IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:

J3797/98

In the matter between

ADRIAAN JACOBUS BOTHA	**First Applicant**
ELIZABETH VENTER	**Second Applicant**

and

DEPARTMENT OF EDUCATION, ARTS CULTURE & SPORTS, NORTHERN PROVINCE GOVERNMENT	**First Respondent**
THE MINISTER OF EDUCATION GOVERNMENT OF NATIONAL UNITY	**Second Respondent**
SETTLERS AGRICULTURAL HIGH SCHOOL	**Third Respondent**
THE GOVERNING BODY, SETTLERS AGRICULTURAL HIGH SCHOOL	**Fourth Respondent**
THE PREMIER, NORTHERN PROVINCE GOVERNMENT	**Fifth Respondent**

JUDGMENT

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de VILLIERS A J

1. The First and Second Applicants are employed as an Administration

Manager and as a senior Matron at the premises of the Third Respondent, a public school as defined in the South African Schools Act 84 of 1996.

2. Their salaries are paid from two sources, from the First Respondent and from the funds of the Third Respondent.

3. On or about 20 May 1998, the First Applicant approached this Court on an urgent basis after the Third Applicant stopped paying its share of his salary with effect from 31 March 1998.

4. That application resulted in this Court (per Basson J) making the following order by agreement between the parties.

- **The First, Third and Fourth Respondents are to pay the Applicant an amount of R6 970 on or before 31 May 1998;**

- **The First, Third and Fourth Respondents will from the same date continue to pay the Applicant an amount of R2 323,50 on a monthly basis.**

- **The First, Third and Fourth Respondents will not unlawfully stop or change the payment of the Applicant's salary in terms of paragraph 2 above.**

- **The First, Third and Fourth Respondents are to pay the costs of the application on a party and party scale up to 18 May 1998, excluding the costs for today.**

5. On 1 December 1998, the First and Second Applicants approached this court on an urgent basis, after they were advised in writing by the principal of the Third Respondent that their "top-up" salary (that portion paid by the Fourth Respondent)) would not be paid from the end of November. *Inter alia*, they sought the following orders:

"3. That an interdict be granted against the Respondents in terms of which:

3.1 First, Third and Fourth Respondents are ordered to adhere to the order of

this Honourable Court dated 20 May 1998 under case number J929/98.

3.2 That the South African Police Service are directed to press charges against the First, Third and Fourth Respondents, and or against the responsible officials in the event of them remaining in contempt of the aforesaid Court Order.

3.3 That the First, Third and Fourth Respondents are ordered to pay the balance of Applicants' salary, for the First Applicant being R2 323,50 per month, and for the Second Applicant, being R1 000,00 per month for the month ending 30 November 1998.

3.4 That the First, Third and Fourth Respondents are ordered to pay the Applicants' salary in accordance with the existing employment agreement between the parties.

3.5 That the First, Third and Fourth Respondents are prohibited to make (sic) **unilateral amendments to the Applicants' salaries and other benefits."**

and

"5. That a declaratory order with the following terms be granted:

5.1 That the First, Third and Fourth Respondents' decision to terminate the Applicants' salaries are (sic) **unlawful, irregular and illegal and not in the compliance with the spirit of the Constitution of South Africa Act 108 of 1996, and that the First, Third and Fourth Respondents' decision to unilaterally terminate the Applicants' salaries are ultra virus** (sic)**.**

5.2 In the alternative, if the Honourable Court finds that the First, Third and Fourth Respondents' decision to terminate the Applicants' salaries is in accordance with the relevant legislation, that it is not applicable to the Applicants' (sic)**.**

5.3 In the alternative, if the Honourable Court finds that the First, Third and Fourth Respondents' decision to terminate the Applicants' salaries is in accordance with the relevant legislation, and that such legislation is applicable on (sic) **the Applicants that the legislation is not in accordance with the spirit and purport of the Constitution of South Africa Act 108 of 1996 and not in accordance the** (sic) **Labour Relations Act 66 of 1995, and that the said legislation is therefore unconstitutional."**

6. At the hearing of the urgent application, the parties agreed to have an interim arrangement for payment of the "top up" salaries by the Third and/or Fourth Respondents made an order of court pending a final resolution of the matter by this Court or the Labour Appeal Court.

7. The Respondents have raised a number of points *in limine*. Amongst other things, they submit that this Court does not have jurisdiction to entertain the application or grant the relief sought. At the hearing of this matter, the parties agreed that that issue should be argued and decided first as it would dispose of the matter should this Court find that it does not have jurisdiction to entertain the application.

8. At the outset I must point out that there are a number of difficulties with this matter, not the least of which is the way in which the Applicants have framed the orders which they seek. However, for the sake of expedition, I have decided nevertheless to rule on the jurisdictional point since the basis on which jurisdiction was challenged and defended was clear from the arguments which the parties presented at the hearing.

9. The jurisdictional point has also been decided on the assumption that all of the Respondents have been properly cited (which is contested by the Respondents).

10. Put simply, the Respondents argue that this Court does not have jurisdiction to determine those disputes regarding remuneration or the enforcement of contracts which arose prior to 1 December 1998 because:

10.1. these disputes were regulated by the Basic Conditions of Employment Act of 1983 ("the old Act") which did not confer jurisdiction on this Court (**Gaylard v Telkom SA Ltd** (1998) 19 ILJ (LC) at 1627D - 1628 C; **Schoeman & Another v Samsung Electronics SA (Pty) Ltd** (1997) 18 ILJ 1098 (LC); **Legal Aid Board v John NO & Another** (1998) 19 ILJ 851 (LC); **Monyela & Others v Bruce Jacobs t/a LV Construction** (1998) 18 ILJ 75 (LC); **Ackron and Others v Northern Province**

Development Corporation [1998] BLLR 916 (LC));

10.2. because of the presumption in our law that enactments do not obtain retroactively unless there is express provision to the contrary in the statute (**Mahomed v Union Government** 1911 AD 18**; Jockey Club of SA v Transvaal Racing Club 1959 (1) SA 441 AD at 451; Edwards v Tuckers Land and Development Corporation (Pty) Ltd 1983 SA 617 W**), the Basic Conditions of Employment Act of 1997 ("the new Act") which, at section 77, does confer jurisdiction on this Court to determine claims of this nature with effect from 1 December 1998 (the date on which the Act came into operation) but which does not contain a provision which confers jurisdiction on this Court retroactively, does not confer jurisdiction to determine the dispute relative to the non-payment of the portion of the Applicants' salaries which arose prior to its enactment.

10.3. because the agreement which forms the basis of Basson J's order enforces the contract of employment and because the Court did not have jurisdiction on 20 May 1998 to make such an order (for the same reasons as advanced above) that order is a nullity. This Court, therefore, is precluded from granting the relief sought by the Applicants relative to that order. In support the Respondents cited the following as authority : **Coalcor (Cape) (Pty) Ltd & Others v Boiler Efficiency Services CC & Others** 1990 (4) SA 349 (C) at 357I - 358C**; Minister of Agricultural Economics and Marketing v Virginia Cheese & Food Co (1941) (Pty) Ltd** 1961 (4) SA 415T at 424E**; Suid-Afrikaanse Spoorwee en Hawens & Andere v Mentz** 1965 (1) SA 888 A at 895. Harms *Civil Procedure in the Supreme Court* Issue 18 at page 423 Para 07A.

11. Before going any further I wish to dispose of this last point. I

believe the Respondents have misdirected themselves by couching this issue as one which the Court has to consider relative to its jurisdiction. There is no doubt that this Court has jurisdiction, by virtue of its inherent powers, to order compliance with its own orders and to consider contempt proceedings and order committal. (See, for example, **Tshumi v Queensburgh Plastics** D455/97 unreported**; Ntombela v Herridge Hire and Haul CC & Another** [1999] 3 BLLR 253 (LC)**; National Union of Mineworkers v B K H Mining Services t/a Dancarl Diamond Mine & Others** J1118/97 unreported).

12. This is as far as I need to go on this point. Whether the Court can make the order in terms of 3.1 and 3.2 of the application on the basis of Basson J's order, in the face of authority which suggests, as Harms does (*op cit*), that, in cases where the court lacked jurisdiction to make the order sought, the decision may be disregarded without the necessity of having it set aside, is something which the Court will have to consider during argument relative to the merits of the order sought.

13. I am therefore satisfied, for these reasons, that this Court has the necessary jurisdiction to entertain prayers 3.1 and 3.2 of the application.

14. I now turn to the other jurisdictional points raised by the Respondents.

15. The starting point for any consideration of the jurisdiction of this Court is section 157 (1) of the Act which reads as follows:

"**Subject to the Constitution and section 173 and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by**

the Labour Court."

16. I believe this section has been properly interpreted by Zondo J in **SJ van Zyl v SFF Association** J2533/98 unreported) as follows:

"**In my view what those provisions mean is that, where the issue arises whether the court has jurisdiction in respect of a particular matter, the question to be asked is whether or not there are provisions, either in the Act or in any other law, which say such a matter must be determined by the Labour Court. If the answer is that there are such provisions, then this court has jurisdiction. If the answer is that there are no such provisions, then this court does not have jurisdiction.**

If I am correct in saying that the provisions of section 157 (1) mean what I have said they mean, then the question I must ask myself in this matter is the following: are there any provisions in this Act or any other law which say that a dispute of the kind involved in this application must be determined by this Court. With that in mind it is important to determine what the dispute is which is before the Court in this case."

17. The dispute which is before the Court in this application is, quite simply, whether the Respondents acted lawfully when they terminated the payment of that portion of the Applicants' salary which was being paid out of the funds of the Third Respondent. I believe that if this Court has jurisdiction to determine that dispute, and finds that the termination was unlawful, then it is competent for it to order the relief sought by the Applicants' by virtue of its express powers in terms of the provisions of section 158 (1) of the LRA which empower the Court to:

17.1. grant urgent interim relief (section 158 (1) (a) (i));

17.2. grant an interdict (section 158 (1) (ii));

17.3. grant an order directing the performance of any particular act which order, when implemented will remedy a wrong and give effect to the primary objects of this Act (section 158 (1) (iii));

17.4. grant a declaratory order (section 158 (1) (iv)); and

17.5. deal with any matters necessary or incidental to performing its functions in terms of this Act or in terms of any other law (section 158 (1) (j)).

18. Fundamental to the decision regarding jurisdiction is to establish who the employer in this dispute is.

19. If the employer is not the State, this Court would not have jurisdiction to entertain the application in respect of those payments which fell due prior to 1 December 1998 because the dispute with regard to the non-payment of that remuneration falls to be decided in terms of the provisions of the old BCEA or in terms of the contract and neither the LRA nor the old BCEA contain provisions which confer jurisdiction on this Court to determine that issue where the state is not the employer.

20. In passing, I must point out to the Respondents that, in any event, the provisions of the old Act did not apply to the State as employer and the Applicants, by virtue of the provisions of section 2 (d) and (e) which exclude any person employed by the State and any person employed by a school or other educational institution which is maintained wholly or partly from State funds.

21. However, I am of the view that if this Court finds that the termination was unlawful it does have jurisdiction to order the payment of remuneration which falls due after 1 December by virtue of the provisions of section 77 (3) of the new Act which confers jurisdiction on this Court with regard to all employers including the State (with some exceptions not relevant to this dispute) to "hear and determine any matter concerning a contract of employment irrespective of whether any basic conditions

constitutes a term of that contract".

22. By virtue of these provisions, the Court therefore has jurisdiction to entertain prayers 3.4 and 3.5 of the application and grant the relief sought.

23. If the State is the employer, I believe this Court does have jurisdiction to examine the reasons behind the failure to pay the November "top up" salary and grant the relief sought in prayers 3.3, and to grant the relief sought in prayers 5.1 and 5.2 by virtue of the provisions of section 158 (1) (g) which empowers the Court to review any decision taken or any act performed by the State as employer as well as section 157 (2) (b) (prior to its amendment in February 1999) which allows this Court to examine the conduct of the State with reference to the constitution and administrative law where the State is the employer.

24. In addition, at the very least, the Court can scrutinize the way in which the State went about terminating the payment to assess whether the State as employer has violated the Applicants' right to fair labour practices as enshrined in section 23 of the Constitution by virtue of the jurisdiction conferred on it in section 157 (2) (a) of the Labour Relations Act of 1995.

25. The question then is what does “the State as employer” mean and do the Respondents fall within the definition?

26. This question was rightly answered by Landman J in **SAAPAWU v Premier (Eastern Cape) & Others** [1997] 9 BLLR 1226 (LC) at 1232B as follows:

"Various references are made in the Constitution, 1996, to an organ of State. It would seem to be clear that the founding parties of the Constitution envisaged a broad conception of the State to include not only the State as it is traditionally known but also to include other functionaries or institutions….. exercising a public power or performing a public function in terms of any legislation."

27. From the papers it is clear that the Applicants have what Landman J calls "a composite employer" (in **SAAPAWU v Premier (Eastern Cape) & Others** supra at 1232E – F). It is common cause that they are employed both by the First Respondent (the State in its traditional and narrow sense) and the Third Respondent, a public school as defined in the South African Schools Act 84 of 1996 which, in terms of that Act, clearly exercises a public power and performs a public function.

28. Hence, those responsible for the payment of the "top up" salary and those responsible for its termination are "the State as employer" and thus the Court has jurisdiction to deal with the application by virtue of the provisions of section 157 (2) (prior to its amendment on 1 February 1999) and/or section 158 (10 (g).

29. With regard to prayer 5.3, the Applicants ask for this Court to declare any "relevant legislation" which allows the Respondent to terminate the payment of their "top up" salaries unconstitutional.

30. In terms of section 172 (2) (a) of the Constitution, the Supreme Court of Appeal, a High Court or **a court of similar status** (my emphasis) may make an order concerning the constitutional validity of an Act of Parliament which order has to be confirmed by the Constitutional Court.

31. Section 151(2) of the LRA confers on the Labour Court the same status as a high court in relation to matters under its jurisdiction. Hence

the Labour Court can make an order concerning the constitutional validity of an Act of Parliament which deals with matters which fall within its jurisdiction.

32. It is my view that that the constitutional validity of any legislation which establishes or regulates an employer/employee relationship can be tested by this Court. As Landman J points out in **SAAPAWU v Premier (Eastern Cape) & Others** (supra at 1229A – B):

"**The common thread running throughout the jurisdiction of this Court is almost without exception the existence of an employer/employee relationship between the parties to the dispute.**"

33. The Respondents seek to justify the decision to terminate the payment of the "top up" salaries with reference to those provisions of the SA Schools Act 84 of 1996 and the Public Service Act 103 of 1994 relative to the payment of remuneration to their employees. To this extent, both Acts can be said to regulate the employer/employee relationship with regard to the payment of remuneration and hence the Labour Court would have the necessary jurisdiction to make the declaration sought by the Applicants in prayer 5.3.

34. The Court therefore has jurisdiction to entertain the application and grant the relief sought by the Applicants.

35. The Applicants have asked for a special costs order against the Respondents relative to the late filing of the Respondents' Heads of Argument and relative to the *points in limine* raised by the Respondents in the event of the Court finding against the Respondents relative to these points.

36. Whilst I am not inclined to grant a special costs order against the Respondents relative to the jurisdictional point, I am inclined to grant a special costs order relative to the Respondents' failure to timeously file their heads of argument which set out the Respondents' case relative to the jurisdictional point for the first time.

37. In compliance with the directive issued by this court on 5 March 1999, the Respondents ought to have served and filed their Heads of Argument on or before 21 April 1998. When the Heads did not materialize on that day, the Applicants' attorney wrote to the State Attorney as follows:

We confirm the telephone discussion between writer and your Mr Duvenhage that the Respondents' Heads of Argument are not ready to be filed.

We place on record that our Ms Anderson has another trial next week and that Thursday 22 April 1999 and Friday 23 April 1999 had been scheduled by her for preparation in the above matter. In the event the Heads of Argument not being served on our offices on 22 April 1999 at least by 10h00 a special costs order will be sought with regard to preparation.

38. The heads were served and filed, by fax, on Monday 26 April 1999. Because of her trial, the Applicants' attorney had to prepare the supplementary heads after hours and on 28 April 1999, a public holiday.

39. The Respondents argued that they only received the first page of the Registrar's directive and hence did not know that they had to file their heads on 21 April 1999.

40. As the Applicants' attorney pointed out, not only is it clear from the directive that the directive consists of more than one page (and hence the Respondents' attorney ought to have acted responsibly and taken up the

failed facsimile transmission with the Registrar), they were aware from the telephone discussion between the Applicants' attorney and they ought to have been aware from the Practice Direction of this Court (1/98) of the date on which their heads of argument were due for service and filing.

41. In addition there was no attempt on the part of the Respondents to apply for condonation.

42. The award of costs by the Labour Court is regulated by Section 162 of the Act as follows:

i **The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.**

ii **When deciding whether or not to order the payment of costs, the Labour Court may take into account:**

iii **……**

(b)the conduct of the parties-

iv **in proceeding with or defending the matter before the Court; and**

v **during the proceedings before the Court.**

43. When considering an award of Costs, this Court has followed the guidelines established in **National Union of Mineworkers v East Rand Gold & Uranium Company Limited** 1992 (1) SA 700 (A) at 739A-F. **Cargo Motors Ltd v Hamilton** (1996) 17 ILJ 113 (LAC) emphasizes the point that, in the absence of special circumstances, costs should follow the result unless considerations of fairness require it to yield. In **Callguard Security (Pty) Ltd v Transport and General Workers Union & Others** (1997) 18 ILJ 377 (LC) at 386, it was held that it is not the correct approach to ask what the requirements of law are, whether they require that costs be granted and then to ask the question whether or not there are

any considerations of fairness which warrant that costs should not be granted. This would render the requirements of fairness secondary to the requirements of law.

44. I am satisfied, on the facts presented by the Applicant, which were not disputed by the Respondents, that fairness demands that the Applicants recover their costs relative to the preparation of their supplementary heads on the attorney and client scale. The Respondents' conduct in this regard was disrespectful to the Applicants' attorney and to this Court.

45. The Respondents were also in default of the time limits imposed by the rules of this Court relative to the filing and service of their reply to the application. Because the Applicants conceded that they had suffered no prejudice and did not object to the late filing and service of the document and because the Respondents enrolled the matter for hearing, the Court exercised its discretion of favour of condoning the late filing and service of the reply.

46. I therefore make the following order.

46.1. The Respondents' point *in limine* with regard to the jurisdiction of this Court is dismissed with costs.
46.2. The Respondents are ordered to pay the costs occasioned by the Applicant's attorney's preparation of the document entitled "FURTHER ARGUMENTS FOR APPLICANTS IN REPLY TO RESPONDENTS' ARGUMENTS" on the attorney and client scale.
46.3. The Registrar is directed to set the matter down for hearing of the further points *in limine* and the merits on the opposed roll.

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I de VILLIERS AJ

Date of Hearing	:	29 and 30 April 1999
Date of Judgment	:	23 July 1999
For the Applicants	:	Riki Anderson Anderson and Kloppers Attorneys
For the Respondents	:	Advocate Tobie Kruger instructed by the State-Attorney