THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case : 97/2006
REPORTABLE

In the appeal between:

BOXER SUPERSTORES MTHATHA	First appellant
CHAIRMAN OF DISCIPLINARY HEARING, BOXER SUPERSTORES	Second appellant

and

NOMAHLUBI LORRAINE MBENYA	Respondent

Before:	Cameron JA, van Heerden JA, Jafta JA, Hancke AJA, Theron AJA
Heard:	Tuesday 22 May 2007
Judgment:	Thursday 31 May 2007

Jurisdiction – high court – termination of employment – employee claiming relief because 'unlawful' – not falling within exclusive jurisdiction of labour courts – high court has jurisdiction – jurisdictional challenge dismissed

Neutral citation: Boxer Superstores Mthatha v Mbenya [2007] SCA 79 (RSA)

JUDGMENT

CAMERON JA:

[1] This is an appeal from a decision of Peko ADJP in the High Court at Mthatha, dismissing an objection to the court's jurisdiction. The dispute arose on 7 December 2004, when the first appellant (the employer)[1] terminated the employment of the respondent, Ms Mbenya (the employee). Seven months later – well outside the time limits for challenging an unfair dismissal under the Labour Relations Act 66 of 1995 ('the LRA') – the employee applied to the high court for (a) an order that the disciplinary hearing preceding her dismissal 'be set aside' and its outcome be declared 'unlawful' and be set aside; (b) a declarator that her dismissal was 'unlawful' and of 'no force'; (c) re-instatement to her former position 'with all salaries and benefits to which she was entitled up to the date of her purported dismissal' (alternatively an equivalent position 'with all the benefits as if nothing has happened to her'); (d) back-pay; (e) costs.

[2] The employer in response raised a point of law in terms of Uniform Rule 6(5)(d)(iii),[2] contending that the high court –

[1] The second appellant is the chairman of the disciplinary inquiry that determined the dismissal.
[2] Supreme Court Act 59 of 1959, Uniform Rule of Court (6)(5)(d) 'Any person opposing the grant of an order sought in the notice of motion shall – … (iii) if he intends to raise any question of law only […] deliver notice of his intention to do so, within the time stated in the preceding subparagraph [ie, within fifteen days of notifying the applicant of his intention to oppose the

'lacks jurisdiction to entertain the application for the relief as sought in the Notice of Motion in that the provisions [of] the Labour Relations Act 66 of 1995 dictate that the High Court does not retain jurisdiction to adjudicate on a dispute of the nature alleged by the applicant.'

[3] In her founding affidavit the employee asserted that her dismissal was substantively unfair (there being no grounds for it), as well as procedurally unfair (in that at the disciplinary hearing, where she appeared with a shop steward representing her, she was not asked to plead guilty or not guilty, and was put on her defence, and cross-examined, without any evidence being proffered against her). For these reasons, she claimed, her dismissal was 'unlawful'. She added that 'my rights have been violated' by the respondents, submitting that 'everyone is equal before the law and has the right to equal protection of the law',[3] and noting that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before court',[4] and that she had been advised that the high court has jurisdiction to hear the matter.

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application], setting forth such question.'

[3] Echoing s 9(1) of the Bill of Rights.

[4] Echoing s 34 of the Bill of Rights.

[4] The employer's objection to the application challenges its viability in the forum the employee has chosen. As yet there is no answering affidavit, and we must at this stage take the allegations in the founding affidavit to be established facts,[5] determining whether, if they are true, the high court has jurisdiction. In this task, the employee was unrepresented before us, and we invoked the assistance of the Free State Society of Advocates, from whose ranks Mr Venter appeared as amicus curiae. We are grateful to him for his able assistance.

[5] The exclusive jurisdiction of the labour court has been carefully circumscribed in recent years. Section 157(1) of the LRA provides that subject to the Constitution and to the Labour Appeal Court's jurisdiction, and except where the LRA itself 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'. Despite the seeming breadth of this provision, it is now well established that –

(i) (as Peko ADJP observed in dismissing the jurisdictional objection) section 157 does not purport to confer exclusive

[5] LTC Harms *Civil Procedure in the Supreme Court* (1990, with updates to April 2007) para

jurisdiction on the labour court generally in relation to matters concerning the relationship between employer and employee (*Fedlife Assurance Ltd v Wolfaardt*),[6] and since the LRA affords the labour court no general jurisdiction in employment matters, the jurisdiction of the high court is not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations (*Fredericks v MEC for Education and Training, Eastern Cape*);[7]

(ii) the LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship – particular conduct may not only constitute an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the labour court, the high court has jurisdiction even if the claim could also have been

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B6.35, p B-52.
[6] 2002 (1) SA 49 (SCA) para 25, per Nugent AJA for the majority.
[7] 2002 (2) SA 693 (CC) para 40, per O'Regan J for the Court (endorsing *Fedlife* at para 38).

formulated as an unfair labour practice (*United National Public Servants Association of SA v Digomo NO*);[8]

(iii) an employee may therefore sue in the high court for a dismissal that constitutes a breach of contract giving rise to a claim for damages (as in *Fedlife*);

(iv) similarly, an employee may sue in the high court for damages for a dismissal in breach of the employer's own disciplinary code which forms part of the contract of employment between the parties (*Denel (Edms) Bpk v Vorster*).[9]

[6] In these cases, the exclusive jurisdiction of the labour court does not preclude the employee's recourse to the high court. This case pushes the boundary a little further. The novel question it raises is whether an employee may sue in the high court for relief on the basis that the disciplinary proceedings and the dismissal were 'unlawful', without alleging any loss apart from salary. In my view, the answer can only be Yes. This Court has recently held that the common law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing (*Old Mutual Life Assurance Co SA Ltd v*

[8] (2005) 26 *ILJ* 1957 (SCA) paras 4-5, per Nugent JA for the Court.

Gumbi).[10] This means that every employee now has a common law contractual claim – not merely a statutory unfair labour practice right – to a pre-dismissal hearing. Contractual claims are cognisable in the high court. The fact that they may also be cognisable in the labour court through that court's unfair labour practice jurisdiction does not detract from the high court's jurisdiction.

[7] The sole issue in *Gumbi*, as in this case, was a challenge to a dismissal arising from a complaint about the fairness of pre-dismissal disciplinary proceedings. Although the employer there abandoned its initial jurisdictional challenge to the high court's competence to hear the case,[11] the high court and indeed this Court would have been obliged to raise the lack of jurisdiction had the matter fallen within the labour court's exclusive statutory competence. In my view, by adjudicating the employee's claim, the courts in *Gumbi* implicitly decided the question at issue in this case.

[8] It would moreover be illogical to hold that an employee can claim damages for breach of the common law contract of employment in

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[9] 2004 (4) SA 481 (SCA) paras 15-16.

the high court – as in *Fedlife* and *Denel* – but cannot claim (as is inter alia here sought) a declarator.

[9] And indeed the employee here was careful to formulate her claim on the basis that her dismissal was 'unlawful'. She did not complain about its unfairness; nor did she invoke the benefits the LRA confers on employees through the protection of the labour court's unfair labour practice jurisdiction. It is true that the relief she claimed went far beyond a declarator, including reinstatement with back-pay. In *Transnet Ltd v Chirwa*,[12] I observed that the employee's insistence on approaching the ordinary courts – when the LRA afforded ample remedies, including retrospective reinstatement and compensation if the employer failed to discharge the burden of proving that the dismissal was both procedurally and substantively fair – could involve a penalty regarding relief. The ordinary courts should be careful in employment-related matters not to usurp the labour courts' remedial powers, and their special skills and expertise.[13]

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[10] [2007] SCA 52 (RSA) paras 5-8, per Jafta JA for the Court.
[11] See *Old Mutual v Gumbi* para 1.
[12] 2007 (2) SA 198 (SCA) paras 46-47 and 66-67 (Mpati DP concurring).
[13] Because the other judges (Mthiyane JA, with whom Jafta JA concurred, and Conradie JA) concluded that the appeal should be allowed, thereby refusing the employee relief altogether, it was not necessary for them to consider this point.

[10] That means that even if the employee's factual allegations prove true, she may well not ultimately be entitled to the relief she seeks, particularly since according to her founding papers she had an internal right to appeal, which she failed to exercise. At best she may be entitled (subject to the unexhausted appeal process) to have the hearing set aside, and the matter remitted to the employer. That however is not at present the pivotal issue, since the employer's objection involved a challenge to whether the high court had jurisdiction to entertain the application at all, or to afford the employee any portion of the relief she sought.

[11] In argument, counsel for the employer conceded that the LRA does not confer jurisdiction on the labour courts over unfair dismissals without more, since these are first subject to compulsory conciliation and arbitration. He nevertheless contended that though the employee professed to base her case on the lawfulness of her dismissal, in substance her complaint was about its fairness – over which the labour courts ultimately have exclusive jurisdiction. Accordingly, he argued, the employee was in truth invoking the unfair labour practice and the labour court's remedial jurisdiction, which in terms of s 191 of the LRA

fall squarely within the labour court's exclusive competence.[14] This Court should, he urged, therefore give effect to the substance, rather than the form, of the employee's case.

[12] This characterisation may be correct, so far as it goes, but it leaves out of account the fact that jurisdictional limitations often involve questions of form, and that the employee in this case, as already mentioned, formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness. In *Fedlife*, Nugent AJA pointed out:

> 'Whether a particular dispute falls within the terms of s 191 depends on what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the "fairness" of the dismissal is the subject of the employee's complaint. Where it is not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee's complaint is about.'[15]

[13] That applies here. The appeal must in my view fail and the jurisdiction of the high court must be upheld. Although the employee was unrepresented before us, her attorney was still on

[14] LRA s 191(1) governs disputes 'about the fairness of a dismissal, or a dispute about an unfair labour practice'.

record. Since that may have entailed costs, the appeal must be dismissed with costs.

E CAMERON
JUDGE OF APPEAL

CONCUR:
van Heerden JA
Jafta JA
Hancke AJA
Theron AJA

[15] 2002 (1) SA 49 (SCA) para 27.