

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: HC-MD-CIV-MOT-GEN-2020/00073

In the matter between:

**MARIANA PIETERS**

**APPLICANT**

and

**THE MINISTER OF URBAN AND RURAL  
DEVELOPMENT**

**1<sup>ST</sup> RESPONDENT**

**THE VILLAGE COUNCIL OF MALTAHOHE**

**2<sup>ND</sup> RESPONDENT**

**ROCHELLE KANDJELA**

**3<sup>RD</sup> RESPONDENT**

**OTTO SHIPANGA**

**4<sup>TH</sup> RESPONDENT**

**WERNER COETZEE**

**5<sup>TH</sup> RESPONDENT**

**JANA DE KOCK**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Pieters v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-GEN-2020/00073 [2020] NAHCMD 123 (27 March 2020).

Heard: 20 March 2020

Delivered: 27 March 2020

**Flynote:** Civil Procedure – urgent application in terms of Rule 73 – whether this court has jurisdiction to deal with a matter arising from an employment dispute.

**Summary:** The applicant, an employee of Maltahohe Village Council, was hauled before a disciplinary committee set up by the Minister of Rural and Urban Development. The applicant cried foul and brought an application before this court claiming that the Minister appointed the disciplinary committee in terms of a non-existent provision of the Local Authorities Act, 1992. She also complained that the disciplinary committee was biased in the manner it carried out the proceedings. She applied for an interim interdict of the proceedings pending the determination of a review application that she lodged with the Labour Court. The respondents took the point that this court has no jurisdiction to deal with the matter, considering that the matter arose from an employment situation and that the Labour Court has exclusive jurisdiction to hear that matter regard had to s 117 of the Labour Act, 2007.

Held: that the exclusive jurisdiction of the Labour Court appertains to all the matters outlined in s 117(1) (a) – (i) and that if a matter arises which can be located within any of the provisions thereof, then the Labour Court has exclusive jurisdiction, to the exclusion of this court.

Held that: the provisions of s 117(1)(e), which deal with the granting of an interdict or urgent relief, apply only in situations where the applicant has already lodged a dispute in terms of Part 8 of the Labour Act and that since no dispute had been lodged in that regard by the applicant, the Labour Court could not be said to have exclusive jurisdiction in terms of that provision.

Held further that: having regard to s 117(1)(e), which provides that the Labour Court may 'generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law, or the common law', the said provision was wide enough to vest the Labour Court with exclusive jurisdiction, considering that the dispute arose in an employment situation, which falls within the definition of 'any labour matter', as provided in the said provision.

Held: that s 117(1)(j) is couched in very wide terms in order to ensure as far as possible that labour matters resort under the jurisdiction of the Labour

Court and that it would be undesirable for parties to be shuttling between this court and the Labour Court when the matter involves a labour dispute.

The court found that in the circumstances, the Labour Court had exclusive jurisdiction to grant the relief the applicant sought and that to that extent, the jurisdiction of this court is excluded. The application was thus dismissed with costs for lack of jurisdiction.

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### **ORDER**

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1. This application is dismissed for the reason that this court does not have jurisdiction to entertain the application filed by the Applicant as the complaint falls within the exclusive jurisdiction of the Labour Court.
2. The Applicant is ordered to pay the costs of the application consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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### **RULING**

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#### **MASUKU J:**

##### Introduction

[1] In this application, brought on urgency, the applicant approached the court seeking the following relief:

‘1. An order condoning the Applicant’s non-compliance with the Rules of Court relating to service (and allow service by fax or email) and time periods for exchanging pleadings and hear the matter as one of urgency as contemplated in terms of Rule 73 of the Rules of the High Court.

2. An order that all action and decisions taken by the Respondents on the basis and in pursuance of the decision of the First Respondent, dated 14 February 2020, respectively appointing Third, Fourth and Fifth Respondents to conduct an enquiry

into the allegations of misconduct against the Applicant, be interdicted and restrained.

3. An order that all action and decisions taken by the Respondents on the basis and in pursuance of the decision of the Second Respondent, dated 12 February 2020, respectively appointing Third, Fourth and Fifth Respondents to continue to conduct an enquiry into the allegations of misconduct against the Applicant, be interdicted and restrained.

4. An order, in the event that the enquiry in the alleged misconduct of the Applicant pursuant to the impugned decisions of the First Respondent and the Second Respondent respectively having, on the date of the orders sought herein, been completed and a decision having been taken in terms of Section 29(6)(f) of the Local Authorities Act of 1992 (Act 23 of 1992) as amended, that the implementation of such decision be interdicted and stayed pending the outcome of a review application lodged with the Labour Court.

5. An order that the orders under paragraphs 2, 3, and 4 above as an interim interdict, with immediate effect pending the finalisation of the review application simultaneously filed in the Labour Court by the Applicant.

6. Costs against any of the Respondents opposing this application.'

[2] Needless to say, the respondents cited above, have opposed the application, culminating in them filing opposing affidavits. They moved the court to dismiss the application with costs and on grounds that shall be traversed below.

#### The parties

[3] The applicant is a major female residing in Maltehohe. She is in the employ of the 2<sup>nd</sup> respondent, the Village Council of Maltehohe, as head of department of human resources. The respondents are the Minister of Urban and Rural Development, who is in charge for local authorities in the Republic, as provided in the Local Authorities Act, 23 of 1992, 'the Act'), cited as the 1<sup>st</sup> respondent.

[4] The third to fifth respondents are persons that the appointed to serve as members of a disciplinary committee, the Minister appointed to enquire into allegations of misconduct allegedly committed by the applicant. The sixth respondent was appointed as the initiator of the said proceedings.

### Background

[4] Valentine's Day this year must have been a very painful one for the applicant. This is because on that day, she received a letter issued by the Minister and in which he appointed the individuals referred to above, to enquire into allegations of misconduct by the applicant within the realms of the Maltahohe Village Council.

[5] The applicant challenges the Minister's exercise of the powers vested in him by the Act on grounds that shall be traversed as the ruling unfolds, depending, of course on how the court rules on certain points of law *in limine* that the respondents have raised in their papers. Essentially, the applicant claims that the Minister purported to appoint the disciplinary committee outside the scope of the enabling legislation, an argument on which the respondents pour scorn.

[6] The respondents, as intimated, raised points of law *in limine*, which include that this court has no jurisdiction to entertain this application and that the matter lacks urgency as envisaged in rule 73. Because of the importance of the issue of jurisdiction, it has to be considered anterior to any other issue raised for the reason that if the respondents are correct that the court lacks jurisdiction to consider the matter, then, it cannot even sit to deal with urgency and all the other issues that are raised or arise in the matter. I accordingly proceed to deal with the court's jurisdiction, or lack of it below.

### Jurisdiction

[7] Does this court have jurisdiction to deal with this matter? Is this not a matter that should properly serve before the Labour Court? Ms. Shifotoka, for the respondents' implored the court to answer the two questions above as follows – the first question in the negative and the second in the positive. The answers returned by Mr. Chibwana, for the applicant, were diametrically opposed, he contending and very strongly too, that this court has jurisdiction, regard had particularly to the relief sought.

[8] The starting point for Ms. Shifotoka, was that this case is about a dispute between an employer and an employee. It is thus a labour issue and in terms of which the legislature, in its wisdom, arrogated the jurisdiction exclusively, to the Labour Court and that to that extent, this court's jurisdiction to entertain the application, is excluded. Ms. Shifotoka relied for her submissions on the provisions of s117 of the Labour Act, 11 of 2007.

[9] Mr. Chibwana's argument, was a different kettle of fish altogether. He argued that this court has jurisdiction to hear and determine this matter on account of the fact that the relief sought by the applicant, namely, an interim interdict, to operate with immediate effect, is outside the purview of powers vested in the Labour Court. In short, so the argument ran, the Labour Court, even if approached, would have folded its arms and said to the applicant, 'We cannot assist you although the *lis* arises out of an employer and employee relationship. Please go elsewhere for your relief, this court expressly excluded.'

[10] In support of the argument advanced, Mr. Chibwana referred the court to the judgment of Miller AJ in *Haimbili and Another v TransNamib and Others*.<sup>1</sup> In that case, the question confronting the court was whether the Labour Court had jurisdiction to grant interdictory relief on an urgent basis in cases where a dispute had not been lodged with the Office of the Labour Commissioner, in terms of Chapter 8 of the Act.

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<sup>1</sup> LC 22/2012.

[11] The learned Judge, in the course of the judgment, referred to the provisions of s 117(1)(e), dealing in part, with the jurisdiction of the Labour Court. The said provision has the following rendering:

‘The Labour Court has exclusive jurisdiction to –

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(e) grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8.’

[12] The learned Judge was enamoured to the argument presented to the court by Mr. Totemeyer, who submitted that the meaning to be attributed to the above provision, from reading the text, was that the phrase ‘ . . . “pending resolution of a dispute in terms of Chapter 8,” confines this Court’s jurisdiction to grant urgent relief to those instances where a dispute in terms of Chapter 8 has been lodged and is awaiting resolution.’

[13] In concluding on this issue, the learned Judge held as follows at para 12 of the judgment:

‘In applying those principles I conclude that this Court’s jurisdiction to grant urgent relief is confined to those instances where a dispute was lodged in terms of Chapter 8 and is awaiting resolution. The interpretation contended for by the applicants is not in harmony with the provisions of the Labour Act relating to the resolution of a dispute relating to whether a dismissal is unlawful. That is in the first instance a matter to be resolved by a process of conciliation and arbitration by the Labour Commissioner.’

[15] The learned Judge accordingly found that this court had no jurisdiction in that matter as the dispute had not been lodged in terms of Chapter 8 and was therefor not pending and awaiting resolution.

[16] On the other hand, Ms. Shifotoka drew the court’s attention to two cases dealing with the same issue. The first was the judgment of Damaseb JP

in *Katjiuanjo and Others v Municipal Council of the Municipality of Windhoek*,<sup>2</sup> where the issue presently confronting the court reared its head again.

[17] In dealing with the matter, the learned Judge President had the following to say:

‘The issue in my view is not so much whether the Labour Court does have jurisdiction, but whether the legislature intended to exclude the High Court’s jurisdiction in the kind of dispute now before court.’

[18] This is not the end of the matter. The views expressed by the Judge President were concurred in and echoed by Ueitele J in *Usakos Town Council v Jantze and Others*.<sup>3</sup> The learned Judge reasoned as follows:

‘In the matter of *Trustco Group International (Pty) Ltd v Katzao*<sup>4</sup> Smuts J (as he then was) came to the conclusion that for the High Court to decline its jurisdiction, the legislature must have provided for the exclusion of the jurisdiction in unequivocal language and for that unmistakable purpose.’

Smuts J then proceeded to quote the sentiments expressed by the learned Judge President in the excerpt in para 17 above, which need not be repeated at this juncture.

[19] Ueitele J then proceeded to say the following at para 17:

‘I fully agree with the conclusion by Damaseb JP and am thus of the view that the legislature intended to exclude the jurisdiction of the High Court in the instances contemplated in s 117(1)(a) – (j). The only question to be answered in the instant case is whether the relief sought by an applicant falls within the category of remedies where the High Court’s jurisdiction is clearly excluded.’

[20] I am of the view that the last question posed by Ueitele J above, is the very question that this court is obliged to return and answer in relation to,

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<sup>2</sup> [2014] NAHCMD 311 9I 2987/2013 (21 October 2014).

<sup>3</sup> 2016 (1) NR 240 (HC), p248, para 16.

<sup>4</sup> 2011 NAHC 350 (I 3004/2007), 24 November 2011, paras 14-18.



namely, is the relief sought by the applicant in this matter, one that does not fall within the categories of relief which the High Court's jurisdiction is clearly excluded?

[21] I am of the view that the findings and conclusions of Miller AJ are impeccable and find their life and meaning in the very provision quoted. It therefor appears that a party may not approach the Labour Court in terms of s 117(1)(e) as a court with exclusive jurisdiction in cases where urgent relief, including an urgent interdict is sought, pending the resolution of a dispute already lodged in terms of Chapter 8, headed 'Prevention and Resolution of Disputes'.

[22] In my considered view, that is not the end of the matter. The question that should still be asked, if it appears that a matter or the relief sought may not be obtained from the Labour Court, in terms of s 117(1) (a) to (h), is whether that party may nonetheless be able to bring that matter under the provisions of sub section (1)(i), of s 117, which to my mind, appears to be of an omnibus nature.

[23] The said provision grants exclusive jurisdiction to the Labour Court in matters which, 'generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law'.

[24] To my mind, there are two phrases that one should not allow to sink into oblivion as one considers the above subsection. These are the words 'all matters necessary or incidental' and then the words 'any labour matter'. The question that one needs to ask at the end of the day is this? Is the matter in question provided for in any of the subsection (a) to (h) of s 117? If it is so provided, then the matter in question falls within the exclusive jurisdiction of the Labour Court.

[25] If the matter does not fall within any of the above subsections, then the question that follows, is whether the said matter does, however, fall within the

rubric of the omnibus provision of sub section (1)(i)? As intimated above, the wording employed by the legislature in this particular provision, is quite wide and elastic. It is to that provision that one needs to turn in answering the poser in this matter.

[26] What is not in doubt, from whichever prism one views the matter, is that it is a labour matter. This is so because it emanates from allegations that the applicant was involved in some misconduct whilst engaged in her employment with the second respondent. To that extent, the matter is a labour matter and this is so unmistakably. In view of that conclusion, the jurisdiction of this court is clearly excluded.

[27] The question may still be escalated further, albeit within the very confines of the same subsection in the following manner – is the matter before court necessary or incidental to the functions of the court? In this regard, the facts are that the applicant, an employee was charged by her employer with allegations of misconduct allegedly committed in the course and within the scope of her employment.

[28] In the course of the disciplinary hearings instituted against her, she lodges a review application with the Labour Court and then seeks to stay the disciplinary proceedings, pending the outcome of the review. The question then becomes, if she is dissatisfied with the decision to appoint the members of the disciplinary proceedings and conduct of the proceedings, and seeks to interdict same, is that a matter not necessary or incidental to the functions of the Labour Court?

[29] I am of the considered view that if one concludes that it is not necessary to the court's functions, which I very much doubt, there can be no question or doubt whatsoever that the said matter would then be incidental to the functions of the court. For that reason, I hold the view that the matter would for that reason fall within the exclusive jurisdiction of the Labour Court.

[30] It must have been within the contemplation of the legislature that it is undesirable and unworkable that litigants, employees in particular, should have their disputes tried in more than one court and that when it comes to deciding where the matter is to be heard, they need to split hairs and lose time while deciding, on advice whether the matter falls within the jurisdiction of this court or of the Labour Court. It was for that reason, in my considered view that the s 117(1)(i), generic as it is in its terms, was promulgated, in borderline cases or in cases of doubt.

[31] I am accordingly of the considered view that whereas the argument by Mr. Chibwana and his reliance on the *Haimbili* judgment is correct, there is no doubt in my mind that the matter nevertheless falls within the rubric of s 117(1)(i) of the Act, resulting in the conclusion that the legislature clearly excluded the jurisdiction of this court in relation to the applicant's grievance.

### Conclusion

[32] In the premises, I am of the considered view that Ms. Shifotoka is eminently correct in her submissions. The Labour Court has exclusive jurisdiction to deal with the applicant's complaint and to that extent, this court's jurisdiction is excluded by the Legislature. In this regard, it is unnecessary for the court to consider the other issues raised by the respondents.

### Order

[33] The order that is condign in the circumstances, is the following:

1. This application is dismissed for the reason that this court does not have jurisdiction to entertain the application filed by the Applicant as the complaint falls within the exclusive jurisdiction of the Labour Court.
2. The Applicant is ordered to pay the costs of the application consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku  
Judge

## APPEARANCES:

APPLICANT: T. Chibwana  
Instructed by: Ellis Shilengudwa Inc, Windhoek

RESPONDENT: E. Shifotoka  
Instructed by: Office of the Government Attorney