Botes v City of Johannesburg Property Co SOC Ltd & another (2021) 42 ILJ 530 (LC)

Citation	(2021) 42 ILJ 530 (LC)
Case No	J937/20
Court	Labour Court
Judge	Moshoana J
Heard	September18, 2020
Judgment	September 2020,28
Counsel	*Adv A E Franklin SC* (with *Adv Y Peer*) for the applicant. *Adv M Sibanda* for the first respondent.
Annotations	No annotations to date

Flynote : Sleutelwoorde

Basic Conditions of Employment Act 75 of 1997—Labour Court—Jurisdiction—Court having jurisdiction to hear any matter related to breach of contract—Onus on employee to prove existence of contract term relied on.

Costs—Labour Court—Urgent application by public service employee for order declaring employer conduct unlawful—Abuse of court processes by senior employee having means to afford services of attorneys—Employer compelled to defend application with taxpayers' money—Costs awarded against employee.

Labour Court—Jurisdiction—Basic Conditions of Employment Act 75 of 1997—Court having jurisdiction to hear any matter related to breach of contract—Onus on employee to prove existence of contract term relied on.

Labour Court—Jurisdiction—Dispute relating to unlawful suspension—No remedy under LRA 1995 for unlawful dismissal or other unlawful employer conduct—Court having no jurisdiction to make determination of unlawfulness.

Labour Court—Jurisdiction—Unlawful dismissal dispute or dispute about other unlawful employer conduct—No remedy under LRA 1995 for unlawful dismissal or other unlawful employer conduct—Court having no jurisdiction to make determination of unlawfulness.

Headnote : Kopnota

The applicant commenced employment with the first respondent, the CJPC — a municipal entity of the second respondent, the City of Johannesburg, as its chief executive officer on 1 October 2019 in terms of a five-year fixed-term contract. In terms of an addendum to the contract, the Local Government: Disciplinary Regulations for Senior Managers were made applicable to her. Following allegations of irregularities, the board of the CJPC resolved to place the employee on precautionary suspension on 2 September 2020. The employee approached the Labour Court for an urgent order declaring that her suspension was unlawful and that she be permitted to return to work immediately. She contended that regulation 6 of the regulations, which regulated precautionary suspension in local government and had been made applicable to her in the addendum to her contract, had not been complied with as the municipality and not the CJPC had the power to suspend her. The CJPC had thus acted ultra vires when it suspended her. Both the CJPC and the municipality took issue with the court's jurisdiction.

The court noted that the case pleaded by the employee was one of unlawfulness and not unfairness. It endorsed the view expressed in *Shezi v SA Police Service & others* (2021) 42 *ILJ* 184 (LC) that the effect of the judgment in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC) is that when an applicant alleges that a dismissal or other employer conduct is unlawful (as opposed to unfair), there is no remedy under the LRA 1995 and the Labour Court has no jurisdiction to make any determination of unlawfulness.

The employee's later attempt in argument to rely on a breach of contract justiciable under s 77(3) of the Basic Conditions of Employment Act 75 of 1997 did not assist her. The court agreed with the dicta in *Phahlane v SA Police Service & others* (2021) 42 *ILJ* 569 (LC) that, ordinarily, pleadings in a claim of this nature would assert the term of the contract relied upon, allege breach of the contract by the employer, record an election to enforce the contract by way of specific performance, and seek consequential relief. The cause of action in the present instance was clearly one of unlawfulness, and no more.

The court was therefore satisfied that the application had to be dismissed for want of jurisdiction. In addition, the court concluded that the employee had failed to demonstrate any exceptional circumstances entitling the court to intervene at this stage and, having failed to show exceptional circumstances, no reason existed to entertain the matter as one of urgency.

Assuming it was wrong on the issue of jurisdiction, the court considered the merits of the application, and found that the decision to suspend the employee had been taken by the correct body, namely the CJPC, and that the decision was neither unlawful nor ultra vires.

Regarding costs, the court lamented the abuse of court processes by senior managers who had adequate means to afford the services of attorneys and the fact that respondents were compelled to defend these types of applications with taxpayers' money. It accordingly had no hesitation in ordering the employee to pay the costs of the application.

Case information

Application to the Labour Court for urgent interdictory relief. The facts and further findings appear from the reasons for judgment.

Cases Considered

Annotations:

Southern Africa

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) (referred to)

Booysen v Minister of Safety & Security & others (2011) 32 *ILJ* 112 (LAC) (considered)

Chirwa v Transnet Ltd & others 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) (referred to)

Democratic Municipal & Allied Workers Union of SA & others v City of Johannesburg (2020) 41 *ILJ* 912 (LC) (referred to)

Dladla v Council of Mbombela Local Municipality & another (2) (2008) 29 *ILJ* 1902 (LC) (relied on)

Doctors for Life International v Speaker of the National Assembly & others 2006 (6) SA 416 (CC) (referred to)

Gcaba v Minister for Safety & Security & others 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC) (considered)

Kimberley Junior School & another v Head, Northern Cape Education Department & others 2010 (1) SA 217 (SCA) (referred to)

Law Society of SA & others v President of the Republic of SA & others 2019 (3) SA 30 (CC) (considered)

Masetlha v President of the Republic of SA & another 2008 (1) SA 566 (CC) (referred to)

Millsite Investment Co (Pty) Ltd, Ex parte 1965 (2) SA 582 (T) (referred to)

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) (referred to)

Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) (referred to)

Phahlane v SA Police Service & others (2021) 42 *ILJ* 569 (LC) (relied on)

Raseroka v SA Airways (SOC) Ltd (2020) 41 *ILJ* 978 (LC) (considered)

Santos Professional Football Club (Pty) Ltd v Igesund & another 2002 (5) SA 697 (C); (2002) 23 *ILJ* 1779 (C) (referred to)

Shezi v SA Police Service & others (2021) 42 *ILJ* 184 (LC) (relied on)

Singhala v Ernst & Young Inc & another (2019) 40 *ILJ* 1083 (LC) (referred to)

Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening) 2016 (3) SA 251 (CC); (2016) 37 *ILJ* 564 (CC) (relied on)

Vumba Intertrade CC v Geometric Intertrade CC 2001 (2) SA 1068 (W) (referred to)

Wereley v Productivity SA & another (2020) 41 *ILJ* 997 (LC) (distinguished)

United Kingdom

Salomon v Salomon & Co Ltd [1897] AC 22 (HL); [1895-9] All ER 33 (HL) (referred to)

Statutes Considered

Basic Conditions of Employment Act 75 of 1997 s 77(3)

Constitution of the Republic of SA 1996 s 1*(c)*, s 23(1), s 33, s 35, s 167(7), s 172

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995 s 157, s 157(1), s 157(2), s 157(4)*(a)*, s 157(5), s 158, s 158(1)*(a)*, s 158(1)*(h)*, s 173, s 186(2)*(b)*, s 191(1)*(a)*(i)-(ii), s 191(5)*(a)*(iv)

Local Government: Municipal Systems Act 32 of 2000 s 86B(1)*(a)*, s 93A, s 93J(1)-(2), s 93L

Promotion of Administrative Justice Act 3 of 2000

Adv A E Franklin SC (with *Adv Y Peer*) for the applicant.

Adv M Sibanda for the first respondent.

Judgment reserved.

Judgment

Moshoana J:

Introduction

[1] In this application, the applicant, Helen Margaret Botes (Botes), alleges unlawful conduct on the part of the board of the City of Johannesburg Property Co (CJPC). According to Botes, the board acted ultra vires and as such its decision is bound to be declared as such and be set aside. The onset of this matter is the placing of Botes on a precautionary suspension pending the outcome of disciplinary steps to be taken against her. The basis of the challenge is two-fold, namely *(a)* the board does not have the power to place her on suspension — differently put, the board acted ultra vires as it usurped the powers of the City of Johannesburg Metropolitan Municipality (the municipality) and *(b)* if so empowered, the necessary jurisdictional facts to exercise the powers were absent. The application is opposed.

Background facts

[2] The CPJC is a municipal entity of the municipality. On 1 October 2019, Botes commenced employment with the CJPC as chief executive officer. She entered into a fixed-term contract of employment. Such contract was to endure until September 2024. On or about 30 November 2019, Botes and the CPJC concluded an addendum to the fixed-term employment contract. Relevant to this application, Botes was regarded as a senior employee and the terms of the Local Government: Disciplinary Regulations for Senior Managers [1] (regulations) were made applicable to her. Of essence in this application is regulation 6 which deals with precautionary suspensions.

[3] Around 1 June 2020, the board of the CJPC received a whistleblower's report making allegations of irregularities in respect of the appointment of contractors to perform deep cleaning services at the various properties owned and administered by the CJPC in consequence of the Disaster Management Regulations. Botes was favoured with a copy of the said report. On 4 June 2020, a second whistleblowing report was received, which was also availed to Botes. In both reports Botes was not directly implicated. Following the reports, it was suggested and agreed to by Botes that she be placed on special leave. She remained on special leave until 25 June 2020.

[4] On 18 August 2020, the board of the CJPC resolved to advise Botes of its intention to place her on a precautionary suspension. On 20 August 2020, Botes was invited to be heard prior to the decision to place her on precautionary suspension. On 24 August 2020, Botes exercised her right to be heard and effectively challenged the authority of the board to place her on precautionary suspension. In addition, she highlighted that the allegations lacked particularity.

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[5] On 2 September 2020, the board of the CJPC resolved to place Botes on precautionary suspension. Botes was notified in writing on 4 September 2020 of the resolution to place her on precautionary suspension. Aggrieved thereby on or about 9 September 2020, Botes launched this application on an urgent basis. The application was enrolled before me on 18 September 2020.

The legal basis of this application

[6] This application rotates on two fulcrums. Chiefly Botes challenges the lawfulness of the decision to place her on a precautionary suspension. The second fulcrum is that the jurisdictional facts allowing for the decision to place her on a precautionary suspension are absent. The case of Botes is predicated on regulation 6. The said regulation reads thus:

> 'Precautionary suspension
>
> (1) The municipal council may suspend a senior manager at the workplace on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that —
>
> *(a)* the presence of the senior manager at the workplace may —
>
> (i) jeopardise any investigation into alleged misconduct;
>
> (ii) endanger the well-being or safety of any person or municipal property; or
>
> (iii) be detrimental to stability in the municipality; or
>
> *(b)* the senior manager may —
>
> (i) interfere with potential witnesses; or
>
> (ii) commit further acts of misconduct.'

Jurisdiction of the Labour Court

[7] In opposing the present application, the respondents took issue with the jurisdiction of the Labour Court. The contention being that the weight of authorities [2] in this court leans towards the lack of jurisdiction by the Labour Court. In the main all the recent authorities took a leaf from the judgment of the Constitutional Court in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*.[3] Almost five years ago the learned Justice Van der Westhuizen in *Gcaba v Minister for Safety & Security & others*[4] had the following to say:

> '[52] Finally, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often to be pursued in different fora. . .
>
> [75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa* and not the substantive merits of the case.'

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[8] On the alleged conduct of the board of the CJPC, the following possible causes of action arise — *(a)* an unfair labour practice within the contemplation of s 186 of the Labour Relations Act; [5] *(b)* common-law breach of contract claim; *(c)* breach of s 33 of the Constitution of the Republic of South Africa 1996 (the Constitution) — remediable by review under the Promotion of Administrative Justice Act [6] (PAJA); *(d)* breach of s 1*(c)* of the Constitution — remediable under s 158(1)*(h)* of the LRA — legality/rationality review.

[9] The fact that a party has various possible causes of action does not suggest that he or she can be remedied even if his or her pleadings set out one specific cause of action. The Labour Court is a creature of statute and it derives its powers from the LRA and any other law that gives it jurisdiction. Primarily the jurisdiction of the Labour Court arises from s 157 of the LRA. Section 157(1) specifically provides that the Labour Court has exclusive jurisdiction in respect of matters that elsewhere in the LRA or in terms of any other law are to be determined by the Labour Court. In terms of the LRA, matters relating to suspensions within the contemplation of s 186(2)*(b)* are to be determined by the Commission for Conciliation, Mediation & Arbitration (CCMA) or a bargaining council and not the Labour Court — s 191(1)*(a)*(i)-(ii) read with s 191(5)*(a)*(iv) of the LRA. Botes disavowed the remedies in the LRA.

[10] There can be no doubt that the dispute of Botes is justiciable in the CCMA or at a bargaining council. This not being an appeal or a review this court in its discretion may refuse to determine the dispute of Botes because it is not satisfied that an attempt was made to resolve the dispute through conciliation — s 157(4)*(a).* The scheme of the LRA is predicated on amicable dispute resolution. It is for that reason that this court and other dispute-resolving fora lack jurisdiction if the dispute has not been referred to conciliation.

[11] Section 157(2) is reserved for alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution arising from employment and from labour relations or the constitutionality of any executive or administrative act or conduct or threat thereof by the state in its capacity as an employer and application of any law for the administration of which the Minister of Employment & Labour is responsible. This jurisdiction is shared with the High Court.

[12] What requires emphasis is that the Labour Court may gravitate to s 157(2) only where s 157(1) does not give it jurisdiction. Only then would it seek a shared jurisdiction. Where the LRA gives jurisdiction to other statutory fora, it is fundamentally wrong for the Labour Court to approbate to itself jurisdictional powers under s 157(2) simply because *(a)* a fundamental right as entrenched is violated or threatened with violation; and *(b)* the threat arises from employment and labour relations. A number of other pieces of legislation exist to champion the fundamental rights in chapter 2 of the Constitution. For example,

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the Employment Equity Act [7] (EEA) guarantees the right to equality. In terms of the EEA certain disputes are justiciable in the CCMA or bargaining council. If s 157(2) is not given a restrictive and purposive interpretation some of the disputes could be taken over by the Labour Court. Section 157(5) makes the point above.

[13] Pleadings aside, the conduct complained of may be astutely tucked under s 157(2) because it affects the fundamental right to fair labour practices of Botes — s 23(1) of the Constitution. In my view, it shall be inappropriate for this court to assume jurisdiction when the LRA — a statute passed to give effect to the rights in s 23 of the Constitution — provides that unfair labour disputes in relation to unfair suspensions should be justiciable under s 191 by the CCMA or bargaining council. Without entertaining the debate around lawfulness and fairness, if the legislature wished to clothe any of the dispute-resolving bodies including the Labour Court with powers to entertain the lawfulness of a suspension, the legislature could have said so. The conclusion I arrive at is that the claim of Botes cannot be entertained under s 157(2). The act of placing an employee on precautionary suspension is not an executive or administrative act. On Botes' version, the board is incapable of exercising powers emanating from the regulations. Only a municipal council has that capability. In any event the regulations fall under the administration of the Minister of Local Government and not of Department of Employment & Labour.

[14] I now turn to the pleadings of Botes. As a general principle, a party makes his or her case in the founding papers. In the founding affidavit she testified as follows:

> '7 This is an application in which I seek a *declarator* that my suspension by the board of directors of the first respondent [CJPC], which was communicated to me on 4 September 2020, be declared *to be unlawful* and where I seek an order that the board be directed by the above honourable court to withdraw the notice of suspension, and to permit me to return to work forthwith. . .
>
> 32 The decision to suspend me, therefore, falls to be declared *unlawful* and accordingly reversed. . .
>
> 38 For avoidance of doubt, *the interdict* sought is final in nature.'

[15] As pointed out earlier the jurisdiction of the Labour Court arises from s 157. Section 158 deals with the powers and not jurisdiction of the Labour Court. In other words, the Labour Court may exercise any powers in s 158 if it has jurisdiction to entertain a matter. That simply means

that the Labour Court is not empowered to, for instance, declare as being unlawful and/or interdict actions that do not reside under its jurisdiction. As can be observed, Botes invokes some of the available powers of the Labour Court — declaratory order — s 158(1)*(a)*(iv) and interdict — s 158(1)*(a)*(ii) of the LRA. Unfortunately, where the Labour Court lacks jurisdiction it cannot exercise those powers.

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[16] The case pleaded by Botes is that of unlawfulness and not unfairness. To that end I fully endorse the view expressed by my brother Van Niekerk J in *Shezi v SA Police Service*, [8] when he said:

> 'The effect of this judgment [*Steenkamp v Edcon*] 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.'

[17] Although the Labour Court is a court of law and equity — s 151(1) of the LRA, when it comes to jurisdiction, like any administrative body, its jurisdiction arises or is predicated on certain jurisdictional facts, ie s 157 of the LRA. Plainly, the Labour Court cannot exercise jurisdiction if s 157 does not allow it. Jurisdiction sits on two pillars. Firstly, there must be jurisdictional facts (s 157), secondly the power itself (s 158). In *Kimberley Junior School & another v Head, Northern Cape Education Department & others*[9] the Supreme Court of Appeal said the following, which mutatis mutandis applies with equal force to courts that are creatures of statute:

> 'Under common law, necessary preconditions that must exist before an administrative power can be exercised are referred to as "jurisdictional facts". In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all.'

[18] More appropriately in this matter, without the necessary jurisdiction emanating from s 157 of the LRA, the Labour Court has no powers under s 158 at all. In support of her case for jurisdiction, Botes heavily relies on judgments [10] pre-*Steenkamp*. In *Mettler v Nelson Mandela Bay Metropolitan Municipality*[11] which was decided in 2019 post-*Steenkamp* the court does not specifically deal with the jurisdiction of the Labour Court. It is no authority for the proposition that this court retains jurisdiction. After hearing argument, I directed Mr *Franklin SC* to the cases post-*Steenkamp*. He required time until after 23 September 2020. He was afforded that time. In turn supplementary submissions were made. Apparent from those submissions is a volte face from unlawfulness to a breach of contract claim justiciable under s 77(3) of the BCEA. It does seem that Botes seeks to equate unlawfulness with a breach. Much as this court accepts that at a general level where a party breaches a contract that party is said to be acting unlawfully. By definition unlawfulness means the quality of failing to conform to law, acting contrary to accepted morality or convention; illegal or illicit. Reliance was placed on *Wereley v Productivity SA & another.*[12] This judgment is distinguishable in that Wereley specifically pleaded s 77(3) of the BCEA. Botes placed emphasis on the relief granted by

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my brother Lagrange J in *Wereley*. He declared the conduct to be unlawful and in breach of the contract of employment and void ab initio. I take a different view on the issue of a remedy.

[19] Where a party to the contract does not act in accordance with the terms of the contract, that party is said to be repudiating the contract. The innocent party has a right to accept the repudiation and elect to hold the other party to the contract or cancel the contract and claim damages. If the guilty party does not perform as per the terms of the contract, the innocent party may approach a competent court to seek what is known as specific performance. Therefore, a court may at its discretion order specific performance. That in my view does not extend to declaring unlawfulness. In order for a party to obtain relief of specific performance, that party must first show breach/repudiation — an unlawful act. As a general rule of the law of contract not all breaches/repudiations lead to automatic end of the contract. The innocent party must first make an election. If that party elects to keep the contract alive despite the repudiation — unlawful act — that party may sue for specific performance.

[20] It is observed that other than stating that *Steenkamp* is limited to cases where the LRA is ostensibly relied on, Botes did not deal with the *Shezi* and *Phahlane* judgments. To that extent, I do not believe to be Botes' argument that those judgments are wrong. I do not agree with a submission that *Steenkamp* is confined. The principle in *Steenkamp* can be summarised as follows: where an employee alleges unlawfulness and not unfairness, the Labour Court lacks jurisdiction.

[21] Botes does acknowledge that in her pleadings she did not allege any breach nor did she reference s 77(3). Much as Botes attempts to hide behind the difference between breach and unlawfulness, her claim is not pleaded as one of breach and does not reside in s 77(3). In *Phahlane v SAPS & others*, [13] this court stated the following:

> 'Ordinarily, pleadings in a claim of this nature [contractual claim] would assert that term of the contract relied upon, alleged breach of that contract by the employer, record an election to enforce the contract by way of specific performance, and seek consequential relief. The cause of action in the present instance is clearly one of unlawfulness, in the form of an alleged breach of regulation 9, and no more.'

[22] I fully agree with the above statement. It is only now in argument that Botes seeks to contend that s 77(3) finds application. In *Phahlane*, the following was said at para 6 with which I fully agree:

> 'In other words, a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that provides for that dispute to be determined by this court.'

[23] This court is not persuaded that it retains jurisdiction in this matter. Accordingly, the application ought to be dismissed for want of jurisdiction. What remains is the exceptionality argument. In

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Booysen v Minister of Safety & Security & others, [14] the Labour Appeal Court (LAC) differed with Acting Justice Cheadle that the jurisdiction of the Labour Court is ousted when it comes to incomplete disciplinary steps. First and foremost, *Booysen* was decided before *Steenkamp*. By necessary implication *Booysen* may have been overruled by *Steenkamp* in my view.

[24] In dealing with the question of jurisdiction, the LAC made reference to ss 157 and 158 of the LRA as well as s 77(3) of the Basic Conditions of Employment Act [15] (BCEA) and the Constitutional Court judgments of *Chirwa v Transnet Ltd & others*[16] and *Gcaba*. After that it concluded thus at para 39:

> 'The enquiry in matters of the nature under discussion is whether the *facts presented* indicate whether the Labour Court has jurisdiction to determine the dispute.' (Emphasis added.)

[25] With respect this seems to confine jurisdiction to the facts as opposed to what the LRA provides. In *Steenkamp* the Constitutional Court was more concerned with what the LRA states. In my view, since the Labour Court is a creature of statute, the place to seek and find its jurisdiction is the statute that begets it. The Labour Court has no jurisdiction beyond that granted by the statute creating it. Section 173 provides that the named courts have inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. This section, in my view does not give the Labour Court as a court of a similar status as the High Court inherent jurisdiction in all employer and employee matters. Its exclusive jurisdiction is circumscribed by the provisions of s 157 of the LRA. In *Ex parte Millsite Investment Co (Pty) Ltd*, [17] the following was said:

> '[A]part from powers specifically conferred by statutory enactments and subject to any deprivation of power by the same source, a Supreme Court can entertain a claim or give any order which at common law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments courts have spoken of the inherent power of the Supreme Court. The inherent power is not merely one derived from the need to make the court order effective, and to control its own procedure, but to hold the scales of justice where no law provides directly for such a given situation.'

[26] In my view where the statute circumscribes the power, a court of a similar status as the High Court cannot willy-nilly invoke its inherent

powers. In *Booysen*, the LAC endorsed the observation by the Labour Court that if the court has jurisdiction it would have the power to grant an appropriate remedy and it does not follow that because the Labour Court has the power to grant the remedy

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it has the jurisdiction to determine the matter. At the end the LAC answered the question as follows (at para 54):

> 'To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any *unfair conduct* including *disciplinary action*. However, such intervention should be exercised in exceptional circumstances. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether the failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is exhaustive.' (Emphasis added.)

[27] What can be observed with ease is that exceptionality does not beget jurisdiction. It only begets intervention by the court. The corollary of that is that even where exceptional circumstances are shown, where this court lacks jurisdiction it cannot entertain the matter. Of course, the worrying factor is that of the Labour Court assuming jurisdiction on any unfair conduct or disciplinary action. In terms of the LRA matters involving unfair suspension or other unfair disciplinary action short of dismissal are to be determined by the CCMA or bargaining council. When regard is had to *Steenkamp* all the remedies are derived from the LRA and unfairness is the guide. In terms of the LRA the Labour Court shares jurisdiction with the CCMA and the bargaining council in most of the disputes.

[28] The LRA is crafted in such a manner that matters reserved for the jurisdiction of the Labour Court are carefully spelled out. Nowhere in the LRA does one find jurisdiction approbated to the Labour Court in respect of unfair conduct or disciplinary action. Nonetheless as the court below I am bound by *Booysen*. To the extent that this court assumes jurisdiction, this court refuses to exercise its discretion to intervene. Exceptional circumstances are those that are unusual or different. The Constitutional Court in the matter of *Law Society of SA & others v President of the Republic of SA & others*[18] cautioned thus:

> 'Courts therefore ought to intervene in incomplete processes only when no other avenue is realistically available to adequately address whatever grievances the people might have.'

[29] In my view the better approach is to ask if there are no other avenues as opposed to attempting to define and/or find the so-called exceptional circumstances. It is too arduous a task for the Labour Court. It has been shown in this court that parties make up all sorts of 'exceptional circumstances' not only to get a foot in the door — jurisdiction — but to get this court to stop some unfair but beguiled as unlawful conduct. It is only where a person may not be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object that a court would intervene. [19]

[30] An employee who has been 'unlawfully' suspended has substantial relief in due course. In an instance where, as is the case here, an

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employee's main gripe is that of being suspended by the wrong person, there is no basis for the court to intervene. I must state that under common law where a person exercises a power that he or she does not have, it is said that the person acted ultra vires — an incidence of the rule of law. In the constitutional order ultra vires offends the principle of legality, which renders such conduct reviewable in law. I shall return to the issue of a legality review in due course. However, on application of the *Oudekraal*[20] principle a decision factually remains until set aside by a competent court. Botes does not seek a review before this court.

[31] The conclusion I reach is that Botes failed to demonstrate any exceptional circumstances that would entitle this court to intervene at this stage. Of course, this aspect runs in tandem with the issue of urgency. Where exceptional circumstances are not shown, there exists no reason to entertain a matter as one of urgency. The application must fail on this front too.

The remedy of review

[32] As pointed out above the conduct complained of by Botes is capable of being set aside on review. There can be no doubt that the CJPC is an organ of state. Also, there can be no doubt that the regulation has the status of subordinate legislation. Although the concept of exercise of public power is an elusive and difficult pony to ride, it can be safely stated that exercising powers emanating from regulation 6 is an exercise of statutory power. A functionary cannot exercise powers that he or she does not have. Such offends the principle of legality.

[33] In this court legality reviews are brought under s 157(1) read with s 158(1)*(h)* of the LRA. It has been held in this court that where the LRA provides another remedy, s 158(1)*(h)* may not be invoked. However, in this instance, Botes conveniently disavowed the remedies of the LRA, it can be conveniently concluded that there is no other remedy in the LRA.

[34] Of course the pleaded case of Botes is not one of review but that of a declarator and an interdict. On this simple basis this court shall not consider whether the conduct offends the principle of legality.

The breach of contract claim

[35] Botes alleges that the terms of the regulations are incorporated in her employment contract. In terms of s 77(3) of the BCEA, this court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. It is worth repeating that in a case involving a breach of contract, the innocent party has an election to make. Either to hold the other party to the contract or cancel the contract and sue for damages. Botes did not plead a breach and did not indicate any election she made.

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[36] A remedy of specific performance is a discretionary one. It is a remedy that must be afforded sparingly particularly in employment contracts. [21] Botes did not, in her notice of motion, seek specific performance in a contractual sense. She sought an order to be permitted to return to work. Where a party approaches this court under s 77(3) such a party must state so in his or her founding papers. Having scoured the papers before me I searched in vain for any reference to s 77(3) of the BCEA or any alleged breach. The conclusion I reach is, therefore, that this is not a s 77(3) application.

The merits of the application

[37] Assuming I am wrong on the jurisdiction issue, I proceed to consider the merits of the application. The declarator sought by Botes is not one of declaration of rights as between the parties. It is one as contemplated in s 172 of the Constitution. This power requires dealing with a constitutional matter. In terms of s 167(7) of the Constitution, a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. Section 1*(c)* of the Constitution provides for the supremacy of the Constitution and the rule of law. As pointed out above ultra vires is an incidence of the rule of law. Clearly, Botes is seeking to enforce or protect the rule of law.

The issue of who must exercise the power

[38] A textual reading of regulation 6 suggests that only the municipality may exercise the power. Of course, often times the textual reading does not reveal the intention of the parties. Where a literal interpretation leads to absurdity then it ought to be abandoned in search of the ever-illusive intention of the parties.

The relationship between the CJPC and the municipality

[39] The Local Government: Municipal Systems Act [22] (Systems Act) defines a municipal entity to mean a private company referred to in s 86B(1)*(a)* of the Systems Act. It must follow that the CJPC is a private company. The old principle of *Salomon v Salomon & Co Ltd*[23] is that a company holds its corporate identity and is separate from its shareholders. That being applied, the municipality is a shareholder or, aptly put, an interest holder in CJPC.

[40] Section 93J(1) of the Systems Act obligates and empowers the board of directors of a municipal entity to appoint a chief executive authority. Section 93J(2) states that the chief executive officer is accountable to the board. The dictionary meaning of the word 'accountable' is expected or required to account for one's action; answerable. It has

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been held that a power to appoint implies the power to discipline. [24] The trouble in this matter started when the parties concluded an addendum. The parties chose to adapt the regulations without carefully considering that certain terms, like a municipal council, did not apply to them. At that time, Botes must have known that her employer that she was answerable to was the CJPC and not the municipality.

[41] Similarly, the CJPC was under no illusion that it dealt with Botes as an employee of its shareholder. I do not believe that if an officious bystander were to have asked Botes and the CJPC shortly after the addendum was concluded that where reference was made to the municipal council it referred to the CJPC, they both could have said 'oh yes of course'. Where it is equitable and reasonable to do so a court of law may imply terms into a contract of the parties or fill the apparent missing gap. The legal position is that only the CJPC may employ a chief executive officer and that person so employed is answerable to the board of the CJPC. Section 93A*(b)* of the Systems Act obligates the municipality to allow the CJPC to fulfil its responsibilities. That being so, it is incongruent with the settled legal position that a non-employer may instil discipline on a non-employee. This court in *Shabane v Nkwinti & another*[25] remarked as follows:

> 'To my mind it defies logic for a minister not to have powers to discipline a head that serves in a department under his or her control.'

[42] I hold a view that it shall be illogical to think that a municipality that did not appoint a person would have powers to discipline that person. It shall be congruent with s 93L read with s 93A of the Systems Act to imply [26] that where [the term] 'a municipal council' is employed in the regulations it must mean the board of directors since only it has the statutory power to appoint. As correctly argued by Mr *Sibanda*, appearing for the respondents, the CJPC is not empowered to delegate upwards. In itself it acts on delegated powers as delegated by legislation. The most common form of delegation occurs when someone in a superior role transfers authority to a subordinate. On application of the principle delegatus non potest delegare, the CJPC cannot delegate delegated powers. With all the above legal principles I conclude that the parties intended to mean the board of directors and not the municipal council and they simply forgot to make the necessary changes in their contract when they incorporated the regulations into the employment contract.

[43] Botes is simply taking advantage of that situation whilst knowing fully that she is not accountable to the municipality but to the board of directors. There is simply no basis upon which it can be reasonably concluded that Botes has any relationship of employment

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with the municipality. Therefore, it is absurd to conclude that the parties seriously intended the municipality and its council to take a decision to suspend Botes. The conclusion I reach is that the decision to suspend was taken by the right body and as such it was not ultra vires.

The basis of unlawfulness

[44] The unlawfulness allegation hinges on two grounds. The first ground has already been dealt with above. I took the view that on a contextual and purposive interpretation of the employment contract much as the parties were not empowered to amend the regulations, it was within their powers to specify that where municipal council is referred to it meant the board of directors. This court in order to arrive at a sensible interpretation in order to establish the intention of the parties must imply that reference. With that possibility, the first ground is bound to fail.

[45] The second ground relates to the presence of jurisdictional facts to enable the exercise of the power. Mr *Franklin SC* relegated this ground to being a subsidiary ground. Of relevance in this ground is the phrase 'reason to believe'. The term 'reason to believe' received judicial attention in *Vumba Intertrade CC v Geometric Intertrade CC*, [27] where the court concluded that the reason to believe must be constituted by facts giving rise to such belief and a blind belief or a belief based on such information or hearsay evidence as a reasonable man ought to or could not give credence to does not suffice. In that judgment, the court was seeking to interpret s 8 of the repealed Close Corporations Act. [28] In *Dladla v Council of Mbombela Local Municipality & another (2)*, [29] this court stated the following:

> '[18] Clause 9.1 gives the second respondent, obviously through the first respondent a discretion to suspend. However, that discretion has to be triggered in my view by the presence of allegations that he has committed serious misconduct. Clause 9.1 does not suggest that the said allegations ought to be communicated to the municipal manager before suspension.
>
> [19] The wording is clear. Once an allegation exists that serious misconduct has been committed that is sufficient to trigger the coming into operation of clause 9.1 in particular. The belief that the municipal manager may jeopardize any investigation is in the absolute discretion of the municipality. Therefore, the test is subjective. Such belief need not be communicated to the applicant before suspension.'

[46] Mr *Franklin SC* submitted that Botes' issue is that the allegations were not communicated adequately to her. This court fails to understand this submission. In the letter of 20 August 2020, a catalogue of nine allegations were placed before Botes. Mr *Franklin SC* placed reliance on the decision of *National Director of Public Prosecutions v*

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Zuma[30] to advance the submission that the CJPC was obligated to communicate its reason to believe to Botes. I do not believe that this judgment advances Botes' case by an ounce. Rights of a person to be arrested are constitutional rights — s 35 of the Constitution — and are viewed differently from the rights of a person to be suspended.

[47] Properly viewed, Botes laments the contravention of the audi alteram partem rule. That right is guaranteed in regulation 6(2) which provides that before a senior manager may be suspended, he or she must be given an opportunity to make written representation to the municipal council why he or she should not be suspended within seven days of being notified of the council's decision to suspend him or her. The above is the full extent of the right. Nowhere is it stated that the senior employee must be informed of the reason to believe. This situation is analogous to a retrenchment situation. An employer is entitled to take a preliminary decision to retrench without consulting the employee to be affected.

[48] The only time a senior employee is entitled to some information is when the municipal council informs a senior employee in writing of the reasons for his or her suspension on or before the senior employee is suspended. During the exercise of audi alteram partem a senior employee engages with the reasons why he or she should not be suspended and not with why the municipal council reached its decision to suspend. In exercising the right, there is nothing to prevent the senior employee from settling the mind of the municipal council that his or her presence at the workplace will not jeopardise any investigations; endanger the well-being or safety of any person or municipal property; or be detrimental to stability in the municipality; or that he or she will not interfere with potential witnesses or commit further misconduct. Considering the fact that a municipal council may have taken a subjective view, it may be appropriate to dissuade the municipal council from continuing to hold the subjective view. The regulations obligate a municipal council to consider any representation submitted to it within a particular period. In making her submissions, Botes addressed the issue of the risk of interference, which pertinently addresses the question why she should not be suspended.

[49] I therefore reach the conclusion that the provisions the contract of employment incorporating regulation 6 have not been contravened. There is no basis for this court to declare any unlawfulness on the part of CJPC or interdict it in any manner or form. This application is bound to fail for all the reasons set out above.

The issue of costs

[50] In every judgment of this court, its judges bitterly complain about the abuse of court processes by senior managers of adequate means. Botes earned well over R2 million. She can afford the services

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of what Acting Justice Snyman referred to as 'clever lawyers'. [31] Most of the time, if not all the time, respondents defend these types of applications using taxpayers' coffers. It certainly becomes unacceptable for these respondents to be mulcted with costs in such applications. The message that this court must send out is that costs will follow the results. I have no hesitation in my mind that this matter warrants a costs order.

[51] In the results the following order is made:

Order

1 The application is dismissed.

2 The applicant to pay the respondents' costs.

Applicant's Attorneys: *Edward S Classen & Kaka Attorneys*, Epsom Downs.

First Respondent's Attorneys: *Mkhabela Huntley Attorneys*, Sandton.

1 Promulgated in terms of s 120 of the Local Government: Municipal Systems Act 32 of 2000 and published under GN 344 *Gazette* 34213 of 21 April 2011.

2 *Raseroka v SA Airways (SOC) Ltd* (2020) 41 *ILJ* 978 (LC); *Democratic Municipal & Allied Workers Union of SA & others v City of Johannesburg* (2020) 41 *ILJ* 912 (LC); *Phahlane v SA Police Service & others* J736/2020 11 August 2020 [reported at (2021) 42 *ILJ* 569 (LC) — Eds]; *Shezi v SA Police Service & others* (2021) 42 *ILJ* 184 (LC) and *Singhala v Ernst & Young & another* (2019) 4 *ILJ* 1083 (LC).

3 2016 (3) SA 251 (CC); (2016) 37 *ILJ* 564 (CC).

4 2010 (1) SA 238 (CC); (2010) 31 *ILJ* 296 (CC).

5 66 of 1995, as amended.

6 3 of 2000.

7 55 of 1998.

8 n 2 above at para 12.

9 2010 (1) SA 217 (SCA).

10 See *Nothnagel v Karoo Hoogland Municipality* 2012 JDR 1533 (LC); *Mayaba v CCMA* 2014 JDR 2219 (LC); *Mettler v Nelson Mandela Bay Metropolitan Municipality* unreported decision case no P487/2018 delivered 2 July 2019.

11 unreported decision case no P487/2018 delivered 2 July 2019.

12 (2020) 41 *ILJ* 997 (LC).

13 n 2 above at para 9.

14 (2011) 32 *ILJ* 112 (LAC).

15 75 of 1997.

16 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC); [2008] 2 BLLR 97 (CC).

17 1965 (2) SA 582 (T).

18 2019 (3) SA 30 (CC); 2019 (3) SA BCLR 329 (CC) at para 24.

19 See *Doctors for Life international v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC).

20 See *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA).

21 See *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2002 (5) SA 697 (C); (2002) 23 *ILJ* 1779 (C).

22 32 of 2000.

23 [1896] UKHL 1; [1897] AC 22 (HL); [1895-9] All ER 33 (HL).

24 *Masetlha v President of the Republic of SA & another* 2008 (1) SA 566 (CC) and *Shabane v Nkwinti & another u*nreported decision case no J1947/17 delivered 18 January 2018.

25 n 24 above at para 33.

26 See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

27 2001 (2) SA 1068 (W).

28 69 of 1984.

29 (2008) 29 *ILJ* 1902 (LC).

30 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA)

31 See *Raseroka* n 2 above.