour Court. *Gcaba* is authority for basing that assessment of jurisdiction on the applicant's pleadings, as opposed to the substantive merits of the case:¹⁶

'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 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.'

[9] In answering the core question, it must be appreciated that the same set of facts may give rise to several different causes of action, and that a litigant may choose the cause of action they wish to pursue and prepare their pleadings accordingly.¹⁷ *Baloyi* cites the example of a person seeking to pursue a claim of unfair dismissal, which would have necessitated an approach to the Labour Court in terms of s 157(1) of the LRA. Similarly, a case based on interdicting participation in or strike-related conduct associated with a strike not in compliance with the provisions of Chapter IV of the LRA would engage the exclusive jurisdiction of the Labour Court.¹⁸ That avenue was clearly open to the College. *Baloyi* confirms, however, that it does not follow that that path was obligatory.¹⁹ The point is illustrated again with reference to an unfair dismissal claim, and the dictum of the SCA in *Makhanya*:²⁰

¹⁶ *Gcaba* ibid para 75.

¹⁷ *Baloyi* op cit fn 4 para 38.

¹⁸ S 68(1) read with s 157(1) of the LRA.

¹⁹ *Baloyi* op cit fn 4 para 39.

²⁰ *Baloyi* op cit fn 4 para 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)... [citing *Makhanya*]:²¹

“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.”

[10] The Constitutional Court has confirmed that it would be incorrect, and a misapplication of *Chirwa*, to base a finding of lack of jurisdiction on a holistic determination of whether the dispute is located ‘within the compass of labour law’.²² To repeat, the question is whether the specific causes of action relied upon by the College fall within the jurisdiction of the High Court or the Labour Court (or both).

[11] Considering the notice of motion and supporting affidavits, it is sufficiently clear that the College forsakes reliance on its right to apply for an interdict on the basis that NEHAWU’s strike action was unprotected. Approaching the matter on the basis that any labour or employment-related dispute associated with interdicting strike-related conduct must be dealt with by the Labour Court would have the effect of destroying other causes of action or remedies, which was not the intention of the LRA.²³ While other options may have been pursued, an alleged or threatened violation of fundamental rights is discernible on the papers as the basis for this application. The focus is ultimately, and somewhat widely, on constitutional rights – including the rights of students (to education), staff (to freedom and security of the

²¹ *Makhanya v University of Zululand* [2009] ZASCA 69 paras 11 and 71.

²² *Baloyi* op cit fn 4 para 43.

²³ *Gcaba* op cit fn 7 para 73.

person and to work, which forms part of the constitutional right to dignity) and the College (to trade). It arises from 'employment and the labour relations' but falls within what was contemplated by s 157(2) of the LRA, so that the concurrent jurisdiction of the High Court and Labour Court was engaged. The pleaded case therefore cannot be said to fall within the exclusive jurisdiction of the Labour Court.

[12] The jurisdictional point failing, there is no opposition on the papers to the interim relief sought. The papers make out the case for an order in terms of the draft submitted, other than 2.1.6 and 2.17 of that draft.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 14 March 2023

Delivered: 15 March 2023

Appearances:

For the applicant: Adv S Cole SC

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For the respondent: Adv C Cordell

Instructed by: NEHAWU
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