

SOUTH AFRICA / JUDGMENT

MEC for the Department of Health Eastern Cape v NEHAWU and Others (P48/22) [2022] ZALCPE 9 (24 June 2022) [2022] ZALCPE 9

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

P48/22

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

CASE

NO: P48/22

In

the matter between:

THE
MEC FOR THE DEPARTMETNT OF HEALTH
EASTERN
CAPE
Applicant
and
NEHAWU
First Respondent
PERSONS
LISTED IN ANNEXURE 'A'
Second Respondent
ESSENTIAL
SERVICES COMMITTEE
Third Respondent

Heard:

17 June2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the Respondents' Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 12h00 on 24 June 2022.

JUDGMENT

LALLIE J

- [1] On 5 May 2022 this court issued a rule nisi calling upon the first and second respondent to show cause why an order declaring their industrial action to constitute an unprotected strike should not be made final. The rule nisi included an interdict restraining the first and second respondent who will be referred to as the respondents in this judgment, from participating in the strike and interfering with the proper functioning and operation of the Department of Health of the Province of the Eastern Cape. The application is opposed by the respondents.
- [2] Before the return day the respondents filed a counter-application seeking, mainly, the following relief:
- ‘1. That it be declared that the Applicant's failure to provide fully equipped ambulances to the employees of the following Emergency Medical Services Bases: Adelaide, Bedford, Fort Beaufort, Alice, Keiskammahoek, King William's Town, Peddie, Cathcart and Stutterheim, is in conflict with the provisions of section 27 of the Constitution of South Africa; The National Health Act 61 of 2003 and the provisions of GN1320 of 1 December 2017: Emergency Medical Services Regulation (Government Gazette No. 41287), particularly the provisions of Regulation 11(a) of Annexure A as read with Annexure B thereof; and the provisions of section 1 of the Eastern Cape Province Health Act 10 of 1999;
2. That the Applicant be ordered to provide an adequate number of ambulances, ambulance personnel and adequate ambulance equipment as stipulated in Annexure A and Annexure B of the Emergency Medical Services Regulations in respect of all ambulances allocated to Adelaide, Bedford, Fort Beaufort, Alice, Keiskammahoek, King Williams's Town, Peddie, Cathcart and Sutterheim, within 10 days.’
- [3] On the return day the applicant sought an order discharging the rule nisi and the counter-application was argued. In opposing the counter-application the applicant raised a number of points in limine. The one on this court's lack of jurisdiction will be considered first as the authority of the Labour Court to adjudicate a matter depends on whether the necessary jurisdiction exists.

- [4] It was argued on behalf of the applicant that an order declaring the applicant's failure to provide fully equipped ambulances to the Emergency Medical Services employees based in Adelaide, Bedford, Fort Beaufort, Alice, Keiskamahoe, King Williams Town, Peddie and Stutterheim to be in conflict with provisions of section 27 of the Constitution of the Republic of South Africa (the Constitution) may not be granted as this court lacks jurisdiction to grant it. It was argued that a litigant who alleges the infringement of a right that is protected in the Constitution may not rely on the Constitution directly but on legislation enacted to protect that right. Reliance was placed on *Electoral Commission of South Africa v DA and Others*[1] and *My Vote Counts NPC v Speaker of the National Assembly*[2]. The correctness of the applicant's argument was not successfully challenged by the respondents. I therefore accept the applicant's argument because it is consistent with the legal position in respect of claims based on alleged violation of constitutional rights.
- [5] It was further argued that this court lacks jurisdiction to declare the above mentioned alleged conduct of the applicant to be in conflict with the provisions of the National Health Act[3] and provisions of GN 1320 of 1 December 2017, Emergency Medical Services Regulation (Government Gazette NO 41287) and provisions of section 1 of the Eastern Cape Province Health Act[4]. It was argued that the counter-application falls outside the realm of section 157 of the Labour Relations Act[5] (the LRA). Section 157(2) of the LRA, so went the argument, may be invoked when section 157(1) does not grant the necessary jurisdiction. In support of the argument, reference was made to *Botes v City of Johannesburg Property Company SOC Ltd and Another*[6]. It was the applicant's case that it is fundamentally wrong for this court to appropriate to itself under section 157(2), jurisdictional powers where the LRA has given jurisdiction to other statutory fora because a constitutional right is violated or threatened.
- [6] It was argued on behalf of the respondents that section 157(2) of the LRA grants this court the necessary jurisdiction to adjudicate the counter-application. Section 157(2) of the LRA provides as follows:
- ‘(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.’
- [7] An interpretation of section 157(2) requires that provisions of section 157(1) which reads as follows be taken into consideration:

‘(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.’

Section 157(1) therefore gives the Labour Court exclusive jurisdiction over those matters that the LRA or other law confers on it. A concession was made on behalf of the respondents that the law, other than the Constitution, the counter-application is based on, does not confer on the Labour Court jurisdiction to determined matters arising from it.

[8] The respondents’ case on jurisdiction is based on section 157(2) read with section 158(iv) of the LRA. The latter grants the Labour Court the power to issue declaratory orders. It was argued on behalf of the applicant that the power of the Labour Court to make declaratory orders is limited to matters which fall under its jurisdiction. I have considered the authorities the respondents sought to rely on which, in the applicant’s view, are distinguishable from the matter at hand.

[9] Section 27 of the Constitution guarantees, inter alia, the right to access of health care services. The respondents sought to rely on *Sobramoney v Minister of Health, kwa Zulu-Natal*[7] where a terminally ill patient was denied the use of dialysis equipment in a public hospital. He approached the Constitutional

Court in an effort to enforce his right in terms of section 27(2) of the Constitution which provides that no one may be refused emergency medical treatment. The judgment is distinguishable from the respondents’ case which is not based on denying a particular

individual the right to emergency health care. The efforts to protect the Constitutional right are not linked to the conduct of the department of health as an employer. Some authorities the respondents sought to rely on deal with claims which are based on the LRA and the Basic Conditions of Employment Act[8] statutes in which the jurisdiction of the Labour Court is expressly conferred.

[10] The respondents also sought to rely on *Khula Community Development Project v The Head of Department of Eastern Cape Department of Basic Education and Others*[9], which was delivered on 22 March 2022. In that matter the applicant sought to enforce the right to basic education. A reading of the judgment reveals that the manner in which the applicant’s case was pleaded distinguishes it from the matter at hand. The constitutional right that was violated is disclosed in unequivocal terms. So is the manner of the violation and the persons whose right to basic education was violated. Each case is determined on its pleadings. A further significant difference is that the applicant did not link the right to basic education that was allegedly violated with its employment or labour relations.

[11] Jurisdiction is determined on the pleadings. In applications affidavits constitute both pleadings and evidence. An applicant’s case must be stated in the founding affidavit. In the respondents’ founding affidavit to the their counter-application, the deponent stated that the

Constitution guarantees every person the right to access to health care services including emergency medical service. He further states that section 27(3) provides that no one may be refused emergency medical treatment. The respondents, as it was correctly argued on behalf of the applicant, do not identify the person who was refused emergency medical health care and the form the denial took.

- [12] The respondents submitted that the applicant's failure to provide properly equipped and adequate ambulances in certain areas should be declared a violation of section 27 of the Constitution. The averments the respondents made did not achieve their purpose of placing their counter-application within the realm of section 157(2). The respondents did not disclose the portion of section 157(2) they based their case on. They therefore did not disclose what the violation of section 27 of the Constitution arose from. Section 157(2) delineates in section 157(2) (a),(b) and (c) the alleged or threatened violation of the constitutional rights which fall within the jurisdiction of the Labour Court.
- [13] The respondents made no allegations proving that the alleged violation of section 27 of the Constitution they sought to rely on arises from employment and labour relations or any circumstances referred to in section 157(2)(b) or (c).
- [14] The provisions of section 157(2) of the LRA are elucidated in the following dictum in *Motor Industry Staff Association v Macun No & Others*[10] :
- '... s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s157(2)(a), (b) and (c).'
- [15] The applicants did not prove that this court has the necessary jurisdiction to adjudicate the counter-application. The point in limine on jurisdiction must therefore succeed.
- [16] The respondents sought a costs order against the applicant. In light of the applicant's success in opposing the counter-application, fairness requires that a costs order should not be granted as a result of having the rule nisi discharged. In taking the decision on costs I am mindful of the costs that were reserved when this matter was postponed. However, the effect of costs orders when parties have a continuing relationship in the circumstances of this matter tipped the scales in favour of the applicant.

[17] In the premises, the following order is made:

Order:

1. The rule nisi is issued out of this court on 5 May 2020 is discharged.
2. The point in limine on jurisdiction is upheld.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Thys

Instructed by

The State Attorney

For the Respondents: Advocate Madokwe with Advocate Ndamase

Instructed by

Ntanzi Attorneys Inc

[1] (2021) 4 All 52 (SCA).

[2] 2016

(1) SA 132 (CC).

[3] Act 61 of 2003.

[4] Act 10 of 1999.

[5] Act 66 of 1995 as amended.

[6] [2021] 2 BLLR 181 (LC).

[7] 1998

(1) SA 765 (CC).

[8] Act 75 of 1997.

[9] an unreported judgment of the High Court, Eastern Cape Division under case number 611/2022.

[10] (2016) 37 ILJ 625 (SCA) at para 20.

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Prepared on 14 October 2026 · Esheria