IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 06/05/2005

CASE NO: 9171/2005

DELETE WHICHEVER IS NOT APPLLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

In the matter between:

HUGH JONES	**FIRST APPLICANT**
KEN DICKENSON	**SECOND APPLICANT**

And

TELKOM SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
MIKE COMBRINK	**SECOND RESPONDENT**
WILLIE SCHUTTE	**THIRD RESPONDENT**
JOHN MARALLICH	**FOURTH RESPONDENT**
WALTER MAZOLA	**FIFTH RESPONDENT**
VENIL MULLER	**SIXTH RESPONDENT**
FRANS POTGIETER	**SEVENTH RESPONDENT**
GORDON JENKINS	**EIGHT RESPONDENT**
SAM MOODLEY	**NINTH RESPONDENT**

JUDGMENT

BOTHA, J:

In this matter the applicants, after an amendment of their notice of motion, ask for interim relief pending final relief. The motion relief is asked in part A of the amended notice of motion. The final relief is asked in part B.

The final relief that the applicants ask is in essence that certain appointments made by the first respondent in a restructuring of posts be reviewed and set aside and that the two applicants be appointed to two positions.

The interim relief is in essence that the first respondent retain the applicants in their present positions pending the determination of the review application.

The first respondent, Telkom SA Ltd, had from 1999 reduced its workforce by some 30 000. Eventually it realized that its corps of managers had not been reduced commensurately, and since December 2004 it has embarked on a ;restructuring of its management posts. 2 5000 managers were involved. The aim was to reduce them by some 250. The restructuring affected all departments. This application concerns the Security and Investigation department (S & I) .

The first respondent implemented a restructuring of the S & 1department which had the effect that in the end, 13 managers were vying for 11 restructured positions. Three regional managers were retained in their positions, which remained unaltered. They were appointed without being subjected to testing and interviews. Four other managers were appointed t6 restructured posts without being subjected to testing and interviews on the basis that their restructured positions contained at least 60 % of the job description of their previous positions.

The first respondent contended that it was part of the scheme of the restructuring that a manager whose job after restructuring retained more than 60 % of its job description, would be appointed to that position. See paragraph 2.6.7.1 on p81. That was admitted in the replying affidavit. See p141. There was a dispute about whether the posts of the four managers referred to above did indeed retain more than 60 % of the original job content.

In the end six managers were tested and interviewed for the remaining four restructured positions. The two applicants were the two unsuccessful candidates.

The case of the applicants is that the restructuring process infringed their constitutional rights to fair procedure. In particular they relied on the fact that only six out of eleven managers were subjected to testing and interviews. A subsidiary point on which they also relied was that they were given too short notice to consider their options. They were advised of their options, *inter alia,* voluntary severance packages, in a letter dated 23 March 2005 and were required to signify their choices by the 31st March 2005.

Mr van Deventer, who appeared for the first respondent, took a *point in limine* that this court does not have jurisdiction in view of the provisions of section 157 (1) of the Labour Relations Act, 1995 (Act 66 of 1995). He referred the court to **Communication Workers Union and Another v Telkom SA Ltd and Another 1999 (2) SA 568 T at 594 G - 595 B, Imata v Northern Pretoria Metropolitan Sulstructure 1999 (2) SA 234 T at 239 C - F, 239 J**

and **Mgijima v Eastern Cape Appropriate Technology Unit and Another 2000 (2) SA 291 Fat 299 H, 300 J - 301 J.**

Mrs Cassim SC who, with mr Ganese, appeared for the applicants relied on the provisions of section 157 (2) of the Labour Relations Act and argued that this court had concurrent jurisdiction, the matter being a constitutional issue. She relied on section 33 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (the Constitution) and on the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). In this regard her argument was based on the fact that the first respondent was an organ of State. She contended that the procedure followed in the restructuring was unfair.

In my view the *point in limine* must be upheld. It is clear to me that the fairness of the procedure adopted in the restructuring process can not be determined without having reference to matters that fall within the purview of the Labour Relations Act, and, more particularly, chaper VIII. Such matters are to be determined exclusively by the Labour Act in terms of section 157 (1) of Regulations Act.

It was held in **Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 SCA at 61 AC** that the exclusive jurisdiction of the Labour Court only arises in respect of matters that in terms of the Labour Relations Act are to be determined by the Labour Court. See also **Fredericks and Others v MEC for Eduction and Training, Eastern Cape and Others 2002 (2) SA 693 CC at 713** A-B. In

this case I am convinced that a vital component of the issue to be determined concerns unfair dismissals, unfair labour practises, and dismissals based on operational requirements, all issues that ultimately resort under the exclusive jurisdiction of the Labour Court. The applicants have attempted to disavow a reliance on unfair dismissal in their prayers, but it is clear from the body of their affidavits that they consider the process adopted by the first respondent as one that has unfairly led to the termination of their employment, either as from 31 March 2005 or from 31 May 2005.

It does not help to say that it is a constitutional issue. Even to determine whether the process followed was fair constitutionally speaking, one will have to begin to establish whether it was fair in terms of the Labour Relations Act. Constitutional issues cannot be determined in the abstract. In this case what is at stake is the fairness of a restructuring process. Whether the process was fair has to be judged according to the facts of the case and in the context of the national legislation that gives effect to section 23 (1) of the Constitution. See **National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 CC, paragraph 33 and 34 at 19 and paragraph 41 at 21 and 22.**

I agree with what was said in **Manyahti v MEC for Transport, Kwazulu-Natal, and another 2002 (2) SA 262 N at 266 G:**

> **" ... the mere fact that the applicant is employed by an organ of State which has, according to the applicant, infringed his**

constitutional rights does not confor jurisdiction on this court to deal with the dispute".

In the case of **Mgijima** *supra* at **309 A - F** the following is said:

"In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter under the provisions of s157 (2) of the Act. In my view it would run counter to the purpose and objects of the Act with which I have dealt earlier in this judgment. To conclude otherwise would mean that the High Court is effectively called upon to determine a right which has been given effect to and which is regulated by the Act. To hold otherwise would be to ignore the remainder of the provisions of the Act and would enable the resolution machinery created by the Act. This may give rise to "forum shopping" simply because it is convenient to do so or because one of the contended by the first respondent in the present matter.

I am of the view that for purposes of s157 (2) of the Act the substance of the dispute between the parties should in every case be determined. What is in essence a labour dispute as envisaged by the Act should not be labelled a constitutional dispute simply by reason of the fact that the facts thereof and the issues raised could also support a conclusion that the conduct of the employer complained of amounts to a violation of entrenched rights in the

> **Constitution and should be declared as such. In every case it should rather be determined if the facts of the case giving rise to the dispute and the issues between the parties are to be characterised a "matter" provided for in the Act, and if that "matter" is in terms of s157 (1) to be determined by the Labour Court, the High Court is precluded from exercising jurisdiction".**

I respectfully associate myself with there remarks. I have taken note of the contrary decision in **Mbayeka and Another v MEC for Welfare, Eastern Cape 2001 (4) BCLR 374 Tk**, but I am, with respect, of the view that the judgment in the case of **Mgijima** *supra* is to be preferred.

The fact that the High Court has jurisdiction in constitutional matters does not confer jurisdiction on it in respect of labour matters that are in terms of section 157 (1) of the Labour Relations Act entrusted exclusively to the Labour Court. Section 157 (2) does not confer jurisdiction on the High Court that it does not otherwise have. It confers jurisdiction on the Labour Court which it would not otherwise have had. In that respect I agree with what was said in the case of **Mbayeka and Another** *supra* at **379 C - D**.

As far as the expression "concurrent jurisdiction" is concerned. I can refer to **Bensingh v Minister of Education and Culture [2003] 1 All SA 157 D at 163 d - g.**

It does not matter that the applicants only asked interim relief. They have to prove the jurisdiction of this court. See **Communication Workers Union v Telkom SA Ltd *supra* at 594 G -I.**

For all these reasons I am of the view that the *point in limine* must be upheld. It follows that the application must be dismissed.

The following order is made:

The application is dismissed with costs which costs shall include the costs incurred on 30 and 31 March 2005.

C. BOTHA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION