THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 3106/18

In the matter between:

PSA obo MEMBERS	**Applicant**

and

MINISTER OF HEALTH	**First Respondent**
DEPARTMENT OF HEALTH	**Second Respondent**
DEPARTMENT OF PUBLIC WORKS	**Third Respondent**
MINISTER OF PUBLIC WORKS	**Fourth Respondent**

Heard: 11 October 2018

Judgment delivered: 12 October 2018

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JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant has initiated these proceedings on behalf of its members employed by the first respondent, the Department of Health, in the Civitas Building, located at 22 Thabo Sehume Street, Pretoria. They contend that the building is unsafe. In this application, they seek a final order, amongst other things, directing the respondents in terms of s 8 of the Occupational Health and Safety act, 85 of 1993 (OHSA), to provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of its employees, further directing the respondents to comply with the recommendations contained in reports on the surveys conducted by the National Institute for Occupational Health (NIOH) in respect of an indoor air quality survey and an area noise survey, and directing the respondents to move the applicants to a safer working environment free of the risks and hazards identified in these reports. The applicant also seek orders declaring that the members' refusal to work in the building does not amount to a strike, and interdicting the first and second respondents from disciplining its members for refusing to enter the Civitas building.

[2] The nature of the application is described in the founding affidavit as one brought in terms of s 158 (1) (b) of the Labour Relations Act, 66 of 1995 (LRA). That section, as will appear below, empowers this court to grant orders to compel compliance with the LRA or any other employment law.

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Jurisdiction

[3] When the application was first called, the court raised the issue of jurisdiction, as it is obliged to do (see *Commercial Workers Union of SA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 2461 (CC)) and in particular, whether in terms of s 157 of the Labour Relations Act (LRA), either the LRA or some other law conferred jurisdiction on the court to grant the relief sought. In particular, the court raised the concern that in terms of the OHSA, this court enjoys only an appellate jurisdiction, and that there is no express provision in the Act (or any other) that confers jurisdiction to hear a matter relating to the enforcement of general obligations (such as those established by s 8) as a court of first instance. The parties agreed that the matter stand down and that they would file heads of argument on this issue. In their heads of argument, the third and fourth respondents raised a further jurisdictional point to the effect that since there was no employment relationship between them and any of the applicant's members, and given that s 8 of the OHSA applies only to an 'employer' as defined, the court had no jurisdiction to entertain the applicant's claim *viz a viz* the third and fourth respondents.

Factual background

[4] The factual background is not particularly material to a determination of the jurisdictional points, and it is sufficient for present purposes to record the following. After complaints about the condition of the Civitas building and the working conditions of its members, in May 2018, the Department of Labour conducted an inspection of the premises, at the invitation of the second respondent. A prohibition notice was issued in respect of an individual who was found to be operating a forklift without the required certificates and training, otherwise direction notices were issued in relation to the need to assess noise levels and air quality. In June 2018, the National Institute for Occupational Health (NIOH) conducted surveys on the area noise in the plant room, and indoor air quality in the building. The reports established that the noise rating limit was

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exceeded in two of the four areas measured and further, that in a number of offices on different floors, air velocity and relative humidity did not conform to the recommended standards. The reports incorporated a series of conclusions and recommendations.

[5] The applicant avers that in terms of the outcomes of the above reports, the second respondent intentionally refuses to comply with its statutory duty to ensure a safe working environment at the Civitas building. In broad terms, the third and fourth respondents oppose the application on the basis that the reports on which the applicant relies do not support its contentions and indicate that air quality is within acceptable levels and that while the plant room may have high noise levels, this is expected for a room where plant machinery is kept and which employees do not enter on a frequent basis. Further, the third and fourth respondents aver that there is a notice at the entrance to the plant room stating that it is a noise area, and that employees working in the room have been issued with protective muffs. Similarly, the first and second respondents dispute the factual basis on which relief is sought and deny that the working environment in the Civitas building is unsafe, or that it poses a risk to the health of the applicant's members. Specifically, the first and second respondents aver that but for the NIOH report (which contains recommendations on which they have acted), there is no evidence to support the applicant's claims.

The legislative framework

[6] Section 157 (1) of the LRA defines the sources of the court's exclusive jurisdiction and provides as follows:

> (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.

[7] Section 157 (2) deals with the court's jurisdiction in respect of the application of the fundamental rights established by Chapter 2 of the Constitution. It reads as follows:

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(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.

[8] Section 158 lists the powers of the Labour Court. The section reads as follows:

158. Powers of Labour Court

(1) The Labour Court may-

(a) make any appropriate order, including

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in this Act;

(vi) an award of damages in any circumstances contemplated in this Act; and

(vii) an order for costs;

(b) order compliance with any provision of this Act or any other employment law.

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(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with -

(i) the constitution of that trade union or employers' organisation (as the case may be); or

(ii) section 26(5)(b);

(f) subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

(j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

[9] In so far as the OHSA is concerned, s 35 (3) provides that this court is constituted as an appellate court in respect of decsions taken by the chief inspector in terms of s 35 (1). The mechanisms of enforcement established by the OHSA, in broad terms, provide for reports to be made to the inspectors, investigations or formal inquiries to be conducted by inspectors, and written reports to be produced by inspectors. Section 30 confers broad and far-reaching powers on inspectors, including the right to issue directions and prohibition

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notices whenever the inspector is of the opinion that an employer has failed to comply with any applicable regulation. Section 35 (1) establishes a right of appeal to the chief inspector by any person aggrieved by any decision taken by an inspector. Section 35 (3), as I have indicated, provides that any person aggrieved by decision taken by the chief inspector either on appeal or in the exercise of any power under the Act, may appeal to this court. This court is empowered by s 35 (3) to confirm, set aside or vary the decision or substitute for such decision any other decision which the chief inspector in the opinion of the court ought to have taken.

Analysis

[10] Turning then to the question whether this court has the jurisidction directly to enforce any of the general duties of employers established by s 8 as a court of first instance, by way of a general observation, there appears to be a common misconception that this court has jurisdiction to entertain any dispute that concerns a work-related grievance, deal with any allegations of unfair employer conduct, or somehow to exercise a general supervisory role over the employment relationship. This is not the case. As long ago as 2001, in *Langeveldt v Vryburg Transitional Local Council & others* (2001) 22 *ILJ* 1116 (LAC), Zondo JP (as he then was), bemoaned the uncertainty created by jurisidictional overlaps and said the following:

> [66] To my mind, to allow this state of affairs to continue is a logical and makes no sense, especially as our country does not have an abundance of human and financial resources. As a country we should use our resources optimally. There should only be a single hierarchy of courts which have jurisdiction in respect of all employment and labour matters.

[11] Despite this plea, and a plea for legislative intervention (see paragraph 67 of the judgment) the LRA has not been amended to confer jurisdiction on this court in all employment-related matters. This court's jurisdiction remains regulated primarily by s 157 of the LRA. The interpretation of s 157 was for some years the subject of controversy, but two judgments by the Constitutional Court (*Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC, and *Gcaba v Minister for Safety and*

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Security & others 2010 (1) SA 238 (CC)) and one more recently by the Supreme Court of Appeal have made the position clear. In *Motor Industry Staff Association v Macun NO & others* (2016) 37 *ILJ* 625 (SCA) at para 20, the SCA summarised the approach to be followed:

> 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. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the constitutional provision itself.

[12] The LAC also had occasion recently to pronounce on s 157, and observed that if the court has the jurisdiction it would have the power to grant an appropriate remedy and that because this court has the power to grant the remedy, it does not mean that it has jurisdiction to grant the remedy (see *Booysen v Minister of Safety and Security and others* (2011) 32 *ILJ* 112 (LAC)). More recently, in *Merafong City Municipality v SAMWU* [2016] 8 BLLR 758 (LAC)), the LAC said the following:

> [29] Section 157(1) is more of a confirmatory and reference section. It is not in itself a primary source of jurisdiction. Instead, it confirms that the Labour Court has jurisdiction in matters where the Labour Court has exclusive jurisdiction in terms of the LRA. It also confirms that the Labour Court's jurisdiction where other legislation provides that a matter <u>has to be determined</u> by the Labour Court. Its main purpose, as derived from its wording within the context of the entire section 157, appears to be to delineate to those instances in which the Labour Court would have exclusive jurisdiction (own emphasis).

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> [30] Section 157 (1) directs the reader of that section to the sources of the Labour Court's exclusive jurisdiction, albeit in very vague and general terms. It does not refer to specific sections in the LRA, but suggests that they are to be found elsewhere in that Act. As a result, the interpreter is saddled with the difficult task of having to, for example, distinguish purely jurisdictional provisions from general empowerment provisions. The difficulty is exacerbated by sections which purport to contain mere empowerment provisions, whereas they, on proper construction, also actually contain provisions which are sources of the Labour Court's jurisdiction
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> [31] Section 158 is such a section. Its introductory wording specifically states that it deals with the powers of the Labour Court. Because the introductory words of the previous section, that is section 157, states that it deals with the jurisdiction of the Labour Court, the immediate expectation is that section 158 is not a source of jurisdiction, but merely contains provisions defining the powers of the Labour Court in respect of matters, which, in terms of some other provision of that Act, falls under the jurisdiction of the Labour Court. However, a close reading of the entire section 158 dispels that initial notion. It does deal with powers (post jurisdiction), but also with powers, which cannot but be construed and understood as sources of jurisdiction.

[13] In other words, the distinction between jurisdiction and powers as they are drawn by sections 157 and 158 is not necessarily cast in Manichean terms. It remains for the court to determine whether the statutory provision on which an applicant relies to found jurisdiction is indeed one that confers jurisdiction (as the LAC decided in *Merafong* in relation to s 158 (1) (h) and applications to judicially review decisions taken or acts performed by the state in its capacity as employer), or whether it is no more than the expression of a power that may be exercised once jurisdiction has been established.

[14] The jurisdictional difficulties occasioned by the wording of sections 157 and 158 are not limited to the overlapping jurisdiction between this court and other superior courts. Section 157(5), for example, expressly provides that this court does not have jurisdiction to adjudicate an unresolved dispute where the LRA or any other employment law require the dispute to be resolved through arbitration.

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This provision reinforces the bifurcation in the dispute resolution processes established by the LRA. In the same way that this court does not enjoy jurisdiction in respect of those disputes reserved for determination by arbitration, the court should be circumspect and slow to assume jurisdiction, in the absence of any provision that expressly confers jurisdiction, in relation to matters that fall primarily within the purview of the institutions of enforcement established by other employment laws, for example, the inspectorates established by the OHSA and the Basic Conditions of Employment Act (BCEA).

[15] The manner in which jurisdiction should be established is not disputed. *Chirwa* (*supra*) makes clear that jurisdiction is determined on the basis of the pleadings, and not on the substantive merits of the case. (See also the LAC's judgments in Merafong and *Booysen*.) In motion proceedings, this includes not only the formal terminology of the notice of motion, but also the content of the supporting affidavits. These must be interpreted, when necessary, to establish the legal basis of the applicant's claim. To the extent that the applicant's counsel objected to the respondents' failure to raise any jurisdictional objections in their respective answering affidavits, it should be recalled that in a matter such as the present, where jurisdiction goes not to person or territory but the court's competence to grant the relief sought, that it is for the applicant to establish that the court has jurisdiction to grant that relief.

[16] Turning then to s 157 of the LRA, it is common cause that the applicant does not approach this court by way of its appellate jurisdiction – the applicant is not aggrieved by any decision of the chief inspector, and the relief sought is not based on any decision by an inspector or the chief inspector. The relief sought is specifically the enforcement of what the applicant contends to be the second respondent's obligations in terms of s 8 of the OHSA, read with the recommendations contained in the NIOH reports. The crisp issue for decision then is whether this is a matter which in terms of the LRA or any other law (specifically the OHSA) is to be determined by this court.

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[17] As I have indicated above, s 8 of the OHSA establishes the general duties of employers to their employees in relation to health and safety at work. Section 8(1) requires every employer to provide and maintain 'as far as is reasonably practicable, a working environment that is safe and without risk to the health of his (sic) employees'.

[18] Save for s 35(3) the there is no other provision of the OHSA that expressly confers jurisdiction on this court or, to employ the wording of s 157 (1), that requires any matter to be determined by this court. To the extent that the applicant contends that there is nothing in the OHSA that precludes the applicant from approaching this court, as it has, for final relief on an urgent basis based on s 8 of the Act, this submission ignores that fact that this court has no inherent jurisdiction except that referred to in s 151 (2), i.e. in relation to matters under its jurisdiction. In these circumstances, it seems to me that this court has no jurisdiction as a court of first instance in relation to the enforcement of any obligation under the OHSA.

[19] To the extent that the applicant relies on s 158(1) (b), that paragraph must necessary be read in the context of sections 157 and 158, and their purpose. In my view, s158 (1) (b) cannot be interpreted to mean that in the absence of any provision in the LRA or any other law conferring jurisdiction on this court to so order, the court may nonetheless compel compliance with any provision of the LRA or any other employment law. First, the wording of s 158 (1) (b) is not 'jurisdiction conferring', in the words of *Merafong*. The section empowers the court to order compliance with the LRA or any other employment law, but on the terms established by the statute concerned. So, for example, where a statute such as the OHSA empowers inspectors to make determinations on the extent to which an employer is in compliance with its regulatory obligations, it is not for the court to assume the function of an inspector or perform the functions of an inspector. The absence of any provision in the OHSA conferring exclusive jurisdiction on this court to order compliance with its provisions should be contrasted, for example, with the Employment Equity Act, 55 of 1998, which

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provides that this court has exclusive jurisdiction to determine any dispute about the interpretation and application of the Act, and in s 50 (1) f), expressly provides that this court may order compliance with any provision of the Act. Secondly, there is an important policy reason for this conclusion. To hold otherwise would run the substantial risk that this court would undermine the carefully crafted enforcement mechanisms created by the OHSA and indeed, other statutes that regulate the workplace. To use an example employed by the applicant's counsel, if employees complain of being compelled to work in a smoke-filled room, for this court to intervene and enforce air quality standards as a court of first instance, would undermine the institution of the inspectorate established by the Act. It cannot be that an applicant has a choice of referring a compliant to an inspector for investigation, alternatively, to this court for adjudication. Such an interpretation would also require the court to assume a degree of technical skill and expertise on its part of the court that does not necessarily exist. While it is true that this court may be called upon ultimately to decide the correctness of an inspector's decision, sitting as it does as an appeal court, it has the benefit in those circumstances of the outcome of prior investigation and the basis of decision-making by those employed specifically to enforce the Act.

[20] This court has previously held in relation to the enforcement of the Basic Conditions of Employment Act (BCEA), that it should not usurp the functions of labour inspectors by granting orders that directly enforce the provisions of that statute. In *Ephraim Moyo v Bull Brand Foods* (2010) 31 *ILJ* 951 (LC), the court held that this court's intervention as a court of first instance to enforce the minimum standard established by the BCEA would undermine the system of enforcement established by chapter 10 of that statute, in particular, the labour inspectorate. The court observed that its general supervisory function would be eroded should it grant what would amount to compliance orders. For the same reasons, in my view, while acknowledging the functional differences between the BCEA and the OHSA, s 158 (1) (b) should not be construed so as to read in jurisdiction to enforce the OHSA in the first instance.

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[21] In short, neither the plain wording of s 158 (1) (b) nor its obvious purpose indicate that it is a jurisdiction-conferring provision. In the words of *Merafong*, it is a mere empowerment provision rather than a source of jurisdiction.

[22] The applicant's counsel submitted that if sections 157 and 158 were to be read restrictively, the applicant's members would be left without a remedy to address their urgent concern regarding their work environment. This is not a basis which renders it competent for this court to intervene. The OHSA establishes its own remedies, which are available to the applicant and its members.

[23] To the extent that the applicant relies on s 157 (2) of the LRA and submits that its complaint implicates a Chapter 2 right in the Constitution, (in the form of a right to an environment that is not harmful to the health or the well-being of its members), this is not a claim foreshadowed by the founding affidavit. The founding affidavit states no more than that the applicant's members have a clear right to work in an environment that is not harmful to their health and well-being, and that compelling them to continue working in an environment that is harmful to their health and well-being is a violation of that right. The applicant does not identify the fundamental right on which it relies with any greater specificity; it is not clear, for example, whether the right relied on is that established by s 24 (Environment), or s 23 (Labour relations), or both. This is not something I need attempt to discern from the founding affidavit - the authorities are clear. An applicant is not entitled to seek the direct enforcement of a fundamental right; its claim must necessarily be brought in terms of the legislation that gives expression to the right (in this case, the OHSA) – see *Motor Industry Staff Association v Macun NO & others* (*supra*). To the extent then that the applicant relies on s 157 (2) directly to enforce a fundamental right, the application must fail.

[24] In the case of the third and fourth respondents, there is a further objection to jurisdiction which, in my view, stands to be upheld. It is not disputed that there is no employment relationship between the applicant's members and either the third or fourth respondents. The third respondent is no more than the owner and landlord of the Civitas building, It is described in the founding affidavit as 'the

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custodian and manager of national governments' (sic) fixed assets including the determination of accommodation requirements, rendering expert built environment services to other departments, the acquisition, maintenance and disposal of such assets'. The third and fourth respondents have not been joined for convenience – the applicant specifically seek substantial relief against them, based on s 8 of the OHSA. Since the third respondent is not the employer of the applicant's members, it has no obligations to them in terms of s 8 of the OHSA. Those obligations are established as between an employer and its employees. The third and fourth respondents have no relationship whatsoever with the members of the applicant, either in contract or statute. I fail to appreciate how in these circumstances it can be said that this court has jurisdiction to grant the relief sought by the applicant against the third and fourth respondents; they are not an 'employer' for the purposes of s 8 of the OHSA and there is no matter that arises between them and the applicant's members that is required to be determined either by the LRA or any other law.

[25] The consequence of the findings reflected above is that this court has no jurisdiction to grant the order is contemplated in paragraphs 1.2 to 1.4 of the notice of motion, all of which make specific reference to s 8 of the OHSA or to the reports whose recommendations the applicants seek in effect to enforce. The relief contemplated in prayer as 1.5 and 1.6 (respectively that the applicant's members' refusal to work is not a strike and that the first and second respondents be interdicted from taking any disciplinary action on account of any refusal to enter the Civitas building), is dependent on the court having the necessary jurisdiction to enforce s 8 of the OHSA in the terms sought by the applicant. In summary, the court has no jurisdiction to grant any of the relief sought by the applicant. The application accordingly stands to be dismissed.

Costs

[26] Finally, in relation to costs, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. There is no reason why the interests of both ought not to be best satisfied by an order for costs. The

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application is misguided, and the respondents have had to utilise taxpayer's money to oppose it. I do not think however, given the nature of the application, that the costs of two counsel are warranted. Further, it seems to me that the interests of the law and fairness are best satisfied by each party bearing its own costs in respect of the proceedings on 21 September 2018, when the application was postponed.

I make the following order:

1. The application is dismissed with costs, such costs to be limited to the costs of one counsel and to exclude the costs of 21 September 2018 when the application was postponed and costs reserved.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. O Mooki SC, instructed by Thabang Ntshebe Attorneys

For the first and second respondents: Adv. SK Hassim SC, with her Adv. L Pillay, instructed by Ramakgaba Gonese Attorneys

For the third and fourth respondents: Adv. C Puckrin SC, with him Adv. HC Janse an Rensburg, instructed by the state attorney

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