REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10731/11

DATE:02/09/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

NTOMBIZAKHE THEODORA MCABA Applicant

and

POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU) First Respondent

GENERAL SECRETARY – NATHI THELEDI Second Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] In this opposed application the applicant seeks the relief framed in the notice of motion as follows:

> "*1. Declaring that the purported dismissal of the Applicant by the First and the Second Respondents unlawful and invalid.*
>
> *2. Ordering the First and the Second Respondents not to temper with the status of the Applicant as First Vice President and a member of POPCRU until the appeal to the National Congress of the First Respondent is heard.*
>
> 3. *Ordering that the rights and privileges enjoyed by the Applicant before the purported dismissal be re-instated.*
>
> 4. *Directing the First and the Second Respondents and any other Respondent that may oppose this application, to paying the costs of suit, jointly and severally, the one paying the other to be absolved.*"

THE PARTIES

[2] The applicant, a Captain in the South African Police Service ("*the SAPS*"), was elected as a National Office Bearer and First Vice-President of the first respondent. Her election as such occurred at a National Congress of the first respondent and in terms of clause 13.6 of the first respondent's Constitution (2007 ed) held during June 2007.

[3] The first respondent is the Police and Prisons Civil Rights Union, a trade union active in the SAPS and the Department of Correctional Services and the Traffic Departments. I shall henceforth refer to the first respondent as ("*POPCRU*"). The second respondent is the General Secretary of POPCRU, acting in the present proceedings by virtue of the provisions of clause 12.2.10

of the Constitution of POPCRU. I shall henceforth refer to the second respondent as ("*the General Secretary*").

COMMON CAUSE FACTS

[4] It is not in dispute that the applicant is not an employee of POPCRU, and nowhere in her papers does she make such allegation. POPCRU, through the General Secretary, has filed opposing papers. The applicant thereafter filed a replying affidavit. It is also not in dispute that during October 2010, the National Executive Committee ("*the NEC*") of POPCRU resolved that the applicant be suspended from POPCRU pending finalisation of some investigation. In this regard, the resolution of the NEC, Annexure "C" to the founding papers, reads as follows:

> "*Subsequently, the normal NEC sitting on 30-31 October 2010 resolved that the 1st Vice President should be suspended from the organisation pending finalisation of the investigation … Outcomes of the investigation reports will be presented to the NOBs to the CEC for engagements.*"

"*NOB's*" refer to the National Office Bearers, whilst "*CEC*" refers to the Central Executive Committee of POPCRU. The minutes of the meeting of the NEC held on 30-31 October 2010, Annexure "FA5" to the answering affidavit, show that the applicant was not in attendance as she tendered an apology. This is not in dispute as well. It is further not in dispute that on 7 December 2010 the Deputy General Secretary of POPCRU addressed a letter by registered mail to the applicant in which her membership of POPCRU was terminated. The letter, received by the applicant on 14 December 2010, reads as follows:

> "*It is with regret to inform you that the Central Executive Committee meeting held on 5 December 2010 has resolved to terminate your membership with immediate effect.*"

At the same time POPCRU also communicated the decision by letter to the SAPS in the following terms:

> "*With reference to above subject, you are hereby informed that Captain Ntombizakhe Mcaba, who was released by the South African Police Service as National Office Bearer of POPCRU, is no longer holding this position with effect from Sunday, 05 December 2010. This communication serves to officially inform that she should be removed from the list of National Office Bearers of POPCRU who are released as per the SSSBC agreement. Her deployment can be determined by the South African Police Service …*"

The letter is headed "*Withdrawal of Captain Mcaba from the Office Bearers Position*". The "*SSSBC*" refers to the Safety and Security Sectoral Bargaining Council attached to the founding papers, and being an agreement entered into between the SAPS, POPCRU and the South African Police Union on 10 October 2007.

[5] It is further not in dispute that on 31 December 2010, the applicant, acting in terms of clause 24.14 (Chapter 18) of POPCRU's Constitution, noted an appeal to the National Congress of POPCRU against the termination of her membership. In the notice of appeal, Annexure "F1" to the founding papers, the applicant advanced the following grounds:

> "*(i) The termination of my membership and removal from the position of the 1st Vice President is procedurally flawed and unfair.*

> *(ii) The termination of my membership and removal from the position of the 1st Vice President is substantively flawed and unfair.*"

Clause 24.14 of POPCRU's Constitution provides:

> "*In the event of a person who is found guilty of unprofessional or unethical conduct there shall be the right to appeal from the Province to the National Disciplinary Committee whose decision shall be final.*"

There are no time frames within which an appeal may be lodged. In the founding papers the applicant contends that she filed the appeal timeously. This must be accepted as it is not challenged. However, as noted later herein, POPCRU makes some rather interesting submissions about the appeal procedure within POPCRU. It is significant that as at the time of the founding affidavit, the appeal was not yet heard.

APPLICANT'S CASE

[6] As a consequence, the applicant alleges that the termination of her membership of POPCRU was unlawful, invalid and procedurally flawed for a number of reasons. These include that she was not part of any investigation launched by POPCRU which led to her suspension or termination of her membership; that her appeal was still pending; that she was not provided with reasons for the decision to suspend her or to terminate her membership; that in terminating her membership, POPCRU has breached its own rules and constitution; and most importantly, that POPCRU has blatantly ignored the rules of natural justice by denying the applicant the right to be heard in order to receive her side of the story (the *audi alteram partem* rule).

POPCRU's CASE

[7] On the other hand, POPCRU has raised a number of defences to the relief sought by the applicant. The defences include two preliminary points. The first point *in limine* is to the effect that to the extent that the applicant alleges that there was non-compliance with POPCRU's Constitution, this High Court has no jurisdiction to adjudicate over the dispute. In this regard, reliance is placed on the provisions of sec 157(1) read with sec 158(1)(e) of the Labour Relations Act 66 of 1995 for the contention that it is in fact the Labour Court which has exclusive jurisdiction for such relief. The second point *in limine* is premised on the basis that since the applicant is not an employee of POPCRU, but that of the SAPS, she is not entitled to the relief "*dismissing*" her from her position as First Vice-President of POPCRU. If the applicant was "*dismissed*" as an employee, it is once more, so the argument proceeded, the Labour Court that has the requisite jurisdiction to adjudicate over the relief she seeks.

[8] The last-mentioned point *in limine*, with which I deal instantly, is capable of easy resolution in favour of the applicant. POPCRU has consistently and completely misconstrued the applicant's case against it. Neither in the founding papers nor in the replying affidavit does the applicant

allege that she was an employee of POPCRU. In prayer 1 of the notice of motion the applicant uses the words, "*purported dismissal*". The use of the word "*dismissal*" is unfortunate as it runs against the entire grain of the actual relief sought by the applicant. The essence of her relief is that her removal from the office of First Vice-President was procedurally unfair. Moreover, in Annexure "D1"-"D3", the letter of POPCRU to the applicant, does not use the word "*dismissal*" but rather the word "*terminate*". Furthermore, in her letter of appeal, Annexure "F1", dated 31 December 2010, the applicant uses the word "*termination*" twice, and not once the word "*dismissal*". Furthermore, it is common cause that the applicant is a Captain in the SAPS, her employer. She was elected as First Vice-President, a National Office Bearer of POPCRU, with the concurrence of the SAPS, and based on the SSSB Council agreement. This point *in limine* plainly has no merit and calls to be rejected.

[9] However, if I am incorrect in my determination of the second point *in limine*, I am persuaded that POPCRU cannot succeed on both the first point *in limine* and on the merits of the application. I deal last in this judgment with the first point *in limine*. I prefer to deal first with two matters which are equally capable of easy disposal in favour of the applicant.

ADJUDICATION ON MERITS

[10] The first issue has regard to the appeal noted by the applicant. In the founding papers the applicant alleges that it was procedurally unfair and

premature for POPCRU to first terminate her membership without concluding the appeal procedure (see para 15 of the founding papers). She says that since she lodged the appeal on 31 December 2010, she has heard nothing from POPCRU. In para 14.1 of the answering affidavit POPCRU alleges that:

> "*Although there is no appeal procedure as such, the CEC has decided that the delegates at the National Congress should decide on the applicant's fate. The National Congress shall therefore determine whether the applicant should be re-admitted as a member of the union and whether she should be reinstated as the First Vice President. Accordingly, the applicant does have a remedy and she has exercised that remedy and the first respondent's National Congress shall hear her appeal.*"

If the contents of the last quoted para are confusing and indeed contradictory, paras 36.3, 37 and 38.2 of the answering affidavit are even more puzzling. Para 36.3 states:

> "*The applicant has been afforded a right of appeal to the National Congress.*"

Paragraph 37 is more bemusing. Para 37.1 states:

> "*Given that the applicant has lodged an appeal and that the appeal shall be entertained there is no reason why the applicant should have approached this above Honourable Court before the appeal is heard.*"

Paragraph 37.2 goes on to allege that:

> "*It shall be argued at the hearing of this matter that this application is premature and that the remedy available to the applicant is one that she has already pursued, namely the appeal to the National Congress.*"

In para 38.2 POPCRU contends that it has complied with its Constitution and has followed a lawful process. The para proceeds to state that:

> "… *The first respondent's constitution provides for a disciplinary process however this applies to ordinary members and not National Office Bearers. In addition both the NEC and the CEC had regard to the investigations report, 'FA10A' to 'FA10N', and determined lawfully, that the applicant's membership of the union be terminated.*"

The answering affidavit was attested on 8 April 2011, although the body of the attestation reflects that this occurred in March 2011. The minutes of the CEC of POPCRU held on 5/6 December 2010, Annexure "FA11L", show that the decision to expel the applicant was with immediate effect, without notice and in her absence. Paragraph 35.12 of the answering affidavit states that:

> "*The first respondent is to hold its national congress in June 2011. It has been decided by the CEC in the light of the applicant's appeal that the applicant shall have the right to state her case to the National Congress against her removal as a National Office Bearer and her expulsion from the union as a member.*"

[11] The above extracts from the answering affidavit show clear and various contradictions in the version of POPCRU. On the one hand, there is the allegation that the applicant has no appeal remedy, whilst on the other hand it is alleged that she has such remedy which she has exhausted. Furthermore, on the one hand, it is contended that the appeal has been dealt with, whilst the general tone is that the present application is premature as the appeal was still to be heard by the National Congress of POPCRU.

[12] What is, however, patent is that the applicant was never informed of an appeal hearing. There was no reaction to her notice of appeal dated 13 December 2010. In the replying affidavit she states credibly that she only became aware in the opposing papers that her notice of appeal was in fact received and set down for some time in June 2011. POPCRU has conveniently omitted to direct the Court to the specific provisions in its disciplinary procedures in the constitution which supports the view that the disciplinary process applies to ordinary members only, and not to National Office Bearers. During argument the Court insisted in obtaining a complete copy of POPCRU's Constitution. This was done even though POPCRU resisted the request. Clause 24 under Chapter 18 of POPCRU's Constitution deals with Disciplinary Procedures. There is no clause excluding National Office Bearers. It is significant that clauses 24.11 to 24.13 provide as follows:

> "*24.11.* *Whenever the Disciplinary Committee has been directed to hold a hearing its Secretary shall in accordance with the POPCRU Code of Conduct cause to be served on the person whose conduct is the subject of the hearing and upon the complainant a notice setting forth the date, time and subject matter of such hearing;*
>
> *24.12.* *In setting the date, time and place of such a hearing, regard shall be given to the convenience of the Disciplinary Committee and all parties concerned;*
>
> *24.13.* *The Secretary of the Disciplinary Committee shall cause a record of its proceedings to be taken. The Secretary may cause to be served on any such person a notice requiring him/her to attend before the Committee and to produce at the hearing any documents he/she may have in her/his possession, which is relevant to the hearing. Such notice shall be served in the same way and shall have the same effect as a notice requiring the attendance of a witness legal trial;*

> *14.24 In the event of a person who is found guilty of unprofessional or unethical conduct there shall be the right to appeal from the Province to the National Disciplinary Committee whose decision shall be final.*"

Clause 24.14, in terms of which the applicant lodged her appeal, has already been referred to earlier in this judgment.

[13] From the above, it is clear that the applicant was never notified of such hearing; did not attend the hearing; and that there are no records of such disciplinary hearing. What is of critical significance is that the applicant's appeal hearing, on the version of POPCRU, is still pending. In my view, the argument advanced by the applicant that POPCRU acted unfairly in ignoring her appeal, has considerable merit. The appeal was plainly pending. In *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA), at para [16] the Court said:

> "*The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens).*"

In regard to the *onus* to prove a pending suit, which *onus* the applicant has, in my view, discharged in the present matter, see *Dreyer and Others v Tuckers Land and Development Corp (Pty) Ltd* 1981 (1) SA 1219 (T) at 1231. I conclude that the applicant ought to succeed as well on this aspect.

[14] I deal with the second issue on the merits in respect of which the applicant must also succeed. That is that in taking the decision to terminate her membership, POPCRU completely ignored the rules of natural justice by not hearing her side of the story. Implicit in the rules, is the *audi alteram partem* rule ("*the audi rule*"). In *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A), at 748E-H, Corbett CJ said:

> "*The right which is generally referred to by means of the maxim audi alteram partem has been discussed and analysed in a number of recent judgments of this Court … The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle stated that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter – see Chikane's case supra at 379G), unless the statute expressly or by implication indicates the contrary. One of the issues in this matter is whether what I shall call 'the audi principle' is confined to cases where the decision affects the liberty, property or existing rights of the individual concerned or whether the impact of the principle is wider than this. I shall deal with this issue in due course.*"

Indeed, later on in the judgment, and at 763I, Corbett CJ proceeded to state that:

> "*As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include also the legitimate expectations. In short, I do not think that the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the Court. For these reasons I agree with the conclusion reached by the Judge a quo to the effect that the decision of the second appellant to turn down the applications of the respondents for the posts of SHO at the hospital was invalid by reason of his failure to accord the respondents a fair hearing before taking the decision.*"

(Compare *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A).)

[15] In the instant matter, POPCRU contends that prior to the suspension and ultimate termination of the applicant's membership, it carried out certain investigations. The investigators concluded that the applicant had breached certain clauses of the Constitution and Code of Conduct, and was guilty of alleged professional conduct. It is, however, clear that the applicant was not part of the investigations or invited to take part in such investigations. POPCRU alleges that the applicant refused to participate in the investigation process "*in that she refused to answer the telephone calls of the Second Vice- President who was in charge of the investigation*". In para 18 of the founding papers the applicant contends that she was never invited to any investigation nor was she provided with a copy of the written investigation report which led to her suspension. She also contends that she was never provided with any reasons explaining the decision to terminate her membership. Indeed, POPCRU has not provided any documentary proof in the form of correspondence to the appellant to challenge the applicant's contentions. There is similarly no documentary proof that the applicant was invited to the meeting of December 2010 where the decision to terminate her membership was taken. The letter of 7 December 2010 addressed to the applicant informing her of the termination of her membership equally provides no reasons for the termination. POPCRU, simply and consistently acted unilaterally in deciding the fate and termination of her membership. She was never heard.

[16] In argument, and from the papers, it appears that the position of First Vice-President of POPCRU held by the applicant, even though as an employee of the SAPS, was not without any benefits. Annexure "FA11(g)" to the answering papers shows that during her tenure, the applicant was deployed to international trips by POPCRU, including trips to Europe, Ghana, Zambia, Botswana and Swaziland between September 2007 and May 2010. In this regard POPCRU expended the sum of approximately R28 299,00 for such overseas trips. There were also other cash allowances made to the applicant. It can therefore be safely accepted that when she was elected as First Vice-President in June 2007, the applicant had legitimate expectations to enjoy these benefits until her term was ended in a legitimate manner. In this regard clause 13.6.1.2.3, under Chapter 7 of POPCRU's Constitution provides:

> "*The Deputy and Vice-Presidents shall hold office for a period of four years until the next election of the position.*"

Clause 13 further provides that if she is nominated for the position of Deputy and Vice-Presidents, the nominee shall be a member of the Union in good standing. In regard to the authority of the applicant during her tenure, clause 13.2.3.1. of the Constitution provides:

> "*The 1st Vice President exercises the power and duties of the President in the absence of both the President and the Deputy President.*"

From this, it is plain that the position occupied by the applicant was not purely ceremonial or nominal, without any benefits. To terminate these benefits without a proper hearing or without even hearing the applicant, affected her legitimate expectations as envisaged by Corbett CJ in *Traub and Others supra*. In addition, sec 34 of the Bill of Rights provides that:

> "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

The applicant in the present matter was plainly denied this right to appear before POPCRU's Disciplinary Committee and to state her case. On this aspect, I conclude that the conduct of POPCRU in ignoring utterly the rules of natural justice, and the *audi* principle, entitles the applicant to succeed as well in the relief she seeks.

FIRST POINT *IN LIMINE*

[17] I now turn to the first point *in limine* raised by POPCRU. This is that this Court lacks the requisite jurisdiction to hear the present application based on the provisions of sec 157 read with sec 158(1) of the Labour Relations Act 66 of 1995 ("*the LRA*"). The situation becomes worse for POPCU when in the heads of argument it is contended by POPCRU, on the one hand, that "*subsequent to the filing of these papers the Applicant's appeal has been entertained by the first respondent. The Applicant's expulsion was found to be valid and necessary. Accordingly, the relief sought by the Applicant has*

become academic as the appeal has been held". On the other hand, and in para 14 of POPCRU's heads of argument, it is argued that, "… *the Applicant brought this application prematurely as she had lodged an appeal against her expulsion which had not been heard at the time of the lodging of the papers*" (underlining added). This, in my view, is not only contradictory but exceedingly untenable. There are no specific details as to when, how, and who heard the appeal. There is also no allegation that the applicant was present when the appeal was heard. It is indeed aggravating and further conduct of POPCRU riding roughshod over applicant's rights to quickly hear the appeal as soon as the present application was served on it. It is clear that POPCRU was hell-bent on ejecting the applicant as a National Officer Bearer at all costs, and irrespective of the means used. This, the Court cannot countenance. In short, the argument is that the Labour Court has exclusive jurisdiction to hear all matters that appear in the LRA, and that since the matter involves a dispute between a registered trade union (POPCRU), and one of their members about an alleged non-compliance with the trade union's Constitution, this High Court also does not have jurisdiction. As seen hereunder, the argument is misplaced, especially where it presupposes that the applicant was employed by POPCRU and that she now claims reinstatement on the basis of an unfair dismissal.

[18] It seems to me that POPCRU's argument is rather skewed and selective in that it clearly ignores the provisions of sec 157(2) of the LRA which provides that:

> "*(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Ch 2 of the Constitution of the Republic of South Africa, 1966, and arising from –*
>
> *(a) employment and from labour relations;*
>
> (b) *any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*
>
> (c) *the application of any law for the administration of which the Minister responsible.*"

The latter provision must, of course, be read with the provisions of sec 157(1) of the LRA, which states, *inter alia*, that:

> "*… the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*"

SOME LEGAL PRINCIPLES

[19] The question of the competing jurisdiction between the Labour Court and the High Court has been the subject matter of numerous court decisions, including the Constitutional Court. For example, in *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA), the respondent (Chirwa), was dismissed by her employer, Transnet (the appellant). She approached this High Court for the review and setting aside of the decision of the appellant to dismiss her from her employ, as well as an order that she be reinstated on the ground that the dismissal had violated her right to administrative action that was lawful,

reasonable and procedurally fair, as enshrined in sec 33 of the Constitution. The High Court (Brassey AJ) found that her dismissal constituted '*administrative action'* as defined in sec 1 of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"); that the common-law rules of natural justice applied to the decision to dismiss; that those rules had been breached when the decision to dismiss her was taken; and that she was, accordingly, entitled to be reinstated. On appeal, the Court had to determine firstly, whether the dismissal was a matter that fell to be determined exclusively by the Labour Court in terms of sec 157(1) of the LRA, 1995 ('*jurisdiction*'), and whether the dismissal constituted '*administrative action*' as defined in sec 1 of PAJA. In upholding the appeal, and at paras [8] to [10], Mthiyane JA said:

> "*The subject has arisen in matters dealt with by this Court. In Fedlife Assurance Ltd v Wolfaardt Nugent AJA writing for the majority said that Ch 8 of the 1995 Act (meaning the LRA) was not exhaustive of the rights and remedies that accrue to an employee upon the termination of employment. In that case, the Court held that, whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the LRA itself, an employee was not deprived of the right to endorse a common-law contract and that his or her right to do so was not abrogated by the LRA (paras [17] and [22]). The same approach was adopted in the judgment of this Court in United National Public Servants Association of SA v Digomo NO and Others. There Nugent JA said:*
>
> > *'The remedies that the Labour Relations Act provides against conduct that constitutes an 'unfair labour practice' are not exhaustive of the remedies that might be available to employees in the course of the employment relationship. Particular conduct by an employer might constitute both an "unfair labour practice" (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant's claim in the present case was not that the conduct complained of constituted an "unfair labour practice" giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in the Constitution and that is protected by s 33 – which is clearly cognisable in the ordinary courts.'*

[9] The topic has also been dealt with in the High Courts. In Mbayeka and Another v MEC for Welfare, Eastern Cape, Jafta J had to consider an application by government employees who challenged their suspensions from duty without emoluments as invalid/or being unconstitutional and thus sought reinstatement. The employer resisted the application on the basis that the High Court had no jurisdiction in the matter. The employer contended that the dispute fell within the exclusive jurisdiction of the LRA in terms of s 157(1). The learned Judge rejected the argument and held that on a proper interpretation of s 157(2) of the LRA:

> *'… the Labour Court will never enjoy exclusive constitutional jurisdiction even in matters where the cause of action is confined to an alleged violation of the right to fair labour practices simply because that is a constitutional right in terms of s 23 of the Constitution.'*

The point made in the judgment is, in my view, unanswerable and especially instructive in this case where the complaint is that Smith breached the applicant's right to administrative action that is lawful, reasonable and procedurally fair – a constitutionally entrenched right under s 33 of the Constitution. As to the Labour Court's power to adjudicate on this right, as pointed out in Mbayeka, it merely enjoys 'concurrent [as opposed to exclusive] jurisdiction with the High Courts'.

[10] For the above reasons, I conclude that the High Court had jurisdiction in the matter …"

(Footnotes omitted.)

See also the extremely instructive exposition of the applicable law by Cameron JA in the dissenting judgment at para [59]. In addition, in *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA) Cameron JA, in a majority judgment, at para [6] said:

"*In these cases, the exclusive jurisdiction of the Labour Court does not preclude the employee's recourse to the High Court. This case pushes the boundary a little further. The novel question it raises is whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were 'unlawful', without alleging any loss apart from salary. In my view, the answer can only be*

> *Yes. This Court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing (Old Mutual Life Assurance Co SA Ltd v Gumbi). This mans that every employee now has a common-law contractual claim – not merely a statutory unfair labour practice right – to a pre-dismissal hearing. Contractual claims are cognisable in the High Court. The fact that they may also be cognisable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction.*"

I must again emphasise that the cases referred to above are clearly distinguishable from the present matter for reasons advanced earlier in this judgment.

[20] From the above, it is plain that although the *Chirwa* decision supports the contention of the applicant in the instant matter, especially on the issue of jurisdiction, the facts in the *Chirwa* matter are clearly distinguishable from the facts in the present matter. For example, in the present matter, the applicant is not employed by POPCRU. The relief she seeks is not based on unfair dismissal. The applicant was properly elected as First Vice-President of POPCRU during a National Congress in June 2007, and in terms of clause 13.6. of POPCRU's Constitution. As a consequence, she became a National Office Bearer of POPCU. The applicant does not have a contract of employment with POPCRU. In terms of clause 10.3.1.7 of POPCRU's Constitution, the applicant can only be removed by the National Conference.

[21] In addition, careful scrutiny of the notice of motion shows that in spite of the usage of the words, "*purported dismissal*", in prayer 1, the applicant relies on the violation of her common law rights, rules of national justice, and her constitutional rights. There is no reference to a contract of employment or

unfair dismissal. She claims that the process followed by POPCRU in terminating her membership without a proper hearing was procedurally unfair, and that she was denied the right to be heard. Similarly, POPCRU followed the same unfair procedure in regard to applicant's appeal. In *Minister of Safety and Security and Others v Vilakazi* [2000] 3 All SA 95 (N) at 101b-c it was stated that:

> "*The failure to afford a person who may be adversely affected by an administrative decision the opportunity to make representations as to why it should not be taken is per se prejudicial to such a person. It is not incumbent upon him to show that had he been afforded a proper hearing, he would have succeeded in persuading the decision-maker to decide differently.*"

[22] For all the aforegoing reasons, I am convinced that the first point *in limine* raised by POPCRU in regard to the alleged lack of jurisdiction on the part of this Court has no merit at all and is clearly misplaced. Indeed, the same reasoning and conclusion reached above applies equally to POPCRU's reliance on sec 158(1)(e) of the LRA. The latter sec gives the Labour Court discretionary powers to adjudicate a dispute between a trade union or employers' organisation or any one of the members or applicants for membership thereof, which concerns any alleged non-compliance with the Constitution of a trade union or employers' organisation. From this, it is plain that the jurisdiction conferred upon the Labour Court is not obligatory. There is no dispute about the Constitution of POPCRU in the instant matter. The applicant is a National Office Bearer of POPCRU, having been elected thereto at a National Congress of POPCRU. In terms of clause 10, Chapter 4, of

POPCRU's Constitution, the National Congress, which is the Supreme Governing Body, has the power over "*nominations, removal or reinstatement of National Office Bearers*" (see clause 10.3.1.7). It is common cause from Annexure "D1-D3" to the founding papers that the decision to terminate the applicant's membership was taken by the Central Executive Committee, not the National Congress. This was clearly irregular and procedurally unfair. So was POPCRU's decision in not according the applicant a pre-termination hearing followed by the refusal of a right to be heard on the appeal lodged by the applicant. There are also no reasons furnished for the decision to terminate her membership or to deny an appeal hearing.

CONCLUSION

[23] I conclude that the applicant has succeeded in making out a case for the relief claimed in the notice of motion.

ORDER

[24] In the result an order is granted in favour of the applicant in terms of prayers 1, 2, 3 and 4 of the notice of motion dated 14 March 2011.

_____

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	3 AUGUST 2011
DATE OF JUDGMENT	2 SEPTEMBER 2011