THE LABOUR COURT OF SOUTH AFRICA

AT DURBAN

Of interest to other judges

Labour Court Case No: D616/2024

Caselines Case No: 2024-147941

In the matter between:

SHAWN HITTLER **Applicant**

and

ETHEKWINI MUNICIPALITY **First Respondent**

SBONELO MCHUNU (CHAIRPERSON) **Second Respondent**

BOKANG MOLEFE (INITIATOR) **Third Respondent**

Heard: 24 December 2024

Delivered: 13 January 2025

Summary: (Urgent - Application to declare dismissal unlawful and to compel employer to abide by S 188A pre-dismissal arbitration process – Relief sought might follow either the vindication of a contractual right , or the successful review and setting aside of dismissal decision – Applicant failing to set out clearly a legal basis of their claim falling within the court's jurisdiction – Application struck off for lack of jurisdiction - Costs)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application for urgent final relief. The applicant, Mr S Hittler ('Hittler'), applied to halt a disciplinary enquiry initiated by his employer ('the municipality') pending the outcome of a pre-dismissal arbitration hearing under s 188A of the Labour Relations Act, 66 of 1995 ('the LRA') under the auspices of the relevant bargaining council. At the time he launched this application, the municipality had instituted another disciplinary inquiry against him on additional charges ('the second enquiry'), so he also sought alternative relief in the form of a declaration that any termination of his service implemented by the employer before this application was heard should be declared unlawful.

[2] The initial prayer for relief read:

> *1. That the matter be enrolled as an urgent application and that the forms and service provided for in the Rules of Court, to the extent necessary be dispensed with;*
>
> *2.The in-house disciplinary hearing instituted and continuing by the Respondents against the Applicant is stayed pending the finalisation and outcome of the predismissal arbitration proceedings held at the Bargaining Council under case numbers EMD052412 and EMD122416;*
>
> *3.That the Respondents are directed to comply with the ruling of the Commissioner dated 3 December converting the current disciplinary proceedings to an inquiry by Arbitrator in terms of section 188A and consolidating the additional charges with the first charges;*
>
> *4.That the Second and Third Respondents be directed to pay costs of this application on an attorney own client scale in line with Scale C of the Amended Uniform Rules of Court;*

IN THE ALTERNATIVE

5.In the event that the Respondent has terminated the Applicant's e contract prior to the hearing to the hearing of this application then seeks the following relief:

5.1That the termination of the Applicants' employment be declared unlawful;

5.2That the termination of the Applicant's employment is set aside;

5.3That the Applicant is reinstated in his employment with the First Respondent with retrospective effect from date of termination without loss of remuneration or benefits.

6.The second and third respondents are to pay the costs of this application on a scale of attorney own client in accordance of scale C of the Amended Uniform rules of court."

[3] The application was launched on 11 December 2024 and was originally enrolled for hearing on 18 December 2024, before my sister, Judge Prinsloo. Before the application could be heard on 18 December two fresh developments had taken place.

[4] Firstly, the municipality had concluded the second inquiry and had dismissed the applicant on Friday afternoon, 13 December. Perversely, in its answering affidavit to the applicant's application, filed late on 17 December, the municipality did not disclose this fact to the court. When the court asked *Mr Mbili,* counsel for the municipality, why this fact had been omitted, he answered cryptically that there was a 'debate raging' between himself and those instructing him, whether the dismissal should have been mentioned in the affidavit. It should have been patently obvious to all involved in that debate, that it was highly relevant to the application and it was inexcusable to deliberately omit it. After some coaxing, which should not have been necessary, the municipality's counsel apologised to the court for this extraordinary omission, but still called it a 'mistake'. He claimed that, at the hearing before Judge Prinsloo, he had intended to point this out to the honourable judge, but the applicant's representative had stood up first to address the court, presumably to deal with the

applicant's request to postpone the hearing in view of the urgent review counter-application launched that morning by the municipality.

[5] This counter-application was the second development which occurred just before the matter was heard. The counter-application took the form of an urgent application to review two rulings of arbitrators of the bargaining council dated 5 June and 3 December 2024. These rulings had the effect of converting the first and second internal disciplinary enquiries into pre-dismissal hearings under s 188A. However, having caused the hearing on 18 December to be postponed, when the matter came before me on 24 December, the municipality decided to remove the counter-application from the roll, after a number of patent defects, such as a failure to cite necessary respondents, were raised.

[6] The applicant filed an answering affidavit to respond to the counter application on 19 December and a 'supplementary' affidavit traversing the circumstances of his dismissal which had taken place after he filed his founding affidavit. There was no objection made to the filing of the supplementary affidavit.

[7] In view of his dismissal on 13 December 2024, the applicant amended the relief he sought to include the declaration that his dismissal was unlawful and an order of reinstatement in his main relief instead of expressing it as a prayer for alternative relief.

[8] The applicant filed heads of argument but none were filed by the municipality.

Summary timeline of pertinent events

[9] On 25 May 2024, the applicant was issued with a notice to attend a disciplinary enquiry containing charges relating to procurement records of a certain municipal contract. According to the applicant the contract in question is connected to a criminal case against twenty-one accused, including a former mayor of the municipality, in which he had given evidence against the accused.

[10] On 31 May 2024, he applied in terms of section 188 A (11)[1] of the LRA to the South African Local Government Bargaining Council (SALGBC), for the enquiry to be conducted in a pre-dismissal arbitration hearing before an arbitrator appointed by the council. The SALGBC Disciplinary Procedure Agreement which defines the rights and obligations of employers and employees on disciplinary matters, also incorporates s 188A (1) and (11) in clauses 19.1 and 19.2 of the procedure.

[11] The municipality opposed the conversion of the disciplinary enquiry. On 5 June 2024, a senior SALGBC arbitrator, Ms H Grobler, issued a ruling that the applicant's request to have his enquiry proceed as a s 188A inquiry by an arbitrator was approved.

[12] The s 188A inquiry convened on 19 November 2024 chaired by another SALGBC arbitration panellist. Both parties were legally represented in the inquiry. By agreement, the chairperson issued the following ruling:

> *"(a)The enquiry would be adjourned to 24 January 2024;*
>
> *(b)the parties would hold a pre-arb meeting on or before 9 December 2024;*
>
> *(c)the parties would deliver a signed minute on or before 17 January 2025."*

[13] Two days later, the applicant was summonsed to a meeting the following day. On attending the meeting on Friday, 22 November he was issued with further disciplinary charges to be considered by a disciplinary enquiry convening on 4 December. The additional charges related to his alleged

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[1] The pertinent provisions of s188A are:

"(1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.

…

(11) Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee."

procurement of forensic services, which he claims relate to the very same procurement contract with which the original charges were concerned.

[14] On Monday, 25 November, the applicant sought to persuade the municipality that the additional charges should simply be dealt with in the same s 188A enquiry that was already underway. On 26 November, the initiator responded. He was adamant that the charges were quite separate from the original charges and were based on different evidence from the charges before the S 188A enquiry, and accordingly the enquiry would proceed. Facing this rebuff, the applicant made a second referral under s 188A to the bargaining council asking that the additional charges to be considered on 4 December be converted into a s188A enquiry and consolidated with the original that was underway.

[15] The municipality opposed this application, but did not file its answering affidavit timeously, ostensibly because of difficulties with the numbering of the applicant's founding affidavit. On 3 December 2024, the chairperson of the S188A enquiry had issued a ruling that the hearing scheduled for 4 December 2024 should be consolidated with the S188A inquiry and the additional chares would be incorporated in the enquiry.

[16] Notwithstanding the ruling, the internal disciplinary enquiry set down on the following day proceeded. The chairperson of the internal inquiry is the same chairperson who presided in the enquiry into the original charges that were referred to the S 188A inquiry. Despite being advised of the bargaining council ruling of the previous day, after postponing the internal inquiry to consider how to respond to the arbitrator's ruling, the chairperson decided to proceed with the internal enquiry.

[17] On 10 December 2024, the municipality advised that the enquiry would resume the next day. However, the applicant served the urgent application by email on the respondent on 11 December 2024 and by hand the following day.

[18] Notwithstanding having had notice of the application, on 12 December 2024, the municipality gave the applicant notice that the internal enquiry would resume the next day. As before, the applicant attended with his

representative. The chairperson refused to stay the proceedings despite the pending application before the court.

Argument and evaluation

[19] It was not in issue that the application had been launched with sufficient urgency. However, the municipality argued that the application had become moot since it had dismissed the applicant and therefore there was nothing to interdict and it had lost any urgency it might have had. It also argued that, in any event, this court had no jurisdiction to determine the lawfulness of the dismissal even if it was inclined to consider nullifying it.

[20] The applicant argues that once the bargaining council was seized with the disciplinary enquiries consolidated in the form of a single s 188A inquiry, the municipality was not entitled to continue with the second disciplinary enquiry. The action of the municipality in proceeding with the second inquiry and then dismissing him, in the face of the arbitrator's ruling consolidating the charges in the second enquiry with s 188A hearing that was soon to commence, was a denial of his right to have the disciplinary proceedings conducted under that section.

[21] The applicant cited a number of authorities in support of his claim, namely *Rabie v Department of Trade and Industry and Another*[2], *South African Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others*[3] and *Mchuba v Passenger Rail Agency of South Africa*.[4] To these may be added the decision in *Kubheka v Member of The Executive Council: Human Settlements (Gauteng Provincial Government) & another* (2021) 42 ILJ 1497 (LC).

[22] The common features of all these cases were that there was a pending pre-dismissal arbitration hearing under s 188A of the LRA, and the applicants were all seeking urgent relief against their respective employers to compel the employers to abide by the pre-arbitration process. However, the factual scenarios differed in important respects.certain important respects the cases concerned different factual scenarios.

[2] (J515/18) [2018] ZALCJHB 78 (5 March 2018)
[3] (2013) 34 *ILJ* 706 (LC) at para 11.
[4] [2016] 6 BLLR 612 (LC) at para 16.

[23] In the *Mchuba* and the *MSC Depots* the court set aside dismissals which had been implemented following an internal disciplinary process when s 188A enquiries were pending. In *Rabie* and *Khubeka*, in-house disciplinary proceedings were suspended pending the outcome of pre-dismissal arbitration proceedings. In this instance, because the municipality proceeded with an internal inquiry and dismissed the applicant despite the pending S 188A pre-dismissal arbitration, the first two cases are more relevant.

[24] In *Mchuba*, the employer had elected to appoint Tokiso, a private dispute resolution agency, to conduct a pre-dismissal arbitration as contemplated in s 188A. In doing so the employer was acting in accordance with its disciplinary code and procedure which provided for such an alternative to an internal inquiry. The employee consented to the process and the procedure was part and parcel of his contract of employment. The employer then withdrew from the process on the pretext that Tokiso was not accredited to conduct the s 188A enquiry. It then convened its own inquiry and dismissed the employee. The court concluded that his dismissal was a breach of the employer's obligation to deal with his alleged misconduct in the S 188A enquiry which was part of the employee's contract of employment. The court stated:

> *[16] … By referring the matter to pre-dismissal arbitration, the respondent lost the right to take decisions on the relevance of documents the applicant requested as it had handed the matter over to Tokiso. When the tripartite agreement was reached, the respondent had no residual power to take any step against the applicant including dismissing him in terms of its disciplinary code. The respondent had no right to abandon the pre-dismissal arbitration unilaterally. By withdrawing from the pre-dismissal arbitration agreement having elected to deal with the allegations of misconduct against the applicant by means of a pre-dismissal arbitration, the respondent acted in breach of the applicant's contract of employment. The applicant is therefore entitled to the relief he is seeking."*

Accordingly, the court set aside the termination and reinstated the employee retrospectively.

[25] The court in *Mchuba* endorsed the approach adopted in *MSC Depots*. In the earlier case, the parties had been bound by their agreement to invoke the S 188A process and a court order to the effect that the allegations of misconduct had to be determined in the arbitration proceedings[5]. The court found the employer was not entitled to abandon the process unilaterally[6]. The court concluded that:

> *"[18] In the absence of any right by the first respondent unilaterally to withdraw from an agreement to refer the allegations of misconduct against the second and third applicants to an arbitration hearing, the applicants are entitled to the relief they seek. Their rights are affirmed by the terms of the order of this court granted on 22 May 2012. In these circumstances, the dismissals of the second and third applicants stand to be set aside, and the first respondent ordered to comply with its obligations in terms of the agreement concluded in terms of s 188A."*

[26] Turning to the present matter, it differs from the two cases discussed in that in those matters it was the employer who invoked the arbitration hearing process and was then prevented from resiling from the process. In this instance it is the applicant that initiated the process using a referral under s 188(11). In addition, until its belated and half-hearted attempt to review the ruling of 5 June 2024 which determined that the disciplinary enquiry it had initiated internally would henceforth proceed as a pre-arbitration hearing under s 188A, the municipality had in fact not contested that the enquiry should proceed on that basis.

[27] The fact that the s188A proceeding was initiated by the applicant under sub-section 188A(11), rather than being initiated by the employer under s188A(1) makes no difference to the legal status of that proceeding *vis-à-vis* the legal status of municipality's internal process in terms of which it purported to continue with a second enquiry and in consequence of which it claimed to have been able to dismiss the applicant. For present purposes all that matters is that there was a s188A proceeding underway

[5] *MSC Depots* at paragraph 14.
[6] *MSC Depots* at paragraph 15.

which included the same charges which the municipality continued to pursue in its second internal disciplinary enquiry.

[28] In this case, it follows from the principles set out in *Mchuba* and *MSC Depots* that the municipality's power to determine the outcome of the disciplinary hearing in respect of all charges brought against the applicant lay solely in the hands of the bargaining council arbitrator seized with the pre-dismissal arbitration once the arbitrator's ruling had been issued on 3 December 2024. The disciplinary procedure which the municipality pursued after that date was of no legal consequence and the chairperson no longer had any power to reach findings or decide a sanction on behalf of the municipality. The arbitrator was now the only party legally empowered to perform that roll. Consequently, the "dismissal" of the applicant by the municipality on 13 December amounted to nothing more than the expression of a belief that it was legally capable of making such a decision.

[29] The municipality's eleventh-hour counter-application to review and set aside the rulings of the arbitrators which established and expanded the scope of s 188A pre-dismissal arbitration in process, was initiated because it recognised that its conduct in continuing with the second internal inquiry flew in the face of the those rulings.

[30] However, even if it is correct that the applicant's dismissal can be declared a nullity because the municipality had no power to proceed with the second internal inquiry, nor any power to dismiss him for the misconduct he had been charged with because that would amount to usurping the powers now assigned to the arbitrator chairing the pre-dismissal arbitration, the municipality insists that the Labour Court has no jurisdiction to pronounce on the issue in this application.

[31] It relies on the principle established in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* [7] to the effect that this court has no jurisdiction under the LRA to entertain claims that a dismissal is unlawful because it was in breach of a provision of the LRA[8].

[7] 2016 (3) SA 251 (CC); (2016) 37 *ILJ* 564 (CC)
[8] *Viz* :

Nonetheless, the termination of a contract of employment may declared unlawful if it is a breach of an employment contract, by virtue of this court's jurisdiction under s77(3) of the Basic Conditions of Employment Act, ('the BCEA')[9]. In addition, in *Hendricks v Overstrand Municipality & another (Hendricks*), the Labour Appeal Court held

> *"In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative G action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law"* [10]

[32] Thus, the applicant might have pleaded a case based on breach of contract, seeking relief in the form of an order of specific performance, or might have applied on an urgent basis to review and set aside his dismissal on grounds of illegality. The difficulty the court has is that in his affidavits and notice of motion, the applicant simply claims that his dismissal is unlawful because the municipality was not entitled to run a disciplinary inquiry in parallel with the S 188A pre-dismissal arbitration. Although he might well have framed his claim as one that flowed from a

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> *"[106] Section 189A falls within Chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE. Under the heading appears an indication of which sections fall under the chapter. The sections are reflected as "ss 185-197B". The chapter starts off with section 185. Section 185 reads: "Every employee has the right not to be— (a) unfairly dismissed; and (b) subjected to unfair labour practice." 114 In South African Maritime Safety Authority v McKenzie [2010] ZASCA 2; 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA); the Supreme Court of Appeal, through Wallis AJA held that one could not simply transpose rights from the LRA into the contract of employment. Conspicuous by its absence here is a paragraph (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in section 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in breach of a provision of the LRA."*

[9] *SA Municipal Workers Union on behalf of Morwe v Tswaing Local Municipality & others* (2022) 43 *ILJ* 2754 (LAC) at paragraphs 11 to 13

[10] (2015) 36 *ILJ* 163 (LAC) at para 29.

breach of contract, he made no reference to his employment contract either in his prayers or in his affidavits. Similarly, he did not set out a case to urgently review and set aside the decision to dismiss him based on illegality. This is unfortunate, but the court cannot formulate an applicant's claim for them, when their founding papers do not give a clear indication of the legal nature of their claim. In Phahlane v SA Police Service & others[11], this court stated:

> *"[6] This court is a creature of statute. In terms of s 157(1), subject to the Constitution and s 173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. In other words, a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that provides for that dispute to be determined by this court. It is incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction is to be determined strictly on the basis of the applicant's pleadings, the merits of the claim are not material at this point. What is required is a determination of the legal basis for the claim, and then an assessment of whether the court has jurisdiction over it (see Chirwa v Transnet Ltd & others 2008 (4) SA 367 (CC); (2008) 29 ILJ 73 (CC) at para 155, Gcaba v Minister for Safety & Security & others 2010 (1) SA 238 (CC); (2010) 31 ILJ 296 (CC) at para 75)."*

(emphasis added)

[33] Similarly, the LAC has reiterated the principle:

> *[21] In any event, the conclusion of the Labour Court on the question of jurisdiction cannot be faulted. The appellant bore the onus to prove, inter alia, that the Labour Court had jurisdiction to hear and determine the matter. This implies that the appellant should have pleaded the basis for jurisdiction and proved it. Since the appellant did neither, the Labour Court was justified in dismissing the application."* [12]

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[11] (2021) 42 *ILJ* 569 (LC) at para 6

[12] *SA Municipal Workers Union on behalf of Makofane v Matjhabeng Municipality & another* (2023) 44 *ILJ* 2692 (LAC)

[34] In this matter, the legal basis for the claim that his dismissal is unlawful has not been pleaded other than to assert that there is conflict between the municipality conducting a parallel inquiry to that of the pre-dismissal arbitration and that the municipality's conduct is unlawful. A bald claim of unlawfulness is insufficient to establish jurisdiction. In the cases relied on by the applicant, the applicant in those matters clearly pleaded that the employer's conduct was a contractual breach. He has not done so in this instance, nor has he framed his case as a legality review, so the court cannot be sure whether he is relying on a contractual right or a right to review set aside the dismissal. Consequently, the applicant has failed to establish a basis for the court's jurisdiction and his application falls to be dismissed.

Costs

[35] I have already commented disapprovingly of about the way the municipality was not candid with the court about its dismissal of the applicant. In addition, its belated application to review the two arbitral rulings necessitated the postponement of the application. It then abandoned this without prior notice to the applicant when the application was re-enrolled. In keeping with the principles of law and fairness, it is appropriate in these circumstances that the municipality must bear the wasted costs of the applicant for the postponement and its costs of filing an answering affidavit to opposed the counter-application and such costs should be paid on a punitive scale.

Order

1. The application is heard as a matter of urgency and any non-compliance with the forms and service provided for in the Rules of Court is condoned.
2. The application is struck off the roll for lack of jurisdiction.

3. The First Respondent must pay the Applicant's wasted costs incurred in the postponement of the application to 24 December 2024, and the Applicant's costs incurred in drafting and filing an answering affidavit to the First Respondent's counter-application and preparing argument relating thereto, with all costs being calculated on an attorney own client scale in line with Scale C of the Amended Uniform Rules of the High Court.

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R Lagrange

Judge of the Labour Court of South Africa

Appearances

For the Applicant	G Kirby-Hirst of MacGregor Erasmus Attorneys Inc.
For the Respondents	B Mbili instructed by S D Moloi & Associates Inc.