REPORTABLE

CASE NO.: SA 89/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PHELEM MASEKA MASULE	**Appellant**
and	
PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	**First Respondent**
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**Second Respondent**
CHAIRPERSON PUBLIC SERVICE COMMISSION	**Third Respondent**
PUBLIC SERVICE COMMISSION	**Fourth Respondent**
DIRECTOR GENERAL OF THE ANTI-CORRUPTION COMMISSION	**Fifth Respondent**
ANTI-CORRUPTION COMMISSION	**Sixth Respondent**
EXECUTIVE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION	**Seventh Respondent**

HANNU SHIPENA (N.O.) **Eighth Respondent**

JUSTINE KANYANGELA **Ninth Respondent**

GOVERNMENT OF REPUBLIC OF NAMIBIA **Tenth Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: **29 October 2021**

Delivered: **04 February 2022**

Summary: This is an appeal from the High Court concerning the controversial issue whether s 117(1) of the Labour Act 11 of 2007 (the Act) ousts the jurisdiction of the High Court in all labour related matters/disputes.

Briefly, the appellant is an employee at the Anti-Corruption Commission (ACC). He holds the position of Chief Investigating Officer. On or about November 2019, the ACC placed an advertisement in the local newspapers in which they advertised the position of Chief: Investigations and Prosecutions. The advert listed the requirements that applicants needed to meet in order to qualify for an interview. The appellant was one of the persons who applied for the position and was shortlisted in 2020. After the interviews were conducted, the panel recommended the appellant for the position. On 16 July 2020, the 8th respondent called the appellant to his office at the ACC to inform him that he was the successful candidate for the position and handed him a letter confirming same. The news about the appellant's promotion was widely circulated to his colleagues throughout the ACC and was published on the ACC's website. The week of 20 July 2020, appellant moved into his new office.

On 3 August 2020, appellant received a letter dated 16 July 2020 from the Prime Minister of the Republic of Namibia (PM) which set aside his appointment. The PM purported to do so in terms of s 7(2)(b) of the Public Service Act 13 of 1995 (Public Service Act). The letter further stated that the appointment was set aside due to a complaint laid with the PM's office on the alleged irregularities that may have taken place during the recruitment process which the PM intended to investigate in due course. Appellant was further invited to make written submissions to the PM's office showing cause as to why the PM's decision should not be made final in the event he was aggrieved by the decision of the PM. After back and forth correspondences, the appellant lodged, on an urgent basis, an application in the High Court where he sought an order interdicting and restraining the respondents from further implementing the first respondent's decision of setting aside his appointment and reviewing and setting aside the first respondent's decision to set aside his appointment to the abovementioned position.

Three preliminary issues of law were raised at the hearing and the one relevant for the purpose of this matter was that the High Court lacked jurisdiction to hear and determine the matter. The High Court relying on the authorities of *Haindongo Shikwetepo v Khomas Regional Council & others* (an unreported judgment per Parker AJ, case no A364/2008, delivered 24 December 2008), *Usakos Town Council v Jantze & others* 2016 (1) NR 240 (HC), and *Katjiuanjo v The Municipal Council of the Municipality of Windhoek* (case no I 2987/2013 [2013] NAHCMD 311 delivered 21 October 2014), held the view that the legislature intended to exclude the jurisdiction of the High Court in the instances contemplated in s 117(1)*(a) – (i)* of the Act. It accordingly declined to condone appellant's non-compliance with the rules of the High Court and to hear the application on an urgent basis, struck it from the roll and ordered appellant to pay costs for the 1st, 5th, 6th and 10th respondents. Aggrieved, the appellant lodged an appeal to this court.

In a concurring judgment (but for different reasons) Damaseb DCJ supports the order proposed by Mainga JA; - to allow the appeal, set aside the order and judgment of the High Court and to remit the matter to that court to be heard on the merits by a judge assigned to the Labour Division.

Held per: Damaseb DCJ (Hoff JA concurring)

That, the Labour Court is not a court separate from the High Court envisaged by article 78(1)(b) of the Constitution. It is only a division created for administrative convenience to deal with labour matters, presided over by judges appointed to the High Court and working under the supervision of the Judge President.

Held per: Mainga JA

That, jurisdiction is determined by the nature of the proceedings, or the nature of the relief claimed therein, or in some cases both the nature of the proceedings and the relief claimed.

That, the intention of the Legislature in the promulgation of s 117 of the Act was to grant the Labour Court exclusive jurisdiction in the field of labour relations.

That, the scope of the exclusivity of the Labour Court is limited to cases enumerated in s 117 of the Act.

That, the general exclusive jurisdiction clause in s 117(1)*(i)* does not oust the common law functions of the High Court in labour matters. If Parliament intended to oust the High Court in the exclusive jurisdiction of the Labour Court or the High Court's functions in the employer-employee relationship at common law, s 117 would have said so in no uncertain terms.

That, s 117(1)*(i)* of the Act confers, both the Labour Court and the High Court, with concurrent jurisdiction.

That, on authority of *Onesmus v Minister of Labour* 2010 (1) NR 187 (HC), this court agrees that the High Court does not draw on any statute for its powers; it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament, including the Labour Act.

That, Part A of appellant's prayers falls within the province of the High Court and prayers 2 and 4 of Part B cannot be granted by Labour Court.

That, even if the Labour Court had jurisdiction, the High Court would have concurrent jurisdiction and the Labour Court cannot claim exclusive jurisdiction. The High Court is one of the two superior courts granted the original jurisdiction not only to hear and adjudicate upon civil disputes and criminal prosecutions, but includes the interpretation, implementation and upholding the Constitution and the fundamental rights and freedoms guaranteed thereunder.

Appeal succeeds.

APPEAL JUDGMENT

DAMASEB DCJ and Hoff JA concurring:

Introduction

[1] This appeal concerns the High Court's refusal to entertain an urgent application in which the appellant (Mr Masule), a public servant employed by the Anti-Corruption Commission[1] (ACC), challenged a decision by the Prime Minister (the PM)

[1] Established by the Anti-Corruption Act 8 of 2003.

– cancelling Mr Masule's promotion appointment and directing an investigation into the process that led to that promotion.

[2] I have had the benefit of reading in draft the main judgment prepared by Mainga JA. The order proposed in the main judgment is to allow the appeal, set aside the High Court's order and to remit the matter to that court for it to consider the merits. I support the proposed order and wish to set out my reasons for doing so.

[3] I hope it will become apparent from my reasons that I do not endorse the view, advanced with great force by Mr Narib on behalf of Mr Masule that because the High Court is vested with 'original jurisdiction' in terms of art 80(2) of the Namibian Constitution (the Constitution), aggrieved persons as contemplated by art 25(2) of the Constitution are entitled in all circumstances to approach the High Court in first instance to assert their fundamental rights and freedoms. At the core of my rejection of that notion is the principle of subsidiarity which I will discuss in due course.

Background

[4] The vacant position of Chief: Investigations and Prosecutions Grade 3 at the ACC was advertised in Namibia's local newspapers. The advertisement specified the requirements that applicants had to meet to qualify to be invited to an interview. In particular, it required that certain documents be attached to an application. It was a condition that incomplete applications and those without confirmation of satisfactory completion of probationary period will be disqualified. A total of 19 applications were

received of which only nine met the advertised requirements. However, four applicants had not attached all or some of the required documents with their applications and were contacted by the ACC's Human Resources Department, after the closing date, and invited to submit the outstanding documents.

[5] After the interviews, Mr Masule was recommended to fill the vacant post by the interview panel although he was not the highest scoring candidate. The recommendation was submitted to the Executive Director (ED) of the ACC who in his submission to the Public Service Commission Secretariat, recommended the candidate (Mr Iyambo) who had scored the highest in the interviews. By so doing, the ACC ED went against the recommendation of the interview panel.

[6] After deliberation, the Public Service Commission[2] (the PSC) informed the ED of the ACC that it had resolved that Mr Iyambo should have been excluded from the selection process as his application was incomplete. Mr Iyambo was one of the candidates that were called by the ACC Human Resources Department and invited to submit outstanding documents after the closing date. In the PSC's view, the ACC erroneously deviated from its own advertisement requirements by allowing non-compliant applicants to submit additional documents after the closing date. The PSC instead recommended the promotion of Mr Masule to the advertised post purporting to act in terms of s 5(1) of the Public Service Act 13 of 1995.

[2] Created by art 112 of the Constitution and by virtue of art 113(a)(aa) advises 'the President and the Government on the appointment of suitable persons to special categories of employment in the public service. . .' Its powers are more fully set out in the Public Service Commission Act 2 of 1990 as amended by the Public Service Act 13 of 1995.

[7] The ED of the ACC by letter dated 16 July 2020 informed Mr Masule that he was promoted to the position of Chief: Investigation and Prosecution with effect from 1 August 2020. By letter dated 17 July 2020, addressed to both the PM and the Director-General of the ACC (the D-G), Mr Iyambo protested the promotion of Mr Masule and demanded an investigation into the matter.

[8] Mr Iyambo's complaint was ultimately submitted to the PM who sought information from the PSC before she could express a view. Upon receipt of the requested documents, the PM forwarded all the documents to the Secretary to Cabinet (the head of the public service) and asked him to advise her on the matter.

[9] The Secretary to Cabinet advised the PM that Mr Iyambo should not have been overlooked as the ACC deviated from its own requirements by inviting candidates who submitted incomplete documents after the closing date.

[10] According to the Secretary to Cabinet, the entire recruitment process was flawed and should be declared null and void and recommended that the PM approaches the President of the Republic to vary or reject the recommendation of the Commission, in terms of s 9(a) of the Public Service Act.

[11] On the advice of the Office of the Attorney-General, the PM by letter dated 31 July 2020 informed Mr Masule that in terms of s 7(2) of the Public Service Act which empowers her to vary or set aside decisions of an Executive Director, she set aside

Mr Masule's appointment on account of what appeared to be irregularities during the process of recruitment which she intends to investigate in due course. The PM invited Mr Masule to show cause why the decision should not be made final.

[12] After a failed attempt to obtain some documents relating to the matter, Mr Masule launched the proceedings which are the subject of the appeal. The application was brought in two parts: Part A and Part B. Part A contains an urgent application seeking interim interdictory relief while Part B seeks review and declaratory relief.

[13] In Part A Mr Masule sought an interim interdict restraining the PM and all other respondents from further implementing the decision to set aside his promotion appointment. In addition, Mr Masule sought an interdict restraining the appointment of the 9th respondent to act in the position of Chief: Investigations and Prosecutions. Mr Masule also sought an order reinstating him to the position of Chief: Investigations and Prosecutions.

[14] Part B is directed at the legality, fairness and reasonableness of the decision to set aside Mr Masule's promotion without *audi*. In the alternative, it seeks an order declaring the PM's decision to be null and void and as being in conflict with arts 8[3],10[4] and 18[5] of the Constitution. Part B also seeks an order reviewing and setting aside

[3] Respect for human dignity.
[4] Equality and freedom from discrimination.
[5] Administrative justice.

the decision appointing the 9th respondent to act in the position of Chief: Investigations and Prosecutions.

[15] In his founding affidavit, Mr Masule contends that his rights to dignity, equality before the law and to administrative justice were abruptly and unfairly violated when the decision to set aside his promotion was made without affording him a hearing.

[16] In justification for his approaching the High Court, Mr Masule states that he primarily sought an order reviewing and setting aside the administrative decision made by the PM and that in terms of art 78(4) of the Constitution, the High Court has 'inherent jurisdiction' to review decisions of public officials that violate art 18 of the Constitution and to grant urgent interim relief. He did not consider his case to be a labour dispute although he reserved all his rights under the Labour Act.

[17] According to Mr Masule, the impugned decision violated his right to a fair and reasonable administrative decision as enjoined by art 18 of the Constitution and the common law and that he was entitled by virtue of the Constitution to enforce and protect his rights directly and in first instance in the High Court.

[18] Mr Masule contends further that although the Labour Act and the Public Service Act are applicable to labour disputes between employee and employer, it is a negation of 'constitutional supremacy'[6] and his right to administrative justice to

[6] In terms of art 1(6) of the Constitution: 'This Constitution shall be the Supreme Law of Namibia'.

suggest that violation of art 18 of the Constitution by a public official is subject and subservient to a statutory framework, when art 80(2) of the Constitution vests the High Court with original (first instance) jurisdiction.

[19] Mr Masule states that he opted to challenge a constitutional breach as opposed to any other breach regulated by a statute, such as the Labour Act, and that he opted for constitutional relief as opposed to statutory relief. According to him, the exercise of power, even in employment relationships, is equally subject to the supremacy of the Constitution.

[20] It is asserted that there is no law that expressly excludes the jurisdiction of the High Court in relation to a violation and/or enforcement of an art 18 constitutional right; and that for the High Court not to entertain a matter, it must be clear that the original jurisdiction it enjoys under art 80(2) of the Constitution has been excluded by the legislature in the clearest terms.

[21] It is unnecessary for the purpose of the appeal to repeat the several grounds of review relied on by Mr Masule in Part B of the application. Suffice it to say that its essence is that the PM's decision to set aside his appointment/promotion is in essence a rejection by her of a valid and binding recommendation by the PSC. It is contended that once a recommendation has been made by the PSC to appoint or promote a staff member, the PM has no statutory discretion, authority, or power to

ignore, vary or set aside such a recommendation. Mr Masule asserts further that the PM's decision was irrational and unreasonable.

Opposition

[22] Both the PM and the D-G opposed the application and deny that Mr Masule's review grounds are sound in law. According to the PM, the impugned decision was intended to ensure the integrity of the process of appointments in the public service and was in the interest of good governance.

[23] Additionally, the PM raised three points *in limine.* The first is that Mr Masule approached the wrong forum, the High Court, as his' is a labour dispute and should be adjudicated by the Labour Court. According to the PM, the possible presence of a constitutional dimension in the application did not oust the 'exclusive jurisdiction' of the Labour Court. As the appeal turns on that issue I do not propose to repeat the other points *in limine* raised by the PM.

The High Court

[24] The court *a quo* took the view that the relationship between Mr Masule and the public service headed by the PM was one of employee-employer and therefore a labour relationship. The impugned decisions were therefore reviewable by (and remained subject to the exclusive jurisdiction of) the Labour Court - applying art 18 of the Constitution.

[25] The High Court's conclusion is predicated on the provisions of the Labour Act which establish a Labour Court for Namibia and set out its jurisdiction. I will discuss these provisions in due course.

[26] The conclusion arrived at by the High Court is inspired by a fundamental misconception that has pervaded our jurisprudence[7] since the enactment of the Labour Act. That misconception is that the Labour Court created by s 115 of the Labour Act is a court other than that contemplated by art 78(1)(b) of the Constitution. Once that misconception is put to rest, the question that we are called upon to answer in this appeal is readily soluble. More on that later.

Main ground of appeal

[27] The decisive ground relied upon by Mr Masule is that the judge below erred in holding that, sitting as a judge of the High Court, she lacked jurisdiction to hear the matter and on that basis struck the matter off the roll. It is asserted that holding that the High Court lacked jurisdiction meant that the Labour Act ousted the original and inherent jurisdiction of the High Court both of which are sourced in the Constitution.

The Labour Court and its jurisdiction

[28] Section 115 of the Labour Act establishes a 'Labour Court' as a 'division of the High Court'. In terms of s 116, 'The Judge-President must assign suitable judges to

[7] In such cases as *Haindongo Shikwetepo v Khomas Regional Council & others* Case No.: A 364/2008, delivered on 24 December 2008; *Usakos Town Council v Jantze and others* 2016 (1) NR 240 (HC); *Katjiuanjo and others v Municipality of Windhoek* (I 2987/2013) [2014] NAHCMD 311 (21 October 2014).]

the Labour Court, each of whom must be a judge or an acting judge of the High Court.' (My emphasis). The judges of the High Court comprise permanent judges appointed in terms of art 80(1) and acting judges appointed by the President at the request of the Judge President of the High Court in terms of art 82(3).

[29] In terms of s 117(1) of the Labour Act:

'The Labour Court has exclusive jurisdiction to –

(a) determine appeals from –

(i) decisions of the Labour Commissioner made in terms of this Act;

(ii) arbitration tribunals' awards, in terms of section 89; and

(iii) compliance orders issued in terms of section 126.

(b) review -

(i) arbitration tribunals' awards in terms of this Act; and

(ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner, or any other body or official in terms of -

(aa) this Act; or

(bb) any other Act relating to labour or employment for which the Minister is responsible;

(c) review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;

(d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;

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

(f) to grant an order to enforce an arbitration agreement;

(g) determine any other matter which it is empowered to hear and determine in terms of this Act;

(h) make an order which the circumstances may require in order to give effect to the objects of this Act;

(i) 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.

(2) The Labour Court may -

(a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or

(b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.'

[30] Relying on these provisions, the first instance judge held that, as a High Court judge, she did not have jurisdiction to adjudicate Mr Masule's application as it was a matter in respect of which the Labour Court retains exclusive jurisdiction by virtue of s 117(1) of the Labour Act. On that ground, the learned judge *a quo* declined to condone Mr Masule's non-compliance with the High Court Rules and to hear the application as an urgent one and accordingly struck it from the roll.

Discussion

[31] The dispute resolution regime created by the Labour Act has existed since the Labour Act came into force on 1 November 2008. The working hypothesis in all this time has been that the Labour Court created by the Labour Act is an adjudication forum different from the High Court of Namibia created by art 78(1)(b) of the Constitution. I will later discuss the misconception undergirding this hypothesis, but before I do so it is important that I deal with the main argument advanced on behalf of Mr Masule to the effect that because the High Court is vested with original jurisdiction in all civil disputes, it can never be precluded from entertaining a matter even if it falls within the jurisdiction of another adjudicatory forum. According to counsel, the only way that can be done is by an amendment to the Constitution.

[32] On this view, because the High Court is a court of original (first instance) jurisdiction and vested with inherent jurisdiction to review all unlawful administrative decisions, it matters not that the legislature has devised an alternative process for dealing with a dispute such as the one his client approached the High Court for.

[33] To support the argument, Mr Narib placed great store on a dictum of Maritz J in *Onesmus v Minister of Labour & another*[8] where the learned judge observed:

> '[14] The constitutional vesting in the High Court of original jurisdiction cannot be glossed over – it is of particular significance. . . The court does not only have the jurisdiction to deal with cases brought before it on appeal regarding the ''interpretation,

[8] 2010 (1) NR 187 (HC).

> implementation and upholding of [the] Constitution and the fundamental rights and freedoms guaranteed thereunder'', it also has the power to do so as a court of first instance'.
>
> [15] Moreover, it does not draw on any statute for those powers; it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament.' (My underlining for emphasis).

[34] The *Onesmus* dictum cannot on face value be faulted, except if one considers its implications for the equally important constitutional principle of subsidiarity. The principle has been stated as follows by the South African Constitutional Court in *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC):

> 'where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'.

[35] The animating rationale of the principle is to eschew the creation of parallel systems of law and a recognition that the legislature has the competence to make legislative choices as long as they are rational and constitutionally compliant. The legislation in question must either be relied on and applied, or it must be challenged on whatever ground it is considered not to pass constitutional muster. It is not

permissible to by-pass such an avenue and rely on the Constitution. The proper course to follow in such a situation is to launch a frontal attack on the legislation believed to be constitutionally non-compliant. Not doing so will result in parallel legal systems and lead to chaos.

[36] As Malaba DCJ (as he then was) observed in *Magurure & 63 others v Cargo Carriers International Hauliers (Pvt) Ltd (Sabot)*[9]:

> 'The principle of subsidiarity is based on the concept of one system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principle of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible.'

[37] In *PS Ministry of Labour and Employment & others v Russel*[10], the Court of Appeal of Lesotho recently observed, in relation to an argument similar to that advanced in this appeal on behalf of Mr Masule:

> '[36] The argument may legitimately be made that unless its jurisdiction is expressly ousted, the High Court always retains jurisdiction in all matters, regardless of another

[9] (CCZ 15/2016 Const. App. No. CCZ 96/2013) [2016] ZWCC 15 (16 November 2016) at 10. The Constitutional Court of SA acts on the same principle: *My Vote Counts NPC v Speaker of the National Assembly & others* 2016 (1) SA (CC) paras 53, 161 and 162.
[10] *PS Ministry of Labour and Employment and others v Russel* C of A (CIV) 27/2021.

forum being vested with a power it would ordinarily enjoy. That approach ignores a fundamental tenet in situations where the legislature through legislation creates alternative fora for the resolution of disputes.

[37] Framing the issue in those terms suggests that the legislature is not permitted by the Constitution to create a comprehensive system of remedies, including appeals, within an institutional structure and making it compulsory for an aggrieved party to exhaust those avenues.

[38] Of course, there are certain things it will be incompetent for the legislature to do. For example, it cannot exclude the High Court's jurisdiction by outsourcing the declaration of unconstitutionality of legislation. That power is reserved under our constitutional dispensation to the High Court.

[39] But subject to that, as Burns[11] aptly comments:

> "The exclusion of the court's power to test the legality of administrative action must flow expressly from the words of the statute or arise by means of necessary implication from the relevant provisions of the statute. For example, a statute that provides for appeal remedies which allow for a comprehensive rehearing of the matter in accordance with the rules of natural justice will be a strong indicator that the legislature intended internal remedies to be exhausted before review proceedings may be initiated."

. . .

[41] In the final analysis, the true test is whether, by providing an alternative route for the resolution of a dispute such as the one contemplated in s 20 of the Public Service Act 2005 (as amended), an aggrieved person has been denied access to court.'

[11] Y Burns *Administrative Law,* 4ed (2013) at 516.

[38] I will further demonstrate why the *Onesmus* dictum should be approached with caution. In Namibia, challenges to unfair dismissals must in the first instance be ventilated through the conciliation and arbitration machinery created by the Labour Act, with only review and appeal jurisdiction vesting in the Labour Court.[12] Similarly, in electoral disputes, the High Court is not the first instance forum in those disputes that the legislature has reserved for magistrates courts, styled electoral tribunals[13]. Is it implied that since those legislative measures were not the result of a constitutional amendment, the High Court retains original jurisdiction?

[39] Therefore, unlike Mainga JA[14], I am not prepared to endorse the view expressed in *Onesmus* without subjecting it to the scrutiny of the subsidiarity principle. In my view, there can be circumstances where the legislature may design dispute resolution mechanisms that litigants must have resort to without approaching the High Court as the first instance forum. Where the legislature makes provision for a dispute resolution machinery which restricts the right of access to the High Court in the first instance, the true test in my view is whether it curtails the right to such extent that it in effect denies the right of access to a competent court guaranteed under art 12(1) of the Constitution.[15]

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[12] The applicable regime is explained in PT Damaseb *Court- Managed Civil Procedure of the High Court of Namibia* (2020) para 2-080 to 2-115.
[13] Electoral Act 5 of 2014, s 162.
[14] See para [85] of the main judgment.
[15] Art 12(1)(a) states: 'In the determination of their civil rights and obligations . . . all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law. . .'

[40] I therefore have a fundamental problem with the suggestion[16], assuming the Labour Court is a court other than the High Court envisaged by the Constitution, that both the High Court and the Labour Court have jurisdiction over the dispute brought to court by Mr Masule.

[41] In my view, the outcome of the present appeal depends on whether Mr Masule failed to follow a dispute resolution mechanism prescribed by the Labour Act - either as regards process or forum. That issue was not determined by the court *a quo* and the outcome of the appeal does not depend on its resolution.

The Labour Court is not a separate court

[42] Article 78(1) of the Namibian Constitution creates the following courts: The Supreme Court, the High Court and the Lower Courts. In terms of art 83 of the Constitution 'Lower Courts' which must be 'established by an Act of Parliament' 'shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.'

[43] In terms of art 80(2) of the Constitution:

> 'The High Court shall have jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and determine appeals from Lower Courts.' (Emphasis supplied).

[16] See para [88] of the main judgment.

[44] The creation of a division of the High Court is not inconsistent with the Constitution. Divisions have in fact been created under some statutes: the Northern Local Division (NLD)[17] and the Electoral Court[18]. The NLD is a geographic division whereas the Electoral Court and the Labour Court are subject-matter divisions.

[45] A geographic division may share jurisdiction with the main division. That is borne of the recognition of the geographic dispersal of Namibia's population and the need to bring justice closer to communities. Where a geographic division is created, causes of action arising within a defined geographical area must be litigated there, while the Main Division retains residual jurisdiction. A geographic division may not entertain a dispute arising in the area falling outside its defined jurisdictional area.

[46] Closer to home, the Labour Act created 'a labour court as a division of the High Court.' The present appeal concerns the import of that provision. What are its powers if compared to the High Court established under art 78(1)(b)?

[47] The Labour Court, just like the other divisions, is a division of the High Court established by art 78(1)(b), read with art 80 of the Constitution. It is not a court separate or independent from the High Court created by the Constitution. The procedures that the division uses and the scope of remedies that it can grant, are determined by the legislation that creates the division. Those procedures and

[17] High Court Act 15 of 1990, ss 2A and 4A (1).
[18] Electoral Act 5 of 2014, s 167(1).

remedies are the litigants' first point of call and make them subject to the limits they impose. That is the constitutional principle of subsidiarity.

[48] A judge of the High Court faced with a dispute which is governed by the Labour Act is required by the principle of subsidiarity to apply the procedures set out under the Labour Act and the rules made by the Judge President on its authority; and to grant the remedies chosen by the legislature for such disputes. Such a judge does so as a judge of the High Court.

[49] It must now be accepted that the line of authorities from the High Court which suggest that the Labour Court created under the Labour Act is a creature of statute separate from and distinct from the High Court reinforce the fundamental flaw that the Labour Court is something other than the High Court created by art 78(1)(b). That conclusion carries with it the unspoken premise that the Labour Court created by the Labour Act is a 'lower court' contemplated by art 78(1)(c) of the Constitution. That is inconsistent with s 115 and s 116 of the Labour Act which decree that the Labour Court is a 'division' of the High Court presided over by judges assigned by the Judge President. It is stating the obvious that the Judge President has no statutory, let alone constitutional, mandate to assign 'judges' of a lower court. Judges of the Labour Court, s 116 states, must be either 'permanent or acting judges' of the High Court.

[50] It must follow that it is a misdirection for a judge of the High Court to decline to hear a matter that comes before him or her on the ground that it falls within the

jurisdiction of the Labour Court, for if by that it is intended that the Labour Court is a forum of adjudication other than the High Court - it is a constitutional anomaly. The matter is more properly not one of jurisdiction but of remedy.

[51] The clear legislative intent behind s 115 and s 116 of the Labour Act is that judges are assigned to the High Court's labour division as a matter of administrative convenience to adjudicate upon disputes contemplated under the Labour Act. I therefore agree with the main judgment that if a matter comes before a judge who for the time being has not been assigned duties in the labour division, he or she must stand the matter down and seek the intervention of the head of jurisdiction to have the matter placed before a judge performing duties in the labour division.

[52] Therefore, the proper inquiry for a judge of the High Court before whom a dispute comes which is labour-related, is the following:

a) Does it fall within the purview of the Labour Act?
b) Has it been instituted in terms of the procedures and processes provided for under the Labour Act and the rules made by the Judge President for such disputes?
c) Is the relief sought that which is competent under the Labour Act?

Disposal

[53] The first instance judge declined to hear Mr Masule's matter on the basis that it was a matter properly within the 'exclusive jurisdiction' of the Labour Court. That is a misdirection. She should have heard the matter and considered whether it is the kind of dispute covered by the Labour Act; whether it was brought in terms of the rules of court governing labour disputes and whether the remedies sought were competent under the Labour Act.

[54] It is for these reasons that I too will allow the appeal, set aside the judgment and order of the High Court, and remit the matter to the High Court to be heard and determined by a judge assigned by the Judge President to the Labour Division of the High Court. I also support the costs order proposed by Mainga JA.

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DAMASEB DCJ

I agree.

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HOFF JA

MAINGA JA:

Introduction

[55] This appeal from the High Court (Main Division) raises a sole issue for determination, namely, whether s 117(1) of the Labour Act 11 of 2007 (the Act) ousts the jurisdiction of the High Court in all labour related matters/disputes.

[56] The issue arose under the following circumstances: Appellant is a staff member of the 6th respondent, the Anti-Corruption Commission (ACC). He holds the position of Chief Investigating Officer. On or about November 2019 he responded to an advertisement for the position of Chief: Investigations and Prosecutions placed by the ACC in the local newspapers. He was shortlisted and eventually interviewed. During July 2020, he was informed that he was the successful candidate and received an appointment letter dated 16 July 2020 from the Executive Director (ED) of the ACC, Mr Hannu Shipena appointing him to the position as from 1 August 2020. What followed were congratulatory wishes and messages from the ACC, particularly the 5th respondent (Director of ACC), his deputy, the Human Resources, from friends and relatives within and outside Namibia. The week of 20 July 2020, appellant moved into his new office.

[57] Subsequently on 3 August 2020, appellant received a letter from the first respondent, Prime Minister of the Republic of Namibia (PM) which set aside his appointment, dated 16 July 2020. The PM purported to do so in terms of s 7(2)(*b*)[19] of

[19] Section 7 of the Public Service Act provides:

'Delegation of powers and assignment of duties of Prime Minister

the Public Service Act 13 of 1995 (Public Service Act). The letter further stated that the appointment was set aside due to a complaint laid with the PM's office on the alleged irregularities that may have taken place during the recruitment process which the PM intended to investigate in due course. Appellant was further invited, in the event he was aggrieved by the decision of the PM, to note that in terms of s 7(2)(*b*) of the Public Service Act, within 14 days from the date of 13 July 2020 (the date the PM's letter was authored) to make written submissions to the PM's office showing cause as to why the PM's decision should not be made final.

[58] Appellant attempted to see the PM in person the week of 10 August 2020 but was told it was not possible. On 11 and 13 August 2020, he wrote to the PM seeking *inter alia* certain documentations and reasons for the decision. In the letter of 14 August 2020, the PM declined to avail the documentations but provided reasons for her decision. On 17 August 2020, appellant forwarded further correspondence to the PM and among other things, gave her the deadline of 19 August 2020 to resolve the

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7. (1) The Prime Minister may, subject to such conditions as he or she may determine, delegate any power, excluding the power to make regulations under section 34, or assign any deputy entrusted to him or her by or under this Act to any staff member or staff members in any office, ministry or agency.

(2) (a) A delegation or assignment under subsection (1) shall not divest the Prime Minister of any power delegated or duty assigned, and he or she may at any time vary or set aside any decision made thereunder.

(b) If a decision so varied or set aside relates to any person, that person may, within 14 days after the variation or setting aside of the decision, make written representations to the Prime Minister in connection with such variation or setting aside.'

dispute amicably. The PM responded on 20 August 2020 reiterating her refusal to provide the documentations sought. She also refused to resolve the impasse on the terms proposed by the appellant; adding that she would proceed as indicated in her letter of 31 July 2020 and make a decision thereafter. When an amicable solution failed, appellant instructed his legal practitioners to bring an urgent application in the High Court seeking the following relief:

'**Part A**

1. An order condoning the applicant's non-compliance with the forms and rules of this court and further directing that, this matter be heard on an urgent basis as contemplated in Rule 73(3) of the Rules of this Honourable Court;

Rule nisi

2. That a *Rule nisi* be issued calling upon the 1st respondent or any of the respondents to show cause, if any, on a date and time to be determined by this Honourable Court under part B of this application why an order in the following terms should not be made final:

    2.1 Pending the finalization of the review proceedings in part B hereof, an order Interdicting and restraining the 1st respondent or any respondent from further implementing the 1st respondent's decision of setting aside the applicant's appointment as Chief Investigations and Prosecutions at the Anti-Corruption Commission.

    2.2 In the event that it is found that the recommendation of the 4th respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission was varied and or set aside by the 2nd

respondent; an order Interdicting and restraining the 1st or 2nd respondents and or any respondents from further implementing that decision varying or setting aside the aforesaid recommendation of the 4th respondent pending the finalization of the review proceedings in part B hereof.

2.3 Pending the finalization of the review proceedings in part B hereof and except where it shall not be prejudicial to the applicant, an order Interdicting and restraining the 1st, 5th, 6th, 7th and the 9th respondents from further implementing the 1st, or 5th, or 6th, or 7th respondents' decision of appointing the 9th respondent to act as Chief: Investigations and Prosecutions at the Anti-Corruption Commission;

2.4 Pending the finalization of the review proceedings in part B hereof, an order reinstating the applicant in the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission and that such reinstatement shall be from the 1st of August 2020.

3. An order directing that the orders in paragraphs 2.1, 2.3, 2.4 and if applicable 2.2 hereof shall operate with immediate effect and shall serve as an interim interdict pending the finalization of part B of this application.

4. An order directing that any respondent that will oppose this application is liable jointly and severally (the one paying to be absolved) for the costs of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

5. In the event that part A of this application is dismissed on any basis or struck from the roll for lack of urgency or on any basis, an order directing that, the 1st respondent is liable for the costs of part A of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

6. An order granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.

. . .

PART B

. . .

1. Reviewing and setting aside the decision of the 1st respondents of setting aside the applicant's appointment as Chief: Investigations and Prosecutions at the Anti-Corruption Commission taken on the 31st of July 2020 and or on any other date;

2. In the alternative to prayer 2 above, declaring the 1st respondent's decision of setting aside the applicant's appointment as Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as being in conflict with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia.

3. In the event that it is found that the recommendation of the 4th respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission was varied and or set aside by the 2nd respondent or any respondent; an order reviewing and setting aside the decision of the 2nd respondent or any respondent varying or setting aside the recommendation of the 4th respondent recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission.

4. In the alternative to prayer 3 above, declaring the 2nd respondent's decision of varying or setting aside the recommendation of the 4th respondent

recommending approval of the applicant's promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as being in conflict with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia.

5. Reviewing and setting aside the decision taken by either the 1st, or the 5th, or the 6th, or the 7th respondent to appoint the 9th respondent to act as Chief: Investigations and Prosecutions at the Anti-Corruption Commission from the 14th of August 2020 up to the 14th of February 2021;

6. An order directing that any respondent that will oppose this application is liable jointly and severally (the one paying to be absolved) for the costs of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

7. In the event that part B of this application is dismissed on any basis, an order directing that, the 1st respondent is liable for the costs of this application including the costs of one instructing and one instructed counsel on an attorney and own client scale alternatively on any scale that this honourable court may deem fit.

8. An order granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.'

[59] In response to appellant's case, the PM chronicled the steps she took from the moment she received the complaint of irregularities in the process of the appointment of the appellant and *inter alia* raised three preliminary issues of law, and the one relevant for the purpose of this matter reads as follows:

> '23. First, I am advised and submit that the applicant is in the incorrect court. This is a labour dispute and should be adjudicated in the Labour Court, the specialist division of the High Court, with exclusive jurisdiction on matters of this nature. The applicant is seeking to review a decision taken by an official, under the Public Service Act, that concerns his promotion, which is a matter within the scope of the Labour Act. His case falls within the parameters of section 117(1)(c) of the Labour Act. The possible presence of a constitutional dimension in the applicant's case, does not oust the exclusive jurisdiction of the Labour Court. Alternatively, the matter falls within the jurisdiction of the Labour Commissioner. Legal argument will be presented at the hearing of this application for interim relief.'

[60] The High Court per Rakow AJ, relying on the authorities of *Haindongo Shikwetepo v Khomas Regional Council & others*,[20] *Usakos Town Council v Jantze & others*[21] and *Katjiuanjo & others v The Municipal Council of the Municipality of Windhoek,*[22] held the view that the legislature intended to exclude the jurisdiction of the High Court in the instances contemplated in s 117(1)(*a*) – (*i*). That court further pointed out that the Act in s 7 provides for disputes concerning fundamental rights and protections and therefore appellant's case falls squarely in the realm of s 117. For the reasons the court *a quo* provided, it held: '. . . I conclude that the High Court sitting as such does not have jurisdiction to adjudicate a matter in respect of section 117(1)(*c*) of the Labour Act, 2007 as that section confers exclusive jurisdiction to the Labour Court.' It declined to condone appellant's non-compliance with the Rules of the High Court and to hear the application on an urgent basis, struck it from the roll and ordered appellant to pay costs for the 1st, 5th, 6th and 10th respondents.

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[20] Unreported judgment per Parker AJ, Case no. A364/2008, delivered 24 December 2008.
[21] 2016 (1) NR 240 (HC).
[22] Case no. (I 2987/2013) [2014] NAHCMD 311 (21 October 2014).

Submissions - Appellant

[61] The main argument of appellant is that s 117(1) of the Act being ordinary legislation can never oust the jurisdiction of the High Court conferred by art 78(4) and art 80(2) of the Namibian Constitution. It was further argued at the hearing of the appeal that the court *a quo* was seized only with part A of the notice of motion and could not at that stage determine the jurisdiction of the High Court concerning review relief in part B of the notice and further that the court *a quo* erred in holding that appellant had direct access in terms of the Act to enforce any of the fundamental rights entrenched in Chapter 3 of the Constitution, whereas in fact and truth, in respect of prayers 1, 2, 3, 4, and 5 of part A of the Notice and prayers 2, 4, 6 and 7 of part B, appellant had no such direct access, in view of subsec 117(1)(*c*) and (*e*) of the Act. That the real question was whether s 117(1)(*c*) of the Act confers exclusive jurisdiction on the Labour Court in granting urgent interim relief.

[62] It was further argued that the court *a quo* erred when it declined appellant's non-compliance with the rules, when it did not determine the question of urgency. That the order pronounced on 28 September 2020 was that 'the court declines to exercise jurisdiction in this matter' and yet that order is not part of the executive order issued by the court *a quo* and that it was not clear why the matter was struck from the roll, was it because of lack of jurisdiction or refusal to condone non-compliance with the rules. Further that the court erred when it ordered appellant to pay costs without considering the basis and merits upon which the appellant sought the costs order and without considering the application of what is known as the 'Bio watch principles'.

That the court *a quo* failed to consider the fact that the appellant specifically invoked and pleaded reliance on constitutional jurisdiction of the High Court, that the provisions of s 117(1) of the Act does not find application to the cause pleaded by appellant, as appellant did not rely on s 117(1) of the Act, that the court *a quo* erred in not considering and correctly applying the entire scheme of the Act, to determine whether that scheme provided the appellant with adequate and effective relief.

Submissions - Respondent

[63] The respondent supports the legal conclusion of the court *a quo* and that only the Labour Court has jurisdiction to hear the application to review the PM's decision. That the conclusion arrived at by the court *a quo* is supported by the Supreme Court's approach in *Cronje v Municipal Council of Mariental,*[23] and most clearly the *Haindongo Shikwetepo*[24] matter above, and that Part B (review application) was within the scope of s 117(1) of the Act.

[64] Respondent agrees with appellant that the High Court ordinarily has jurisdiction to grant interim relief pending the outcome of litigation before the same court, or before a different court or tribunal or other dispute resolution forums, but argues that this 'general power' can be limited or excluded by statute and that, that was the case in the South African matter of *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, & others*.[25] Therefore as the 'general power' can be

[23] 2004 (4) NLLP, 129 NSC.
[24] See footnote 2, above.
[25] 1986 (2) 663 (A).

excluded, there can be no reason in logic or principle why the 'general power' cannot be expressly transferred to another body that might be better suited than the High Court, sitting as the High Court, so it was argued and further that once such a power is visited on another court other than the High Court sitting as the High Court, it would be difficult to argue that the High Court retained its general power to grant a mandatory or prohibitory interim interdict pending the outcome of the proceedings in the second forum.

Constitutional and statutory legal framework

[65] The relevant provisions of the Constitution of Namibia read as follows:

> **'CHAPTER IX**
>
> ***The Administration of Justice***
>
> **Article 78 The Judiciary**
>
> (1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
>
> (a) a Supreme Court of Namibia;
>
> (b) a High Court of Namibia;
>
> (c) Lower Courts of Namibia.
>
> (2) The Courts shall be independent and subject only to this Constitution and the law.
>
> (3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.
>
> (4) The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose.
>
> **Article 79 The Supreme Court**

. . .

(4) The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament.

Article 80 The High Court

(1) The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.

(2) The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.

(3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament.

Article 83 Lower Courts

(1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.

(2) Lower Courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.'

[66] The High Court Act 16 of 1990 (High Court Act) s 1 thereof defines the High Court and Lower Courts as:

"High Court" means the High Court of Namibia Constituted under article 80(1) of the Namibian Constitution;

"lower court" means a court (not being the High Court or the Supreme Court) . . .'

[67] Section 2 of the High Court Act reads as follows:

'The High Court shall have jurisdiction to hear and to determine all matters which may be conferred or imposed upon it by this Act or the Namibian Constitution or any other law.'

[68] Section 115, 116, 117 and 118 of the Labour Act reads as follows:

'**PART D**

LABOUR COURT

Continuation and powers of Labour Court

115. The Labour Court established by section 15 of the Labour Act, 1992 (Act 6 of 1992) is continued, as a division of the High Court, subject to this Part.

Assignment of judges of Labour Court

116. The Judge-President must assign suitable judges to the Labour Court, each of whom must be a judge or an acting judge of the High Court.

Jurisdiction of the Labour Court

117. (1) The Labour Court has exclusive jurisdiction to –

(a) determine appeals from –
  (i) decisions of the Labour Commissioner made in terms of this Act;
  (ii) arbitration tribunals' awards, in terms of section 89; and
  (iii) compliance orders issued in terms of section 126.

(b) Review –
  (i) arbitration tribunals' awards in terms of this Act; and

(ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of –

(aa) this Act; or

(bb) any other Act relating to labour or employment for which the Minister is responsible;

(c) review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;

(d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;

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

(f) to grant an order to enforce an arbitration agreement;

(g) determine any other matter which it is empowered to hear and determine in terms of this Act;

(h) make an order which the circumstances may require in order to give effect to the objects of this Act;

(i) 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.

(2) The Labour Court may -

(a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or

(b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.

Costs

118. Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'

[69] Section 7 of the Labour Act reads as follows:

'**Disputes concerning fundamental rights and protections**

7. (1) Any party to a dispute may refer the dispute in writing to the Labour Commissioner if the dispute concerns –

(a) a matter within the scope of this Act and Chapter 3 of the Namibian Constitution; or

(b) The application or interpretation of section 5 or 6.

(2) The person who refers a dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all other parties to the dispute.

(3) Subject to subsection (4), the Labour Commissioner may refer the dispute to an arbitrator to resolve the dispute through arbitration, in accordance with Part C of Chapter 8 of this Act.

(4) If a dispute alleges discrimination, the Labour Commissioner may –

(a) first designate a conciliator to attempt to resolve the dispute through conciliation; and

(b) refer the dispute to arbitration in terms of subsection (3) only if the dispute remains unresolved after conciliation.

(5) Despite this section, a person who alleges that any fundamental right or protection under this Chapter has been infringed or is threatened may approach the Labour Court for enforcement of that right or protection or other appropriate relief.'

[70] The purpose of the Act is:

'To consolidate and amend the labour law; to establish a comprehensive labour law for all employers and employees; to entrench fundamental labour rights and protections; to regulate basic terms and conditions of employment; to ensure the health, safety and welfare of employees; to protect employees from unfair labour practices; to regulate the registration of trade unions and employers' organisations; to regulate collective labour relations; to provide for the systematic prevention and resolution of labour disputes; to establish the Labour Advisory Council, the Labour Court, the Wages Commission and the labour inspectorate; to provide for the appointment of the Labour Commissioner and the Deputy Labour Commissioner; and to provide for incidental matters.'

[71] I must sound a word of caution from the outset that the High Court should reflect and avoid or find solution to the issue under consideration i.e. whether s 117 of the Act ousts the jurisdiction of the High Court on all labour matters, stated differently, whether a particular matter before that court, is High Court or Labour. It is not an easy

road to tread and it is clear from the conflicting jurisprudence that have emanated from the same issue. In my opinion, for the purpose of Namibia, the issue should not arise at all, for the reason that, one of the purposes (although not mentioned anywhere) of the creation of the Labour Court is that the said court, should consist of Judges who profess to have knowledge, experience and expertise in the field of labour relations. Section 116 of the Act provides that the Judge-President must assign suitable judges to the Labour Court, each of whom must be a judge or acting judge of the High Court. Whether the word 'assign' means on a permanent basis and 'suitable' means judges who profess to have expertise in labour relations is not clear. As far as we know, the judges of the High Court who preside over labour related matters are the ordinary judges of the High Court particularly those in the civil stream and they would most probably alternate to discharge the duties to that assignment. Viewed from that perspective, the Labour Court is an illusion, just the label 'Labour Court'. There are no special benefits a litigant would derive to a composition of an ordinary High Court judge or judges except for costs which may not be ordered in a labour dispute but the High Court sitting as a Labour Court can refrain from ordering costs as per the Act.

[72] Proceeding as the High Court does on this issue, obviously, the entire process becomes very costly to all parties and it enormously delays finality of the dispute.

[73] South Africa has a hierarchy of courts in labour related matters, the Labour Court and the Labour Appeal Court. But even they have struggled with the issue to be determined. In *Fedlife Assurance Ltd v Wolfaardt*[26] in his dissenting opinion Froneman AJA observed as follows: -

> 'Both the Labour Court and the High Courts have grappled with the jurisdictional problems relating to these issues and the result is not harmonious (an exhaustive reference to the cases is to be found in Langeveldt v Vryburg Transitional Local Council & others [2001] 5 BLLR 501 (LAC) at 510-22).'

[74] In the *Langeveldt* matter Zondo JP resorts some 13-15 pages of the judgment to what he headed as 'some of the jurisdictional problems arising from the overlap in jurisdiction between the Labour Court and the High Court' in para 23 he said:

> '[23] An examination of the law reports over the past four years when the Labour Court became fully operational reveals a number of employment and Labour matters which have come before various High Courts. In most of those cases the High Courts have been confronted time and again with the question of whether they had jurisdiction in such matters despite the existence of the Labour Court or whether only the Labour Court had jurisdiction in such matters. A reading of those cases clearly reveals the jurisdictional complexities which the present state of the law has produced.'

(He enumerated some of the cases). After a comprehensive analysis of the difficulties encountered in para 65-69 he continued to say:

> '[65] One of the deficiencies in the dispute-resolution dispensation of the old Act which the stakeholders in the labour relations field sought to bury when they negotiated the new dispute-resolution dispensation under the Act was that that

[26] (2001) 22 ILJ 2407 (SCA) at 2421F-G.

system was uncertain, costly, inefficient and ineffective. Through the new system with its specialist institutions and courts which are run by experts in the field, the stakeholders and parliament sought to ensure a certain efficient, cost-effective and expeditious system of resolving labour disputes. The fact that the High Courts also have jurisdiction in employment and labour disputes completely undermines and defeats that very important and laudable objective and thereby undermines the whole Act.

[66] To my mind, to allow this state affairs to continue is illogical 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. If such disputes are required to be dealt with by a superior court of first instance, the appropriate court to deal with them is the Labour Court. If they are not required to be dealt with by a superior court, they should be dealt with by one or other of the specialist institutions which have been specially created by the legislature to deal with employment and labour disputes.

[67] In the light of all the above I am of the opinion that serious consideration should be given by parliament, the Minister for Justice and Constitutional Development, the Minister of Labour and NEDLAC to taking a policy decision to the effect that all such jurisdiction as the High Courts may presently have in employment and labour disputes be transferred to the Labour Court and all such jurisdiction as the Supreme Court of Appeal may have in employment and labour disputes be transferred to the Labour Appeal Court. The objective would be that there would only be one superior court – the Labour Court – which has jurisdiction to deal with employment and labour matters or disputes as a court of first instance and that appeals from such court would only lie to the Labour Appeal Court as a court of final appeal except in respect of constitutional issues where a further appeal would lie to the Constitutional Court.

[68] Statutory provisions which confer jurisdiction on the High Court to deal with employment and labour disputes such as s 157(2) of the Act and s 77(3) of the BCEA should be amended so as not to give High Courts jurisdiction in employment and labour matters. This would be irrespective of the nature of the issues involved in such matters. In that event, High Courts would no longer have any jurisdiction in employment and labour disputes and they would be left to give their attention to other matters. This would enhance the capacity of the employment and labour field such as commercial matters and those relating to crime which continue to cause our society grave concern.

[69] If the above is done, prospects of achieving the laudable objective of an efficient, expeditious and cost-effective dispute-resolution system in employment and labour disputes will be enhanced. In that way, too, our limited resources will be properly utilized. The problems I have highlighted need urgent attention by the government and all relevant stakeholders. For this reason, I will make an order at the end of this judgment directing the registrar of this court to send a copy of this judgment to all relevant authorities for their attention.'

[75] In my opinion, if a solution is not found to dislodge this impasse, we are headed for parliamentary intervention where Parliament would be asked to substitute the Labour Court for the High Court. The High Court enjoying the sanctuary of the Constitution is going nowhere – it is the elephant in the room (Labour Court) which would have to yield to the High Court. We don't need to get to that point when the Labour Court exists in name only. In this case, whatever result we arrive at, it will be very costly for the parties. Worse still for the appellant if we confirm the order of the High Court, his doors to litigation on this matter would be shut. It is unimaginable in a democracy like ours for the High Court to say to a litigant 'sorry you are in a wrong court'.

The issue for determination

[76] There can be no doubt that the intention of the Legislature in the promulgation of s 117 of the Act was to grant the Labour Court exclusive jurisdiction in the field of labour relations. But on a reading of s 117, it does not purport to confer exclusive jurisdiction upon the Labour Court generally in labour matters i.e. employer and employee, but enumerates the matters that may serve before the Labour Court or rather prescribes that court's jurisdiction. In other words, the scope of the exclusivity of that court is limited to cases enumerated in subsec 1*(a)* - *(i)* and subsec 2 and nothing more. It is only in subsection 1(*i*) where it provides the general exclusive powers to deal with all matters necessary or incidental to its functions under the Act concerning any labour matter, whether or not governed by the provisions of the Act, any other law or the common law.

[77] The question then remains whether the 'general exclusive jurisdiction' in subsec 1(*i*) ousts the common law functions of the High Court in labour matters. The answer is an emphatic **no**. Firstly, s 117 would have said so, without mincing words. Secondly, the Labour Court even where it was manned by knowledgeable, experienced and expertise in labour relations, cannot profess to have greater power than the High Court judges have - where the applicant pleaded a common law claim for damages arising from the unlawful premature repudiation of the fixed-term contract or where a contract of employment is breached on ordinary principles of the common law. In fact, in Chapter 3 of the Act headed, 'basic conditions of

employment', (part F), particularly s 33 provides for unfair dismissal and Chapter 5 'unfair labour practices' particularly ss 48, 49 and 50, provides for unfair disciplinary action and unfair labour practices respectively. The Act is silent on wrongful/unlawful dismissal. It appears to me that s 117 is only applicable where there are allegations of unfairness. Where the allegation pleaded for is that of unlawfulness, that is in the province of the High Court.

[78] In the *Fedlife Assurance Ltd*[27] matter above, the appellant employer and the respondent employee entered into a contract of employment which was allegedly for a fixed term of five years commencing on 1 December 1996. The employer repudiated the contract by purporting to terminate it with effect from 31 December 1998 on the grounds that the employee's position had become redundant. The employee accepted the repudiation and terminated the contract. He instituted the action in the Witwatersrand Local Division of the High Court claiming damages for breach of contract.

The employer filed a special plea that, in terms of s 157(1) of the LRA 1995, the Labour Court has exclusive jurisdiction to adjudicate dismissals occasioned by operational requirements in terms of s 191(5) and s 189 of the LRA. The employee excepted to the special plea on the grounds that it failed to disclose a defence. The exception was upheld and the special plea was set aside. The employer appealed to the Supreme Court of Appeal with leave granted by the court *a quo*.

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[27] Footnote 26 above.

[79] The employer's main point was that an action for wrongful dismissal was no longer recognizable in the South African Court and that the employee concerned has no remedies other than those provided for in Chapter VIII of the 1995 Act.

[80] The majority of the Supreme Court of Appeal (Howie, Marais, Mpati JJA and Nugent AJA), Froneman AJA dissenting rejected that argument and on the issue before us in paras 25-28 said the following:

> '[25] Furthermore s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. Some of the implications were recently discussed by Zondo JP in *Langeveldt v Vryburg Transitional Local Council & others* (2001) 22 ILJ 1116 (LAC); [2001] 5 BLLR 501 (LAC). Its exclusive jurisdiction arises only in respect of 'matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court'. Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed (see for example ss 9, 24(7), 26, 59, 63(4), 66(3), 68(1), 69, etc). In my view those are the 'matters' that are contemplated by s 157(1) and to which the Labour Court's exclusive jurisdiction is confined (though there may be some debate in particular cases as to their ambit: See for example *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood & Allied Workers Union & others* (1997) 18 ILJ 84 (D); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers & others* 1998 (1) SA 685 (C); (1998) 19 ILJ 43 (C).

[26] The only provisions relied upon in the present case in support of the submission that the respondent's action is such a 'matter' were the provisions of chapter VIII. Section 191 provides that 'a dispute about the fairness of a dismissal' may be referred to the appropriate body for conciliation. If it is not resolved it may thereafter be referred to the Labour Court for adjudication if the dismissal was based on the employer's operational requirements.

[27] Whether a particular dispute falls within the terms of s 191 depends upon 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 in 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. The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a 'dismissal' as defined in chapter VIII). In those circumstances the respondent's action is not a 'matter' that is required to be adjudicated by the Labour Court as contemplated by s 157(1) and the special plea was correctly set aside.

[28] The appeal is dismissed with costs which are to include the costs occasioned by the employment of two counsel.

HOWIE JA, MARAIS JA AND MPATI JA concurred.'

[81] Section 157(1) of the Labour Relations Act (LRA) 66 of 1995 of South Africa is the equivalent of Namibia's s 117. Even if I were to accept that the LRA differs in some cases with the Namibia Labour Act, for the purposes of Namibia on wrongful dismissal, given the provisions of s 117(1)(*i*) both the Labour Court and the High Court share concurrent jurisdiction on that score.

[82] As I have already said, if Parliament intended to oust the High Court in the exclusive jurisdiction of the Labour Court or the High Court's functions in the employer and employee relationship at common law, s 117 would have said so in no uncertain terms. That avenue was not possible to Parliament given the original jurisdiction of the High Court as per art 80(2) of the Constitution. Any decisions to the contrary are wrong. Damaseb DCJ was on point when in *MW v Minister of Home Affairs*[28] when he said the following:

> '[46] The Constitution is the source of all law and must take precedence over other laws which are subordinate to it. Constitutional provisions are not determined by the content of legislation.'

[83] In fact, this court in *Nghikofa v Classic Engines CC*[29] held that:

> '[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the high court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above, s 86(2) of the Act provides that a party *may* refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will

[28] 2016 (3) NR 707 (SC) at 717C.
[29] 2014 (2) NR 314 (SC) at 318G-H.

> ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) 22 ILJ 2407; [2002] 2 All SA 295) in para 16).'

[84] In the *Haindongo Shikwetepo* matter above, Parker AJ suggested that the decision of *Onesmus v Minister of Labour & another*[30] with the promulgation of the Labour Act, it has become irrelevant. In my opinion, the 2007 Act did not render that decision irrelevant. Section 18(1) of the Labour Act 6 of 1992 provided for exclusive jurisdictional powers, which same powers are now provided by s 117. In fact, s 115 of the current Labour Act, provides that, 'the Labour Court established by s 15 of the Labour Act, 1992 (Act 6 of 1992) is continued, as a division of the High Court, subject to this part' (i.e Part D, Labour Court). In *Onesmus* matter, Maritz J as he then was said[31]

> '[14] The constitutional vesting in the High Court of original jurisdiction cannot be glossed over – it is of particular significance, also in this application. The court does not only have the jurisdiction to deal with cases brought before it on appeal regarding "the interpretation, implementation and upholding of [the] Constitution and the fundamental rights and freedoms guaranteed thereunder", it also has the power to do so as a court of first instance.
>
> [15] Moreover, it does not draw on any statute for those powers; it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament.'

[30] 2010 (1) NR 187 (HC).
[31] *Ibid* at 195C-D.

[85] I associate myself with the above sentiments and hold that it is the correct law on the issue under discussion. Any contrary view is wrong.

[86] What or how is jurisdiction to be determined. According to the general principle of our law, jurisdiction is determined depending on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases both (a) and (b)[32]. In *Steytler, N.O. v Fitzgerald*, Innes J (as he then was) said:

> 'In order to ascertain whether the Eastern Districts Court was, by Common Law, the proper forum for this suit we must have regard to the nature of the action'. Was it personal, real or mixed?[33] In *Gulf Oil Corporation v Rembrandt Fabrikante EN Handelaars (EDMS) BPK* Trollip J said, . . . whether the one or the other should be applied in any particular case should depend upon the circumstances of that case[34].'

Application of the above principle and law to the facts of this case.

[87] For the reasons above and the general principle determining jurisdiction, regard had to the nature of the appellant's application and relief sought, the High Court has jurisdiction to hear the matter. Part A of appellant's prayers, it was conceded it is within the province of the High Court. In Part B, it was contended prayers 2 and 4 cannot be granted by Labour Court. I agree. The two prayers are in this form:

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[32] *Estate Agents Board v Lek* 1979 (3) SA 1048 (AD) at 1063F-H.
[33] 1911 AD 295 at 315-6.
[34] 1963 (2) SA 10 T.P.D at 18D.

> ‘2 In the alternative to prayers 2 above, declaring the 1st respondent’s decision of setting aside the applicant’s appointment as Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as being in conflict with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia.
>
> . . .
>
> 4 In the alternative to prayer 3 above, declaring the 2nd or any respondent’s decision of varying or setting aside the recommendation of the 4th respondent recommending approval of the applicant’s promotion and or appointment to the position of Chief: Investigations and Prosecutions at the Anti-Corruption Commission to be null and void as being in conflict with Article 1, 8, 10 and 18 of the Constitution of the Republic of Namibia’.

[88] Even if the Labour Court had jurisdiction, the High Court would have concurrent jurisdiction and the Labour Court cannot claim exclusive jurisdiction. The High Court is one of the two superior courts granted original jurisdiction not only to hear and adjudicate upon civil disputes and criminal prosecutions, but that authority includes the interpretation implementation and upholding the Constitution and the fundamental rights and freedoms guaranteed thereunder. Mr Maasdorp’s argument on that point is untenable. Section 117(1)(*d*) and (*e*) are not applicable in the circumstances.

I must pause here to say, given the caution I gave above, this is the right case where both the High Court and the Labour Court could decline jurisdiction and the litigant would be left in limbo.

[89] In *Estate Agents Board* above, Trollip JA, regarding approach (b) said, Approach (b) (the nature of the relief claimed) is based on the principle of effectiveness – the power of the court, not only to grant the relief claimed, but also to effectively enforce it directly within its area of jurisdiction[35]. It is not like if the High Court judge had heard the merits and granted an order, that the order would have been rendered a nullity for lack of jurisdiction. The Labour Court is a division of the High Court, so says the Act, at the very least, the learned judge should have transferred appellant's case to that division. To say that court has no jurisdiction, cannot be correct.

[90] Therefore, the court *a quo* erred to decline jurisdiction and the matter should be referred back to hear the merits.

Costs

[91] The costs should follow the result.

Order

1. The appeal succeeds.

[35] Footnote 14 above, at 1063H.

2. Paragraph 35 of the High Court's judgment and the order that followed are set aside and substituted with the following order:

   'High Court has jurisdiction to hear the matter.'

3. The matter is referred back to the High Court (Labour Division) for the determination of the merits.

4. The respondents are to pay the costs of this appeal, occasioned by the employment of one instructing counsel and one instructed counsel.

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MAINGA JA

APPEARANCES:

Appellant:	G Narib (with him K Kamwi) Instructed by K Kamwi Law Chambers

Respondents:	A Maasdorp
	Instructed by Government Attorney