



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Reportable
 C575/2021

In the matter between:

MAKGOSI LETIMILE

Applicant

and

**THE CAPE TOWN INTERNATIONAL
 CONVENTION CENTRE COMPANY SOC LTD**

Respondent

Date heard: 20 October 2022

Delivered: 8 March 2023 by means of email

**Summary: Exception to statement of claim based on the principle of
 subsidiarity**

JUDGMENT

RABKIN-NAICKER J

- [1] The respondent (CTICC) excepts to applicant's statement of claim, and opposes an amendment to the statement of claim brought after the exception was raised. The respondent relies on the doctrine of subsidiarity to submit that parts of the applicant's pleading do not disclose a cause of action.

[2] In the proposed amended statement of claim, the applicant prays for *inter alia*, general damages, relying on an alleged violation or a threatened violation of the following by the CTICC:

- 2.1 Her *freedom of expression and association*, by prohibiting her from publishing her views on matters relating to the sexual health of disabled women or having access to media platforms to do so, and by undermining and preventing her advocacy in her personal capacity as part of the disability rights movement, and her personal association with the cause of sexual health and well-being of black disabled women;
- 2.2 Her *bodily integrity and privacy rights*, by demanding the disclosure of her personal medical records and requiring to substantiate the truth of claims made in her article;
- 2.3 Her *right to human dignity* by intimidating, insulting and humiliating her in its response to the publications of her views.

[3] The crux of the CTICC's exception to applicant's statement of claim and the redrafted amendment is set out as follows:

- "22. The subsidiarity principle does not permit the applicant to rely directly on the Constitution where specific legislation has been promulgated in order to give effect to constitutional rights (*in casu* the LRA, the EEA and the Code of Good Practice¹ referred to above).
- 23. The applicant relies on fundamental rights under the Constitution as identified above for her workplace related claims when the subsidiary legislation referred to above (and relied on elsewhere in applicant's statement of claim) gives effect thereto.
- 24. The applicant is accordingly obliged to bring the claims which she has brought before this Court for the enforcement of the constitutional rights which she relies on directly in terms of the LRA, the EEA and the aforesaid Code.

¹ On key aspects of Disability in the Workplace

25. She is not permitted to rely on the Constitution directly for any part of her claim (in addition to those claims which she has brought (and can bring) under the LRA, the EEA and the aforesaid Code).
 26. The statement of claim accordingly fails to disclose a valid cause of action in those parts (identified above) which seek to rely on her fundamental rights under the Constitution either separately from or in addition to (which is a duplication of) those claims which the LRA, the EEA and the aforesaid Code recognize and provide for."
- [4] Ms Fourie on behalf of the applicant submitted that a common law claim for damages arising out of a fundamental rights violation in the workplace may be heard by the Labour Court in terms of section 157 of the LRA which provides:
- "157 Jurisdiction of Labour Court
- (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."
- [5] In addressing the argument by the CTICC, that the pleadings offend the principle of subsidiarity, the applicant argues that the CTICC seeks "to massage Ms Letimile's claim into one that looks like a claim for the violation of her section 23 and/or section 9 rights in order to construct a basis for the CTICC's subsidiarity claim." It is submitted that such construction is incorrect because

the pleadings make clear that she relies on the violation of her right to freedom of expression and association, bodily integrity and privacy, and human dignity to ground her damages claim which she pleads: “*is not based on the LRA or the EEA but on the Constitution*”.

- [6] In submission therefore, the applicant relies on establishing that the Labour Court has jurisdiction over the fundamental rights claims above. The proposition is that the LRA gives the Labour Court in section 157(2), the jurisdiction to determine claims for the violation of fundamental rights other than fair labour rights and equality rights, if the claims arise in the workplace or in the employment context.

The principle of Subsidiarity

- [7] Succinctly stated, the principle of subsidiarity means that where legislation gives effect to constitutional rights, it is impossible to go behind that legislation by relying on the Constitution directly. A litigant’s remedy is to attack the legislation for its deficiency.² The applicant submits that the subsidiarity principle is of no relevance to the pleadings in this matter. This is because the applicant relies on section 157(2) of the LRA itself to found its cause of action for the general damages claim.
- [8] The direct reliance on fundamental rights was also taken by a union litigant in a dispute that was dealt with by the Constitutional Court in *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others*³. In that matter, the union first applied to the High Court initially seeking constitutional damages but, in amended particulars, it sought ‘appropriate relief for violation of its rights as envisaged in s 38 of the Constitution’. It also sought damages for defamation arising out of an allegation that the employers’ response to its request for access, which said no more than that the application for access was ‘disapproved’ and the organisational rights agreement was ‘cancelled’, was defamatory in a number of respects. In a further claim, the union sought damages on behalf of each of its members arising from various

² *Maoke & another v Telkom (SOC) Ltd & another* (2020) 41 ILJ 2414 (GP) at paragraph 15 inter alia

³ (2022) 43 ILJ 341 (CC)

disorders that the members allegedly suffered as a consequence of the employers' denial of access to the union.

[9] The employers excepted to the amended particulars and invoked the principle of subsidiarity arguing it precluded the applicant from invoking the Constitution 1996 directly, and that the union should have attacked the constitutional validity of the LRA 1995. They alleged further that the words complained of in the employers' denial of access to the premises were neither *per se* defamatory nor capable of conveying to a reasonable reader a meaning which defamed the union. The High Court upheld the exceptions and refused leave to appeal, as did the Supreme Court of Appeal.

[10] What is useful for our purposes is the summary of the union's approach by Madlanga J:

"[14] Before us the applicant argues that the principle of subsidiarity does not find application. Relying on this court's judgment in *Pretorius*, it submits that the application of this principle is complex. In this regard, the Labour Relations Act is not national legislation that gives effect to the s 23 constitutional right. Also, continues the submission, there is no national legislation that gives effect to the s 17 constitutional right; therefore, the principle of subsidiarity does not come into the equation insofar as this right is concerned.

[15] Further, the applicant contends that the way in which the High Court applied the principle of subsidiarity is unacceptably rigid. Relying on *Maoke*, it argues that the High Court ought to have recognised the fact that the Labour Relations Act does not profess to encapsulate every instance of unfair labour practice. For this proposition, reliance was also placed on this court's judgment in *Pretorius*.

[16] On the exception that concerns the defamation claim, the applicant suggests that the rights to dignity, privacy, assembly and fair labour practices and the right to participate in the lawful activities of a trade union are implicated. It also argues that the question whether the published matter is defamatory must be viewed 'through the prism of the Constitution and in relation to its values'."

[11] The Constitutional Court in *Pretorius and another v Transport Pension Fund and Others*⁴ had, in an unanimous judgment, considered an appeal against the upholding of an exception and stated as follows:

“ [50] The application of the principle of subsidiarity in relation to the LRA and other labour legislation is complex. The Constitution in some instances, like with the rights of access to information and just administrative action, requires national legislation to give effect to these rights. The same requirement is not made in s 23. The LRA itself, however, sets that as one of its objects. Nevertheless there are other pieces of labour legislation that also cover aspects of potential unfair labour practices.

[51] The principle of subsidiarity was recently considered by this court in *My Vote Counts*. Neither the majority nor minority judgment in that case are directly on point because the issue involved a provision of the Constitution that required Parliament to act. Section 23(1) lacks that requirement. A decision by Parliament not to cover the entire field would not fail to fulfil a duty in the Constitution. A fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient.

[52] The majority judgment in *My Vote Counts* expressly disavowed that subsidiarity was a hard rule:

'We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this Court has said that the principle may not apply. This Court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case.'

[53] This indicates that as in *Fetal Assessment Centre* this is a matter where the 'factual situation is complex and the legal position uncertain'. Here there is more than enough legal uncertainty to send the unfair labour practice claim to trial.

⁴ 2019 (2) SA 37 (CC)

[54] If it is accepted that in this matter the principle of subsidiarity does not apply, at least at the exception stage, there is no reason to find that a claim against the new pension funds is facially implausible. A claim like this, invoking the fundamental right to fair labour practices under s 23, has not been litigated before. We should not hold — on exception — that the constitutional guarantee against unfair labour practices does not extend to the actions of pension funds taken in concert with an employer.

[55] The appeal against the upholding of the exception to the unfair labour practice claim must also succeed.”

[12] As is evident above, Pretorius was decided on exception, and the court in that matter was anxious not to close the door on potential, novel claims in circumstances where all the facts had not yet been placed before the court and the outer contours of the principle of subsidiarity had not been fully defined.⁵ However, in the matter before me the applicant has not relied on the as yet fluid concept of subsidiarity in our law, but has tied her case to the mast of section 157(2), an LRA provision which according to submissions on her behalf, allows her to seek general damages relying directly on a range of fundamental rights contained in the Constitution.

[13] Section 157(2) was recently considered by the SCA in *National Union of Metalworkers of SA & others v Dunlop Mixing & Technical Services (Pty) Ltd & others*⁶ a matter in which the Court considered whether the word 'picket' under the Labour Relations Act could be construed as a 'gathering' under the Regulation of Gatherings Act 205 of 1993. The Court surveyed the jurisprudence on the interpretation of section 157(2) and stated:

“[19] The Constitutional Court, in **Gcaba**, considered the tensions that might arise in relation to the interpretation of s 157 of the LRA and related provisions. Van der Westhuizen J noted the principle that “legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of Constitutional rights” (para 55). Alongside that, however, is the consideration that “the Constitution recognizes the need for specificity and specialization in a

⁵ Maoke supra at para 29

⁶ (2021) 42 ILJ 475 (SCA)

modern and complex society under the rule of law" (para 56). The following paragraph in **Gcaba** is significant:

"Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognized 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 emphasized 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.)

[20] The approach to be followed, in summary, is as follows: The LRA is legislation envisaged by the Constitution. In construing the provisions of the LRA, the two objectives referred to above must be kept in mind. Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. The Labour Court and Labour Appeal Court 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. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA." (my emphasis)

[14] The constitutional rights to privacy, bodily integrity, and freedom of expression are not unknown quantities in the Labour Courts. Their infringement arises in cases under the umbrellas of sexual harassment, discrimination and dismissal claims, and play a role in the findings of the Courts. In my view the real issue at the heart of this exception is the question as to whether the reliance on various constitutional rights apart from that to equality and fair labour practices

in this dispute, can give rise to a discreet general damages claim, over and above the damages claim allowed for under the Employment Equity Act⁷.

- [15] In other words, the trial Court will have to consider, if it finds that the applicant's fundamental rights were infringed as pleaded, whether this would in effect impact on the damages awarded under the EEA, or give rise, in addition, to a separate and additional award of general damages as sought by the applicant in her pleadings.

Conclusion

- [16] On the authorities above, and in particular the construction of section 157(2) by the Court in **Gcaba**, I find that the principle of subsidiarity does not apply *in casu*. The applicant relies on section 157(2) of the LRA to raise alleged violations of her fundamental rights by the employer over and above her rights to fair labour practices and equality. How a trial Court may decide the question of remedies should it find for the applicant, after it has heard the evidence of the parties, is not properly the subject of an exception. This will be argued at the end of the trial and appropriately decided after that point.
- [17] In this exception the CTICC relied on a purported failure to disclose a cause of action relying on the principle of subsidiarity. For the reasons set out above, I am of the view that the exception must be dismissed. Both parties agreed that if the exception was not upheld, the application to amend the statement of claim should be granted. I am of the view that costs of the exception should be determined by the trial Court. I therefore make the following order:

Order

1. The exception is dismissed.
2. The application to amend the statement of claim is granted.
3. Costs of the exception to stand over.

⁷ In terms of section 51 (e) of the EEA giving the power to the Labour Court to award damages in any circumstances contemplated in the Act

H Rabkin-Naicker

H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant in the exception:

RGL Stelzner SC with DM Robertson instructed by STBB Attorneys

Respondent in the Exception:

Nadine Fourie instructed by Malcom Lyons Brivik Attorneys