NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 13535/16

In the matter between:

NOMFUNDO TRUDY KWEYAMA **APPLICANT**

and

NATIONAL COMMISSIONER, CORRECTIONAL SERVICES **1ST RESPONDENT**

REGIONAL COMMISSIONER, CORRECTIONAL SERVICES **2ND RESPONDENT**

DIRECTOR DEPARTMENTAL INVESTIGATION UNIT, CORRECTIONAL SERVICES **3RD RESPONDENT**

J U D G M E N T

Delivered on: THURSDAY, 24 AUGUST 2017

OLSEN J

[1] This is the return date of a rule nisi issued on 13 December 2016 at the request of the applicant, Ms N T Kweyama. Three respondents are called upon to show cause

why it should not be declared that the third respondent lacked the "lawful authority" to institute a disciplinary enquiry that resulted in the imposition of a sanction of dismissal of the applicant from her employment by the Department of Correctional Services. The respondents are also called upon to show cause why this court should not declare the dismissal invalid, and set it aside.

[2] The first respondent in these proceedings is the National Commissioner of Correctional Services. The first respondent must in terms of s 3(6) of the Correctional Services Act, 111 of 1998 (the "Act"), perform the functions of the Department of Correctional Services as prescribed in the Act. Section 3(5) provides that the department is under the control of the National Commissioner who in terms of s 3(5)(g), must "appoint, remunerate, promote, transfer, discipline or dismiss correctional officials in accordance with this Act, the Labour Relations Act and the Public Service Act". The first respondent opposes the relief sought by the applicant.

[3] The third respondent also opposes the relief sought by the applicant. The citation of the third respondent is something of a muddle. In the headings employed in the papers the third respondent is described as the "Director Departmental Investigation Unit, Correctional Services". Where cited in the founding affidavit the third respondent is said to be the Director of the Special Investigations Unit established in terms of ss 95A and 95B of the Act. Sections 95A and 95B of the Act in fact direct the creation of two units within the department, namely an investigation unit and a so-called "enforcement" unit, the latter having the responsibility to institute disciplinary proceedings and prosecute in them. (I will revert to those two sections a little later.) As it turns out, each of those units has a director, and each of the directors has put up an affidavit in these proceedings. As the first and third respondents have chosen to overlook the muddle, I must and will do likewise. Unless the context requires more precision, I will refer to the two units and their directors as the third respondent.

[4] The second respondent is the Regional Commissioner of Correctional Services, KwaZulu-Natal. He has taken no part in these proceedings. The applicant was

employed as his administrative secretary at the time of her dismissal. The applicant's interests at the material time appear to have been aligned with those of the second respondent, the person to whom she reported directly in the course of her employment.

[5] The first and third respondents have not only contested the validity of the claim which the applicant seeks to make, but have also objected to the jurisdiction of this court on the basis that the claim could only have been made under the Labour Relations Act, 1995 (the "LRA").

[6] Citing *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA), Mr Pillemer SC, who appears for the applicant, argued that the first task in the course of adjudication in this case is to determine the issue as to whether this court has jurisdiction, and to do so with respect to the claim as pleaded or made, without regard to the question as to whether the claim is good or bad. Mr Naidoo SC, who appears for the first and third respondents, made no objection to this approach. However I have determined that it is more convenient first to consider the merits of the applicant's claim, and then the question of jurisdiction. I do not think that a finding that this court lacks jurisdiction necessarily means that, despite the fact that the merits of the dispute were argued at length, this court should ignore them. But I must commence with an account of the facts.

The Facts

[7] In about February 2016 there were, according to the applicant, certain "differences" between the first and second respondents. Whatever might have caused them, the position is that the Departmental Investigation Unit (one of the two entities making up the third respondent) was about the business of investigating the second respondent's alleged involvement in fraud and the like connected with tenders. Mr R E J Mphamo, who is the director of the unit, was personally involved in the investigation and, in the company of other investigators, attended on the office of the second respondent on 4th February, 2016. At the time the office was under the *de facto* control

of the applicant in the absence of the second respondent who had been suspended. The purpose of the visit was to examine certain documents supposed to be relevant to the investigation. The applicant refused to allow the members of the unit access to the office and to the files. There is no dispute on the papers as to the fact that the applicant impeded the investigation on the day in question. According to the first and third respondents the result of that was that certain documents went missing.

[8] Following this event the applicant was suspended. She refused to accept the suspension. On 16 March 2016 the second respondent returned to work after the court had set aside his suspension, and he uplifted the applicant's suspension. She was then charged with misconduct.

[9] Three charges are reflected in the charge sheet served on the applicant. None of them are perfectly drafted but only the first one is of importance in the present case. It alleged that the applicant had contravened Resolution 1 of 2006, which is the disciplinary code and procedure for the Department of Correctional Services, in that she had obstructed the investigation being conducted by the Departmental Investigating Unit on 4 February 2016 by refusing to provide the files which the unit's officials needed to obtain from the office under the control of the applicant, resulting in them having to suspend their planned operations for the day. As framed the first charge made reference to paragraph (a) of annexure "A" to Resolution 1 of 2006, which is to the effect that an employee will be guilty of misconduct if she or he "fails to comply with, or contravenes an Act, regulation or legal obligation". Regulation 30(3) of the regulations under the Act is to the effect that any person who hinders or obstructs or refuses to comply with the lawful instructions of departmental inspectors, investigators and auditors is guilty of an offence.

[10] The applicant's disciplinary hearing was arranged and set down but she did not attend. It got adjourned more than once apparently in the hope that she would relent and attend. On one of the occasions set aside for the hearing she claims not to have attended on the instructions of the second respondent, and a letter supporting that

allegation is put up. Ultimately the case was determined in the applicant's absence and a sanction of dismissal was the outcome.

The Applicant's Claim

[11] The first statement made in the applicant's founding affidavit, following the citation of the parties, reads as follows.

> "This application is brought as what has become known as a legality review."

She goes on to speak of the events described above as "what has been done to me", asserting that it was done in breach of the law and without lawful authority by persons (ie the third respondent) acting beyond their lawful powers. It is claimed that the third respondent used powers conferred for a particular purpose to achieve an ulterior purpose, namely to prove a point against the second respondent.

[12] The applicant contends that the third respondent's mandate is to investigate theft, fraud, corruption and maladministration by correctional officials, and that the third respondent has the power to institute disciplinary proceedings in respect of such misconduct, but not in respect of anything else; the point being made that there was no accusation in the charges brought against her that the applicant was herself involved in any such corrupt or like activities. She relies on ss 95A and 95B for these contentions.

[13] It is alleged that in terms of Resolution 1 of 2006 (a collective agreement concluded in the Bargaining Council) discipline is a line management function, that the second respondent is the *de facto* employer of the applicant, and that if the applicant is to be disciplined, then it is the second respondent who has to "play the central role".

[14] All the aforegoing having been said earlier in the founding affidavit, the applicant then says the following regarding her claim.

> "I rely on the Constitution, the common law and on s 6(2)(a)(i), (ii), (iii), (d), (e)(i), (ii), (iv), (v) and (vi) and (f)(i) of the Promotion of Administrative Justice Act, 2000 (PAJA)."

Nothing is said about what particular provision of the Constitution, and what particular principle embodied in the common law, is implicated in the claim made by the applicant. However in response to an answering affidavit which took the point that this matter belongs in the Labour Court, the applicant stated in reply that she did not make a claim upon the basis of an unfair labour practice. In argument applicant's counsel disclaimed any reliance on any right vested in the applicant by reason of the LRA. There is no attempt to make a case that the disciplinary procedure followed was unfair in any respect. The applicant's case is said to turn on an interpretation of sections 95A and 95B of the Act. It is argued that because the charges against her did not fall within those sections, the decision to prosecute her, and her prosecution, were made and conducted by persons using powers they derived from the two sections for a purpose not contemplated by the legislation. In the result, there was a violation of the principle of legality, and that rendered the decision made in the proceedings invalid.

The Merits of the Legality Review

[15] The applicant drew attention in her founding affidavit to the fact that the disciplinary code, brought into operation by Resolution 1 of 2006, provides that "discipline is a line management function", and to the definition of the word "employer" which means "the head of department or any member of his/her department designated to perform a specific action, unless the context indicates otherwise." (My underlining.) As I understood the argument of counsel for the applicant, this provision provides context in the construction of ss 95A and 95B of the Act.

[16] Unsurprisingly, counsel for the applicant did not argue in support of the applicant's contention in her founding affidavit that, given that the second respondent was her employer as defined, and that discipline is a line management function, if she

had to be disciplined, it was he who had to play the central role (which would involve in particular, the decision to institute disciplinary proceedings). If the applicant's contention were correct, it would mean that, given the second respondent's alignment with the applicant's interests in the circumstances which obtained at the time, she would have been in the fortunate position of being immune from prosecution. The "context" referred to in the definition of the word "employer" is the context "in this procedure"; which in my view conveys a wider context than that provided by the document (ie the code) viewed in isolation. The code did not obstruct disciplinary steps against the applicant otherwise than with the participation or support of the second respondent.

[17] The applicant's case is really founded on the proposition that the exercise of public powers is regulated by the Constitution, which imposes a constraint that no power and no function may be exercised or performed beyond what has been conferred by law upon the actor concerned. (See *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at para 52.) The founding papers contained no invitation to the first and third respondents to look anywhere but to the provisions of s 95A and s 95B of the Act, read with Resolution 1 of 2006, in order to understand why the applicant asserts that the third respondent's conduct with respect to the disciplinary process was in breach of the law.

[18] Chapter XI of the Act is entitled "Compliance Management", and originally contained only s 95. The two sections relevant to these proceedings were added to the Chapter in 2008, and read as follows.

> "**95A Departmental Investigation Unit**
>
> The National Commissioner must establish a unit to investigate theft, fraud, corruption and maladministration by correctional officials.
>
> **95B Code Enforcement**
>
> The National Commissioner must establish a unit to institute disciplinary proceedings and to prosecute in disciplinary matters resulting from any investigation contemplated in section 95A."

[19] These sections are actually aimed at directing the National Commissioner to do something. They are not empowering sections. In regarding them as such, the applicant has misread them.

[20] The National Commissioner did establish the two units. The head of the unit established under s 95A is called the “Director Departmental Investigation Unit”. The head of the unit established under s 95B is called the “Director Code Enforcement”.

[21] The assumption that the powers contemplated by s 95A and s 95B were in fact given to the respective units is made by the applicant and the first and third respondents. The applicant makes the error of assuming that the sections empower the units, whereas, given the precise wording of the sections, the first respondent must have conferred the powers on the units. (Without having conferred them, the first respondent would have failed to comply with the sections.)

[22] The list of particular offences which appears in s 95A is not repeated in s 95B. The legislature could have provided in s95B that the Code Enforcement Unit could prosecute in disciplinary matters “involving theft, fraud, corruption and maladministration”. Instead the authority to prosecute and institute proceedings relates to “matters resulting” from any investigation contemplated in s 95A.

[23] It is obvious, in my view, that an investigation under s 95A directed at suspected theft, fraud, corruption and maladministration may turn up matters which should be the subject of disciplinary proceedings, but which are not properly described as theft, fraud, corruption or maladministration. Such a disciplinary matter would “result” from an investigation under s 95A. It is sensible that such a disciplinary matter might be dealt with under s 95B of the Act, given that all the information with regard to it would reside not with any other general employee of the department, but with those who are appointed to the two units. Furthermore, the relationship between any other misconduct uncovered in the course of an investigation by the unit contemplated by s 95A, and the theft, fraud, corruption or maladministration it was investigating when it uncovered the

infraction, may render it desirable if not necessary that control over the disciplinary proceedings be maintained by the enforcement unit. In my view the change in wording between the two sections signifies a legislative intent consistent with an appreciation of the aforegoing.

[24] On the papers before me it is indisputable that the applicant's conduct obstructed the investigation of fraud and the like allegedly involving the second respondent. That was in effect the subject of the first charge made against her. That charge clearly resulted from the investigation underway in terms of s 95A, and therefore fell within the provisions of s 95B. To my mind the facts of this case furnish a good example of why it is sensible and logical that the scope of the prosecutorial powers contemplated by s 95B should be wider than the scope of the investigatory mandate contemplated by s 95A. On the plain meaning of the words employed in s 95B, it does contemplate a wider scope of action than does s 95A.

[25] I should add that there is no provision in either of the two sections which would prevent the National Commissioner from authorising the two units, or one of them, to perform functions besides those contemplated by the legislation. The applicant did not make an allegation that no such delegated power existed. Despite that, the respondent did put up some pages from what appears to be the department's code of delegations published on 2 August 2012. They illustrate that at least the Director Departmental Investigation Unit was appointed to perform functions besides those set out in s 95A of the Act.

[26] I conclude that the applicant failed to establish that the disciplinary proceedings were instituted against her by a person or unit whose power was confined in terms of the Act to the list of offences appearing in s 95A of the Act; and that the sanction of dismissal was accordingly unlawful and invalid. The issue as to whether that is the basis upon which I must dismiss the application, which I intend to do, depends on whether I have jurisdiction to do so. I turn to that subject.

The Jurisdictional Challenge

[27] The applicant's reliance on PAJA must be considered first. In *Makhanya v University of Zululand* (supra) at paragraphs 71 and 72, it was held that the proper approach for a court confronted with a claim, and an objection that the court lacks jurisdiction to entertain the claim, is to accept that the claim before the court is "a matter of fact". The examples given are three-fold. If a claimant says that the claim arises from the infringement of a right to enforce a contract then the court must deal with it accordingly. When the claimant says the claim is to enforce a right created by the Labour Relations Act then that is the one before the court, as a matter of fact. When the claim is said to be for the enforcement of a right derived from the Constitution then that as a fact is the claim. The question as to whether the claim is bad is besides the point. The court went on to say that a claim which exists as a fact is not capable of being converted into a claim of a different kind by the mere use of language; and a court cannot under the guise of "characterising" a claim purport to convert the claim placed before the court into a claim of another kind.

[28] I experience a practical difficulty in applying this principle, or approaching the present matter in the light of what was said in *Makhanya,* if, as I understood counsel for the applicant to argue, what the learned Judge said in *Makhanya* means that one should reach an understanding about what a claim is by having regard only to the label attached to it by the claimant; and not by looking to the elements of the cause of action pleaded by the claimant in order correctly to label the claim where the claimant might have done so incorrectly. However, in my view the judgment in *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) illustrates that *Makhanya* should not be read that way.

[29] *Gcaba* concerned a policeman who had applied for a position unsuccessfully. He approached the High Court with an application to review the decision not to appoint him. The High Court decided that it lacked jurisdiction to entertain the application because it was an employment matter. Before the Constitutional Court the applicant

contended that his claim was from inception one which fell under PAJA, as he sought to vindicate his right to just administrative action. The respondents contended that the applicant's claim was a labour matter which had to be adjudicated through the "finely tuned mechanisms provided for in the LRA". The court in *Gcaba* held that before addressing the issue of jurisdiction, and indeed in order to address that question, the court had to decide whether the conduct complained of by Mr Gcaba was administrative action. (See paragraph 63 of the judgment.) Having found that it was not, the court held (in paragraph 75 of the judgment) that where the court's jurisdiction is challenged *in limine* at the outset, the pleadings and, in motion proceedings, also the contents of the supporting affidavits, must be interpreted "to establish what the legal basis of the applicant's claim is". If, "properly interpreted", that enquiry establishes that the applicant is asserting a claim within the exclusive jurisdiction of the Labour Court, the High Court would lack jurisdiction. On that basis the decision of the High Court in *Gcaba* was found to have been correct.

[30] It seems to me that I must follow the same approach as was followed in *Gcaba*. There (in paragraph 64 of the judgment) it was held that where a grievance is raised by an employee relating to the conduct of the State as employer, and there are "few or no direct implications or consequences for other citizens", then the conduct complained of is not administrative action. Here, perhaps even more than in the case of Mr Gcaba, the conduct of the department in which the applicant was employed carried no implications and generated no consequences for anyone outside the particular relationship between the applicant (as employee) and her employer, the State. The applicant wrongly pleads in her papers that what happened is governed by PAJA. She erroneously attaches the lable "administrative action" to the conduct she complains of. For that reason, following *Gcaba*, the conclusion must be that this court lacks jurisdiction if the characterisation of the conduct of the State as administrative action is the only basis upon which the applicant asks the court to decide her claim.

[31] The fundamental point made by the applicant and pressed in argument is that this is a legality review, and that this court has jurisdiction to entertain all legality reviews.

[32] As I understand the argument for the applicant, it is that the High Court entertains legality reviews upon the basis that it always has jurisdiction or power to declare invalid that which has been done otherwise than in conformity with applicable law. Legality review now originates in s1 of the Constitution which provides that the Republic of South Africa is founded, inter alia, on the value of the supremacy of the Constitution and the rule of law. (See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paras 48 and 49.) However, as set out in paragraph 21 of the judgment of Chaskalson CJ in *Minister of Home Affairs v Nicro and Others* 2005 (3) SA 280 (CC), the fact that the legality principle infuses all our law does not mean that it is a right enforceable on its own.

> "[21] The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discreet and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of Ch 2 which contains the Bill of Rights."

The concurrent jurisdiction contemplated by s 157(2) of the LRA is accordingly not engaged merely by reason of a party asserting a legality challenge. It is engaged only with respect to rights entrenched in Chapter 2 of the Constitution.

[33] The basis upon which the applicant has standing in this matter is material. In *Giant Concerts CC v Rinaldo Investments (Pty) Limited* 2013 (3) BCLR 251 (CC) Cameron J dealt with the requirements to establish own interest standing in a legality challenge. The following appears in paragraph 35 of the judgment.

> "Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."

The principal requirement to be fulfilled if that something more is to be found to exist is that the illegality should directly affect his or her rights or interests, or potential rights or interests.

[34] Quite obviously the applicant asserts so-called "own interest" standing in these proceedings. She has no discreet right to engage a court on her own over the proposition which is central to her case, that the institution of disciplinary proceedings by the third respondent in respect of misconduct other than theft, fraud, corruption or maladministration is illegal. What gives her standing is that the proceedings which she claims to have been illegally conducted first threatened and then extinguished her right to be in the employ of the Department of Correctional Services. The applicant comes before court to vindicate employment rights. Given the provisions of s 23 of the Constitution, one would expect to find the task of the protection of those rights lodged in the structures established by the Labour Relations Act.

[35] In *Motor Industry Staff Association v Macun N.O. and Others* 2016 (5) SA 76 (SCA) the court considered an application which had been made to the High Court for an order reviewing and setting aside the extension of the period of operation of a collective agreement. It was said not to have been done lawfully. Citing paragraph 21 of the judgment in *Nicro* (supra) Navsa JA stated the following in paragraph 21 of his own judgment.

> "One cannot assert the 'right' to the principle of legality in a vacuum. In essence, the complaint by the appellant is that the Minister, in purporting to extend the collective agreement to non-parties, acted beyond the powers conferred upon him in terms of s 32 of the LRA. The protections, both procedural and substantive, that exist in relation to collective bargaining are to be sourced in the LRA and not in the 'principle of legality'."

The judgment accordingly endorsed the decision of the High Court that it had no jurisdiction to entertain the case.

[36] A little over two months later a similar question arose in the Supreme Court of Appeal in *South African Municipal Workers Union and Others v Mokgatla and Others* 2016 (5) SA 89. In *Mokgatla's* case the issue was whether the High Court had jurisdiction to determine a dispute concerning the expulsion of members of a trade union allegedly in breach of the union's constitution. The court referred to paragraph 23 of the judgment in *Macun*, and held that the question to be asked was whether the case engaged a jurisdiction shared by the High Court and the Labour Court because it was premised on a violation of a right entrenched in Chapter 2 of the Constitution, or whether it arises simply out of the LRA. In the latter case the High Court has no jurisdiction. Applying that reasoning, the court in *Mokgatla* had the following to say in paragraph 14 on the subject of the application of the principle set out in *Macun*.

> "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 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. 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.**"
>
> (My emphasis)

[37] This case falls directly under s 158(1)(h) of the Labour Relations Act. This court is being asked to review a decision taken or an act performed by the State in its capacity as employer. The action is the dismissal of the applicant. Applying the test set out immediately above, the answer must be that this court is being asked to exercise a power with respect to a matter within the exclusive jurisdiction of the Labour Court; unless, because the case is about a right entrenched in Chapter 2 of the Constitution, the High and Labour courts would both have jurisdiction under s 157(2) of the LRA. The

only non-labour Chapter 2 rights asserted by the applicant are those protected by PAJA. I have already found that her case does not concern PAJA.

[38] In the present matter applying the test which appears to emerge from *Macun* and *Mokgatla* results in a conclusion consistent with the decision in *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) as explained in *Gcaba*.

[39] Especially in case I have misunderstood the breadth of the propositions stated in *Macun* and *Mokgatla*, I should examine the issue of jurisdiction from the other angles debated in argument. Counsel for the first and third respondents relied in argument on the decision in *Steenkamp v Edcon* 2016 (3) SA 251 (CC). *Steenkamp* arose out of the retrenchment of about 3000 employees by Edcon. It was a large scale retrenchment. Section 189A of the LRA accordingly applied. Edcon issued notices of termination of employment to its employees at a time when such conduct was prohibited by s 189A of the LRA. The Labour Appeal Court convened to decide proceedings instituted by Edcon in which it sought a decision that two earlier judgments of that court incorrectly held that dismissals non-compliant under s 189A were invalid. The Labour Appeal Court found in favour of Edcon.

[40] In the Constitutional Court the majority judgment stressed the role of the LRA as the instrument for realisation of rights in terms of s 23 of the Constitution, and the fact that the provisions of the LRA reflect a policy decision to exclude unlawful or invalid dismissals from the ambit of the control the LRA would exercise over labour relations in South Africa. Paragraph 116 of the judgment is instructive.

> "[116] I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a "winner takes all" approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee. For example, where a dismissal is

> unlawful by virtue of the employer having failed to follow a prescribed procedure before dismissing an employee and the dismissal is declared invalid, in law the employee is regarded as never having been dismissed and will be entitled to all arrear wages from the date of the purported dismissal to the date of the order. Under the LRA a dismissal will be recognised as having taken place, irrespective of whether the dismissal is held to have been automatically unfair or unfair because there was no fair reason for it, or because there was no compliance with a fair procedure in effecting it."

[41] The court accordingly held that where the procedural requirements of s 189 or s 189A of the LRA are not complied with in circumstances where there is no acceptable reason, the result would be a dismissal not effected in accordance with a fair procedure. It is a dismissal nevertheless. (See paragraph 125.)

[42] The applicant in this case seeks to avoid the remedies and the jurisdiction of the LRA and the Labour Court by focusing on what she regards as an illegal step in the procedure followed in order to achieve the fairness required by s 23 of the Constitution and the LRA, arguing that the consequence of that alleged illegality is not unfairness but invalidity. It is correct that in *Edcon* the provision said to have been breached and leading to the alleged illegality was one contained in the LRA itself, whereas here it is said to be contained in the Correctional Services Act. However it seems to me that it makes no difference. The alleged harm complained of occurred in disciplinary proceedings governed by our labour law. It is the applicant's case that the procedure which ought to have been followed to discipline her is laid down in the collective agreement imposed by our labour law on her contract of employment. Her real complaint is that her employer failed to follow a prescribed procedure before dismissing her (ie the example given in paragraph 116 of *Edcon*). She says the procedure was not followed because what happened is a nullity; that being a consequence of the fact that the decision to prosecute was not made by an authorised person.

[43] Given the labour regime imposed through the LRA in fulfilment of the rights given in s 23 of the Constitution, the procedure followed in the present case cannot be both unlawful (i.e. a nullity susceptible to a legality challenge) and unfair (i.e. susceptible to

the remedies provided under the LRA) at the same time. The former is premised on the proposition that it is legitimate to find that the applicant was never dismissed. The latter recognises the dismissal as having taken place, but attempts, in the absence of reconciliation, to be fair to all parties in crafting a remedy. As I understand *Edcon*, it is the LRA, and the jurisdiction under it, which is engaged by what has happened in this case.

[44] Counsel for the applicant urged me in argument to follow the line taken in *Solidarity v SABC* 2016 (6) SA 73 (LC). There the learned Judge in the Labour Court was confronted with the question as to whether the Labour Court could provide remedies for "unlawful or invalid dismissals", in the light of the supposed fact that the Constitutional Court in *Edcon* had held that the LRA does not provide remedies for unlawful or invalid dismissals. Counsel argued that the affirmative answer given by the court in the *SABC* case illustrates that a legality challenge, or review of a decision to dismiss, continues to exist, and that, given that the applicant makes a legality challenge, jurisdiction to decide such cases must also reside in the High Court.

[45] I am in respectful disagreement with the understanding of the judgment in *Edcon* conveyed by the Labour Court in the *SABC* case, namely that the LRA does not provide any remedies for unlawful or invalid dismissals. I, with respect, prefer the understanding of the majority judgment of Zondo J in *Edcon* conveyed in the minority judgment of Cameron J, where one sees the following in paragraph 49 of the judgment in *Edcon*.

> "The judgment of Zondo J, which I have had the pleasure of reading, finds that the LRA does not expressly confer a right to be dismissed lawfully. It bolsters this conclusion through an exposition of the LRA's predecessors. It notes the removal of a criminal sanction for unauthorised conduct. It reasons that, since the LRA does not expressly provide for a right to a lawful dismissal, a litigant is not entitled to a declaratory remedy when dismissed in breach of the LRA's provisions. This approach narrows the

entitlement to a lawful dismissal. It infers from the absence of an express provision in the statute that protection against unlawful conduct must be understood to have been absorbed into the statute's fairness protections." (My emphasis.)

[46] The applicant's case is, despite her denial, that she has been dismissed in breach of the LRA's provisions. Her right to a disciplinary process derives from the imposition on the parties to her employment contract of the disciplinary code earlier referred to. The code is a collective agreement the binding effect of which flows from s 23 of the LRA. Its purpose is to advance the realisation of the right under s 185(a) of the LRA not to be unfairly dismissed.

[47] In the circumstances I conclude that this court has no jurisdiction to determine the present application.

Conclusion

[48] Counsel for the applicant argues that if the application is unsuccessful the principle in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) should be applied to reach a conclusion that no adverse costs order should be made. Counsel for the first and third respondents argues, correctly in my view, that costs should follow the result. The applicant ignored the disciplinary process designed to afford her a fair hearing, and for an undisclosed reason did not pursue relief under the LRA. I do not accept that a case constructed around a proper construction of ss 95A and 95B of the Act truly raises "constitutional considerations relevant to the adjudication". (See *Biowatch,* paragraph 25.)

I make the following orders.

1. **The rule nisi granted on 13th December 2016 is discharged.**

2. **The applicant is ordered to pay the costs of the application, including the costs of Senior Counsel where employed, and including any costs which may have been reserved earlier.**

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OLSEN J

Date of Hearing: WEDNESDAY, 14 JUNE 2017

Date of Judgment: : THURSDAY, 24 AUGUST 2017

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