

SOUTH AFRICA / JUDGMENT

Strydom v Arcelormittal South Africa (J 1764/2023) [2023] ZALCJHB 345; (2024) 45 ILJ 931 (LC) (27 December 2023)

[2023] ZALCJHB 345

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 1764/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FLYNOTES:

LABOUR

– Suspension – Without

pay –

Due

to applicant's conduct in deliberately delaying hearing –

Alleges suspension without pay is unlawful –

Court has no

jurisdiction to adjudicate applicant's unlawful suspension

dispute – Averments made are interspersed

with allegations

regarding unfairness of suspension, an issue court has no

jurisdiction to adjudicate as a court of first

instance –

Application struck off roll for lack of jurisdiction.

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: J 1764/2023

MARK

STRYDOM

Applicant

And

ARCELORMITTAL

SOUTH AFRICA

Respondent

Heard:

21 December 2023

Delivered: 27 December 2023
This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 27 December 2023.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis for an order that the decision taken by the Respondent on 5 December 2023 to suspend him without pay, be declared unlawful and null and void, alternatively be set aside.
- [2] The application is opposed. The Respondent took issue with urgency. I do not intend to set out in detail the attack on urgency, as I am of the view that the application should be heard urgently. This Court has a discretion in this regard and I am exercising my discretion to deal with the merits of this application on an urgent basis.

The

facts

- [3] The parties placed comprehensive facts before this Court and I will deal with the facts relevant for purposes of this judgment.

The sequence of events: the disciplinary hearing

- [4] The Applicant is employed as a senior analyst, information management at the Respondent's Newcastle plant. He was placed on precautionary suspension, with full pay, on 31 January 2023 and he received a notice of a disciplinary hearing, set down for 6 and 7 February 2023. The said notice informed the Applicant that he was entitled to be represented by a legal representative, and he secured legal representation.
- [5] The Respondent's representative was not available to proceed with the hearing on 6 and 7 February 2023. In April 2023 the parties agreed for both of them to be legally represented and the disciplinary hearing was to be chaired by Mr Khumalo, an independent chairperson from Tokiso Dispute Resolution Centre. The Applicant's disciplinary hearing was set down for 26 May 2023, on which occasion the Applicant was unrepresented and the hearing did not proceed. By agreement between the parties, the disciplinary hearing was rescheduled to 29 June 2023.

- [6] On 29 June 2023, before the disciplinary hearing commenced, the Applicant's representative, Adv Nel, raised a number of preliminary issues and the chairperson, Mr Khumalo directed that the legal representatives should prepare representations on the preliminary issues raised. The disciplinary hearing was adjourned and it was agreed between the parties that the Applicant would file his preliminary points before 12 July 2023, that the Respondent would respond thereto on or before 19 July 2023 and that the chairperson would issue a ruling within 7 days. On 26 July 2023 Mr Khumalo issued a ruling, wherein the Applicant's preliminary point was dismissed, the charges were not withdrawn and the disciplinary hearing was to proceed. The disciplinary hearing was set down to proceed on 21 and 22 August 2023 and 4 and 5 September
2023. The Respondent's main witness was not available from 13 – 29 August 2023 and the hearing could not proceed on 21 and 22 August
2023. The parties agreed that the disciplinary hearing would continue on 4 and 5, 27 and 28 September 2023.
- [7] On 14 August 2023 the Applicant's attorneys, KMG, addressed correspondence to the Respondent's attorneys, CDH, requesting further particulars. On 31 August 2023 KMG addressed a letter to CDH, advising that no response was received to the request of 14 August 2023 and that as a result, an application for postponement would be made on 4 September 2023, as the Applicant was unable to prepare his defence. KMG also indicated that an application would be made for the recusal of the chairperson and for the disciplinary hearing to be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the provisions of section 188A(11) of the Labour Relations Act[1] (LRA).
- [8] On 1 September 2023 CDH responded to KMG and refused to provide the further particulars as they were of the view that the requested documents were not relevant to the disciplinary hearing and that the Applicant would not be prejudiced without them and that the documents which the Respondent intended to rely on to prove the charges, had already been provided.
- [9] On 4 September Adv Nel raised three preliminary points, which were all dismissed on 5 September 2023. Thereafter the chairperson directed that the charges be read and that the Applicant should plea thereto. At around 13:00 the amended charges were read to the Applicant and he pleaded not guilty to all the charges. After the Applicant pleaded, the chairperson ruled that the matter be postponed to 27 and 28 September 2023.

[10] On 27 September 2023 Adv Nel made an application for the disciplinary hearing to be terminated and for the matter to be referred to the CCMA in terms of the provisions of section 188A(11) of the LRA. The chairperson dismissed the application on 28 September 2023 and the Respondent called its first witness. After the first witness concluded evidence in chief, the matter was postponed by agreement to 20 – 23 November 2023, for the cross-examination of the first witness and for the Respondent to call more witnesses.

[11] Adv Nel cross-examined the Respondent's first witness on 20, 21 and 22 November 2023 and the re-examination was concluded on 23 November 2023. The Respondent's second witness was called and after evidence in chief was concluded, cross-examination started and the hearing was postponed for the finalisation of the witness'

cross-examination.

[12] The parties and the chairperson agreed that the matter be postponed to 1 – 4 and 10 and 11 February 2024.

The sequence of events: the Applicant's unpaid suspension

[13] On 22 November 2023 Ms Vrey from CDH addressed correspondence to KMG, wherein it was alleged that the Applicant was responsible for various unreasonable delays. The letter recorded the history of the disciplinary process since its commencement and it is evident from the content of the letter that Ms Vrey and the Respondent's frustration with the process came to a head during the proceedings of November 2023. The letter recorded that Adv Nel started cross-examination of the Respondent's first witness on 20 November 2023 and on neither 20 or 21 November 2023 had the Applicant provided any response to the charges against him, but Adv Nel instead continued to delay the matter by cross-examining the witness on his qualifications and other irrelevant matters. As a result, the witness did not conclude the testimony on 21 November 2023. On 22 November 2023 the Respondent raised the concern that it no longer employed its second witness and that she had on three separate occasions requested

leave from her current employer to be able to testify and that the Respondent is prejudiced in that, as a result of the Applicant's

delay, the witness might no longer be available to testify. The Respondent requested that the second witness be allowed to testify on 22 November 2023, to which Adv Nel responded that 'he does not care' and indicated that he intended to keep the first witness under cross-examination for the entire week and the second witness will be cross-examined for longer than a day, without knowing who the second witness is or what evidence will be adduced.

- [14] It was clear to the Respondent that the Applicant had at all times decided to delay the proceedings and has no intention of constructively participating in the disciplinary hearing to ensure that it is finalised. The Respondent made it clear that, as a result of the Applicant's conduct in deliberately delaying the disciplinary hearing, its intention was to suspend the Applicant without pay. The Applicant was afforded an opportunity to make written representations as to why he should not be placed on unpaid suspension.
- [15] The Applicant filed his written submissions on 29 November 2023. He submitted a forensic investigation against the Applicant was initiated by the Respondent on 4 February 2022, the forensic investigation was concluded on 10 August 2022 and report recommended that the Respondent takes appropriate action against the Applicant, but no action was taken until 30 January 2023, when the Applicant was charged and suspended.
- [16] The Applicant's version is that the Respondent's second witness testified on 23 November 2023 and finished examination in chief at around 12:30, when the chairperson suggested that the hearing be postponed as it is not desirable to start with cross-examination that late in the day. Ms Very objected due to unreasonable delay and the chairperson ruled that Adv Nel should start with cross-examination. At around 16:00 the chairperson suggested that the hearing be postponed for further cross-examination and by agreement, it was postponed to 1 – 4 and 10 and 11 February 2024.
- [17] The Applicant submitted that placing him on unpaid suspension will be highly prejudicial, will amount to a material breach of contract and he cannot be penalised for exercising his rights to bring applications, which he is by law permitted to bring.
- [18] The Respondent's version is that notwithstanding the fact that its representative and Mr Khumalo were available on dates in December 2023 and January 2024, the disciplinary hearing could not be set down on any date before February 2024, as Adv Nel was on vacation and not available.
- [19] On 5 December 2023 the Respondent suspended the Applicant, without pay, pending the conclusion of his internal disciplinary hearing.
- [20] On 14 December 2023 the Applicant referred an unfair labour practice dispute, relating to unfair suspension, to the Metal Engineering Industries Bargaining Council (MEIBC) and the outcome required is 'the upliftment of both the suspension without pay and the precautionary suspension.'

The urgent application

- [21] Also on 14 December 2023 the Applicant filed an urgent application, seeking an order that the decision taken by the Respondent on 5 December 2023 to suspend him without pay, be declared unlawful and null and void, alternatively be set aside.

[22] The central issue to be decided is whether the decision to suspend the Applicant without pay is lawful. His case is that the Respondent does not have a right to suspend him without pay, either in terms of applicable legislation or in terms of its own policies and the decision to suspend him without pay, when he is already suspended, is unlawful. The Applicant submitted that any delay in the finalisation of a disciplinary hearing cannot justify a further suspension or a punitive suspension without pay.

[23] The Applicant submitted that the reasons for the postponement of the disciplinary hearing were legitimate reasons and most of the postponement were by agreement between the parties and as such, the Respondent cannot justify a suspension without pay, based on its subjective view of unreasonable delay, especially where the Respondent was also responsible for some of the delays.

Obiter

[24] This Court has bemoaned the approach adopted in disciplinary enquiries on several occasions and it continues to express concern regarding the manner in which disciplinary hearings are conducted. As far back as 1992 the Labour Appeal Court (LAC) held in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[2] that:

In *Khanum v Mid-Glamorgan Area Health Authority* 1978 IRLR 215 it was held that there are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary enquiry, viz:

- (a) the person should know the nature of the accusation against him;
- (b) he should be given an opportunity to state his case;
- (c) the tribunal should act in good faith.

(See *Twala v ABC Shoe Store* (1987) 8 ILJ 714 (IC) at 716D-F.)

This court is satisfied that, in the present case, all three of those basic requirements were met in the proceedings, both

before the disciplinary enquiry and on appeal.Moreover, at disciplinary hearings presided over by laymen, it cannot be expected that all the finer niceties which a formal court of law would adopt will always be observed.

[25] In the LRA the statutory requirements for fair procedure are clearly spelled out in the Code of Good Practice: Dismissal and those were elaborated on in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*[3] where it was held that:

To some extent, chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in schedule 8 to the LRA.

Item 4 of the code provides:

'(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.' (Emphasis added.)

It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged

misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace

efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged

(as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural

requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

'The draft Bill requires a fair, but brief, pre-dismissal procedure. . . . [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate

pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.'

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal

trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.

[26] In *Tshongweni v Ekurhuleni Metropolitan Municipality*[4] the Court was faced with a matter where the employee was dismissed and far from the brief pre-dismissal procedure envisaged by the LRA, the disciplinary enquiry was chaired by a member of the Johannesburg bar, and both the applicant and respondents were represented by practising lawyers. The transcript of the disciplinary hearing extends to some 2,240 pages, the bulk of it devoted to technical legal issues. The Court considered the systemic delays in the resolution of labour disputes and explained that a simple, quick, cheap and non-legalistic approach to the adjudication of misconduct cases was envisaged to achieve the purposes of the LRA. The Court remarked that the facts of the case illustrated just how elusive the objects of the LRA remain and how legalism continues to undermine the purpose of the Act:

But systemic delay in the labour dispute-resolution system is rooted more deeply than the managerial or administrative shortcomings of any particular institution. It also extends to the manner in which disciplinary enquiries are conducted by employers, and especially the phenomenon of enquiries chaired by practising lawyers at which both parties are legally represented.

The present case is an example of an individual dismissal dispute that from the outset was handled in a manner that entirely undermines the purpose of the Labour Relations Act (LRA). That purpose is recorded in the Explanatory Memorandum that accompanied the first draft of the current LRA. The memorandum dealt with what was referred to as the highly legalistic and expensive system of dispute resolution, and proposed the following solution:

'In cases concerning the alleged misconduct of workers, the courts have generally required an employer to follow an elaborate pre-dismissal

procedure and have thereafter conducted a fresh, full hearing on the merits of the case. Apart from its duplication and lengthiness,

this approach has obvious cost implications for the parties and the State. The draft Bill requires a fair, but brief, pre-dismissal

procedure, and quick arbitration on the merits of the case....

[27] In *Stokwe v MEC: Department of Education, Eastern Cape and others*[5] the Constitutional Court confirmed that the requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion.

The Court held that disciplinary proceedings must be completed in the shortest possible time-frame.

[28] In *Department of Public Works and another v Vukela & others*[6] the Court observed that there was a 'yawning gap' between the rights of employees in the public and private sectors and the injustice that is occasioned. The matter concerned an extended suspension of an employee, pending a disciplinary hearing and the Court remarked that, without attributing any blame to any particular party, the state of affairs demonstrated the regrettably dysfunctional state of workplace discipline and dispute resolution consequent on a system of regulation that encourages parties to avoid the merits in favour of technicalities. The Court said that:

Ironically, the multiplicity of laws and the consequent complexity, inconsistency, duplication of resources and jurisdictional confusion

are all problems that the LRA sought to address. Perhaps the time has come for there to be a formal enquiry into why workplace

discipline and dispute-resolution procedures (especially in the public sector) remain out of step with legislative intent, and for the legislature to consider how the agreed goal of efficient, expeditious and inexpensive procedures might be better achieved.

[29] The Judge President of the Labour Court and the Labour Appeal Court (Waglay JP) speaking at the CCMA's fourth labour conference, was critical of labour relations at workplaces and said that:

“Workplace disciplinary processes appear to be increasingly dysfunctional, with the referral of the court as a first resort instead of a last resort.”

Naming, shaming and blaming all too often characterise the labour relations discourse. Too many workplaces remain dispute-driven rather than relationship-driven. There is a reluctance to experiment with creative alternatives to the burden style of positional collective bargaining.

The Labour Court has repeatedly commented on the futility of workplace procedures that seek to emulate criminal trials.

[Cases are brought to court] at a massive cost for little return.”

[30] The LRA did not envisage the disciplinary process adopted by many employers and abused by some employees. On the contrary, in its simplest terms the LRA introduced a process that requires an investigation into any alleged misconduct, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision. Considering the number of cases challenging either the institution, continuation or outcome of internal disciplinary hearings, or processes related thereto, that end up in this Court, it is evident that employers, trade unions and legal practitioners (and any other relevant role player) took little note of the provisions of the LRA and judgments of and the concerns raised by this Court. Instead, they are still inclined to agree to retain the criminal justice model by way of contract of employment, employment policies and practices or collective agreements. Obviously, once agreed to, employers are bound to apply the standards to which they have agreed or that they have established.

[31] In casu the Applicant's case is that his suspension without pay is unlawful.

[32] The Respondent in its answering affidavit submitted that the Applicant is an employee who has engaged various stratagems to frustrate the proceeding of the disciplinary hearing and that ‘the courts have held that in circumstances of delays an employer may place an employee on unpaid suspension.’ In argument I canvassed the issue with Ms Ngwenya for the Respondent and she submitted that there is indeed no authority of this Court which confirmed the unpaid suspension of an employee due to delays, but she referred to arbitration awards where it was confirmed that an employer was entitled to place an employee on unpaid suspension, due to delaying tactics. Ms Ngwenya conceded that this Court is not bound by the findings of an arbitrator, but submitted that it was good law and this Court should take note thereof.

- [33] In *Nehawu v University of Cape Town and others*[7] the Constitutional Court confirmed that by their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily.
- [34] Employees who are suspended are normally entitled to their full pay pending disciplinary action. However, where the suspension is extended for an unreasonably long period, due to the employee's requests for postponement or other reasons causing a delay and related to the conduct of the suspended employee, it would be unfair to apply the general principle that a suspended employee is entitled to full pay. In my view the possibility of suspending an employee without pay, where the disciplinary hearing is frustrated and delayed by the employee and the stratagems he/she employs to ensure that the

disciplinary hearing does not finalise within a reasonable period, exists. Suspended employees facing disciplinary action cannot be allowed to find reasons or to employ tactics to delay the disciplinary proceedings at the employer's costs, as that would

constitute an abuse of process. This problem is compounded by the tension between the interests of the employee and the interests of the employer that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. Each case will have to be decided on its own merits.

Analysis

Jurisdiction

- [35] The Respondent submitted that this Court lacks jurisdiction to entertain the Applicant's application. The Applicant seeks to mischaracterise his complaint in an effort to circumvent the bargaining council process as to engineer a basis to bring his matter within the Court's jurisdiction. The Respondent's case is that the Applicant's dispute regarding the unlawfulness of his suspension, properly construed, is an issue that should be adjudicated in terms of the unfair labour practice provisions of the LRA. The Respondent submitted that the distinction between unlawfulness and unfairness is artificial and legally flawed.
- [36] The first question to be decided is whether this Court has jurisdiction to adjudicate this application.
- [37] In his application, the Applicant addressed the issue of jurisdiction as follows:

"The above honourable Court is vested with the necessary jurisdiction to adjudicate this matter since the Respondent's registered

address falls within the area of jurisdiction of the above Honourable Court and the relief sought relates to an unlawful suspension."

[38] Section 156 of the LRA provides that this Court has jurisdiction in all the provinces of South Africa, wherefore it is strictly speaking not necessary to aver that a cause of action arose within the jurisdiction of the Court, as this Court has national jurisdiction. It is rather necessary for the cause of action to fall within the ambit of the jurisdiction of the Labour Court and for averments to be made in that regard.

[39] In *Shezi v SAPS and Others*[8](*Shezi*) the Court considered the issue of jurisdiction and held that:

This court is a creature of statute. Its inherent powers, authority and standing are equal to that of a Division of the High Court, but only in relation to matters under its jurisdiction (see section 151 (2) of the LRA). There is a misconception that the court has jurisdiction over all disputes that arise in the context of an employment relationship. It does not. Some 20 years ago, the Judge President bemoaned the fact that the Court did not enjoy jurisdiction over all employment-related disputes, and urged the legislature to remedy this shortcoming. Regrettably, the legislature did not respond to this call and in broad terms, the jurisdiction of this court remains to be determined in terms of the Act as it was drafted in 1996.

[40] The Labour Court derives its jurisdiction from section 157(1) and (2) of the LRA and its powers from section 158 thereof.

[41] In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another*[9] the Court held that:

I must accordingly turn to the question whether this court has jurisdiction to entertain the present application. This question is intimately intertwined with the question whether the applicant has a right to have the court intervene and come to his assistance at this stage. I might, at the outset state that if the court has the jurisdiction it would have the power to grant an appropriate remedy. But because it has a power does not mean that it has jurisdiction. This proposition is sometimes overlooked.

[42] In *Natal Sharks Board v SA Commercial Catering and Allied Workers Union and Others*[10] the Court held that “Powers and jurisdiction are separate concepts that should not be confused.” This is a very important distinction, because where the Court has a power, it does not automatically follow that it has jurisdiction.

[43] The question whether this Court has jurisdiction to grant the relief sought by the Applicant, is to be determined on the basis of his pleadings. This was confirmed by the Constitutional Court in *Gcaba v Minister for Safety and Security and others*[11](*Gcaba*) where it was held that:

Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba’s case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the

pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the content of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court.

Section 157(1) and (2) of the LRA

[44] Section 157 (1) provides that subject to the Constitution and section 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 this Court.

What this requires is that a party referring a dispute to this Court

for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this Court to adjudicate the dispute.

[45] Section 157(2) gives the Labour Court jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from employment and labour relations and 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. Section 157(2) refers to a 'fundamental right entrenched in Chapter 2 of the Constitution[12]' and it has been accepted that it refers to a 'fundamental right' as set out in the 'Bill of Rights'[13].

[46] It is thus 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. As was confirmed in Shezi:[14]

What this requires is that a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this court to adjudicate the dispute. It is thus 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, of course, 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.

[47] It is evident from the Applicant's pleaded case that he believes that this Court has jurisdiction because the relief he seeks relates to an unlawful suspension. The Applicant is however required to point to the specific provision of the LRA or any other law that confers jurisdiction on this Court to adjudicate his unlawful suspension dispute.

[48] This Court has no jurisdiction to decide a claim relating to unfairness or unlawfulness of suspension in terms of the provisions of the LRA.

[49] In respect of a claim for unlawfulness under the LRA, it was confirmed in Shezi as follows:

In so far as the applicant's cause of action is the alleged unlawfulness of the respondents' conduct, the question is

whether the court has jurisdiction to make such a determination. *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC), the appellants contended that their dismissals by the respondent were unlawful and invalid because their employer had not complied with time periods established by s189A of the LRA prior to issuing notices of termination of employment. The majority of the Constitutional Court rejected this contention, on the basis that this court has no jurisdiction to determine the lawfulness of a dismissal. The court observed that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid. At paragraph 106 of the judgment, the court said the following:

[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...

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 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 the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA...

And further at paragraph [107]:

This indication is reinforced when one has regard to the definition of "dismissal" in section 186 (1) ... Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if the dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.

The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy

under the LRA and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the

LRA, the applicant must categorise the alleged unlawfulness as unfairness (see *Singhala v Ernst & Young Inc & another*

(2019) 40 ILJ 1083 (LC), where my colleague Moshwana J reiterated the principle that dismissals alleged to be invalid and of no force and effect fall outside of the contemplation of the LRA.) By extension, the same principle applies to other forms of employer conduct which are alleged to be unlawful.

[50] The principles were confirmed in *DEMAWUSA and others v City of Johannesburg*[15]

The effect of this judgment (*Steenkamp & others v Edcon Ltd*) is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), that applicant has no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the LRA, the applicant must categorise the alleged unlawfulness as unfairness.

By extension, the same principle applies to any precautionary suspension from employment. Section 185 of the LRA is concerned with unfair dismissals and unfair labour practices. Section 186 (2) defines an unfair labour practice. In paragraph (b), the Act provides that the unfair suspension of an employee or any other unfair disciplinary action short of dismissal, constitutes an unfair labour practice. It follows that what was good for a termination of employment in *Edcon* is good for an unfair labour practice in the present instance. In other words, the lawfulness of any suspension is not a matter regulated by the LRA, and any remedy under that Act must be sought on the basis of fairness.

[51] This Court has no jurisdiction to adjudicate the Applicant's unlawful suspension dispute in terms of the LRA. As such, the Applicant has to point to the specific provision of any other law that confers jurisdiction on this Court to adjudicate his unlawful suspension dispute.

[52] It is evident from his pleaded case that the averments made are interspersed with allegations regarding the unfairness of his suspension, an issue this Court has no jurisdiction to adjudicate as a Court of first instance.

[53] The Applicant specifically pleaded that:

"Suspensions are unfair where the employer failed to comply with policies, regulations etc. In this regard the Respondent's own Disciplinary Policy provides in Part 2 Item 7 "Suspension"

7.1 The company shall have the right to suspend an employee (where appropriate) on full pay, pending the finalisation of the matter or investigation.

The Respondent had no right to suspend me without pay either in terms of the applicable legislation or in terms of its own policies and the decision taken to suspend me without pay where I was already suspended is *contra bonos mores* and as such unlawful."

[54] The Applicant made reference to 'applicable legislation' but failed to point to any specific provision of any other law that confers jurisdiction on this Court to adjudicate his unlawful suspension dispute. His case is also not one pleaded as one in contract, as provided for in the Basic Conditions of Employment Act[16].

[55] The Applicant has indeed sought refuge in the LRA and he has referred an unfair labour practice dispute to the MEIBC and the dispute so referred, includes the dispute about his unpaid suspension. A dispute under section 186(2) of the LRA is a dispute to be arbitrated.

[56] This court has no jurisdiction to determine the fairness of an employer's action where the nature of the dispute is one that requires it to be determined by arbitration. Section 157 (5) of the LRA provides as follows:

Except as provided for in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration.

[57] In *Manamela v Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and another*[17]it was held that:

What is now clear is that as a general proposition the Labour Court is not tasked with the determination as to whether or not a suspension of an employee is fair or unfair, and this task is specifically and only designated to the CCMA (or bargaining council as the case may be). In this regard, the Court in *Gradwell* said:

'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.'

[58] In casu the Applicant sought final relief, in circumstances where he had referred a dispute regarding his suspension to the MEIBC, including his suspension without pay dispute which is therefore pending before the MEIBC. He further failed to establish that this Court has jurisdiction to entertain his application as he did not point to the specific provision of any other law that confers jurisdiction on this Court to adjudicate his unlawful suspension dispute.

[59] In my view the position is this: where a litigant contends that his/her employer committed an unfair labour practice by suspending him/her, whether it is contended that the conduct is unfair or unlawful, such a litigant has to follow the process provided for in the LRA and a mere allegation of 'unlawfulness' will not clothe this Court with jurisdiction. The Courts have made it clear that the fact remains that the exclusion of this Court's jurisdiction in relation to unfair labour practices that are alleged to be unlawful has now been the subject of a definitive judgment by the highest court. Whatever uncertainty may previously have existed; the law is now clear.

Costs

- [60] The last issue to be decided is the issue of costs.
- [61] Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.
- [62] In *Zungu v Premier of Kwa Zulu-Natal and Others*[18] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.
- [63] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[19] it was emphasized that: ‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.’
- [64] Mr Janse van Rensburg for the Applicant submitted that the Respondent’s policy on suspension is clear that it is with full pay. The Applicant made submission to prevent the suspension without pay and to suspend the Applicant’s pay, is a misdirection of the Respondent’s authority and the Applicant seeks as punitive cost order.
- [65] Ms Ngwenya for the Respondent argued that the Applicants should be ordered to pay the costs of this application due to the manner in which he conducted himself during the disciplinary hearing and because his dispute is already pending before the MEIBC. Ultimately, she left the issue of costs in the hands of this Court.
- [66] In my view this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success, more so where an application is filed on an urgent basis during recess.
- [67] In *Sihlali* the Court also considered the issue of cost and held that:

[29] I take this opportunity to warn practitioners approaching the urgent court with such matters to ensure that such exceptional circumstances as contemplated in the Booysen's case do exist. Otherwise they run the risk of punitive costs being made against their clients. It is good practice for practitioners

practicing in this court to keep themselves abreast with the judgments of this court particularly those arising from the urgent

court. There is a developing trend that points to the fact that the urgent court is being abused. Might I state, an urgent court is meant for urgent matters. This court should not be detained to use its scarce, valuable time entertaining self-created urgent matters.

Practitioners should exercise greater care when considering approaching this court on urgency in matters where substantial redress is obtainable in due course.

[68] The Applicant brought an urgent application, seeking final relief, when he already referred a dispute to the MEIBC. Furthermore, the Applicant had no regard for the applicable authorities on the issue of jurisdiction and he did not come to Court as an unrepresented layperson, but he was assisted and represented by his legal team, who failed to consider the applicable principles and who failed to advise him properly before bringing this urgent application.

[69] Fairness dictates that the Respondent cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this Court on an urgent basis. The Applicant did not come to Court as an unrepresented layperson and therefore he was in a position to consider the consequences of instituting urgent litigation.

[70] I am alive to the fact that the Applicant is an individual. This Court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is not an immutable rule. I cannot ignore the fact that the Applicant ultimately initiated this application and persisted with it in circumstances when he should not have done so.

[71] In the present circumstances, the interests of justice require that the Applicant pays at least a portion of the Respondent's costs. In my view, a sum equivalent to 20% of the Respondent's costs will best serve those interests.

Order

In the premises, I make the following order:

1. The application is struck off the roll for lack of jurisdiction;
2. The Applicant is to pay the Respondent's cost, limited to 20% of the taxed costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant: Mr J R Janse van Rensburg from KMG &

Associates Inc Attorneys

On behalf of the Respondent: Adv Z Ngwenya

Instructed by:

Cliffe Dekker Hofmeyr Inc Attorneys

[1] Act 66 of 1995.

[2] (1992) 13 ILJ 573 (LAC).

[3] (2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC).

[4] (2010) 31 ILJ 3027 (LC).

[5] (2019) 40 ILJ 773 (CC), 2019 (4) BCLR 506 (CC), [2019] 6 BLLR 524 (CC).

[6] (2022) 43 ILJ 2319 (LC).

[7] (2003)

(3) SA 1 (CC), 2003 (2) BCLR 154 at par 31.

[8]

(2021) 42 ILJ 184 (LC) at para 9.

[9] 1998 19 ILJ 635 (LC) at 638 E-F.

[10] 1997 18 ILJ 1324 (LC).

[11]

(2009) 30 ILJ 2623 (CC).

[12] Constitution of the Republic of South Africa, 1996.

[13] Walters v Transitional Local Council of Port Elizabeth and another (2000) 21 ILJ 2723 (LC).

[14] See Shezi at par 10, Chirwa v Transnet Ltd [2007] ZACC 23; 2008

(4) SA 367 (CC) at par 155, Gcaba v Minister of Safety and Security (2010) 1 SA 238 (CC) para 75).

[15] (2020) 41 ILJ 912 (LC); [2020] 6 BLLR 574 (LC).

[16] Act 75 of 1997, as amended.

[17] Unreported judgment: J 1886/2013, handed down on 5 September 2013.

[18]

(2018) 39 ILJ 523 (CC) at para 24.

[19]

(2012) 33 ILJ 2117 (LC) at para p 2119 I-J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2023/345.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/strydom-v-arcelormittal-unknown-topic-alcjhb-2023--6a3ea50c3b1caa912980680e>

Prepared on 9 October 2026 · Esheria