IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)

Case no: 10676/2020

In the matter between:

PROCARE OUTSOURCING (PTY) LTD **FIRST APPLICANT**

Registration number: 2018/511745/07

AGRICULTURAL, FOOD, FISHING AND RETAIL INDUSTRY WORKERS UNION **SECOND APPLICANT**

and

PGR MANAGEMENT t/a PALM GARDEN RETREAT MANAGEMENT (PTY) LTD **FIRST RESPONDENT**

Registration number: 2005/009332/07

GRAGOOD DEVELOPMENTS (PTY) LTD **SECOND RESPONDENT**

Registration number: 2003/0000/53/07

WILLEM DANIEL KOEGELENBERG **THIRD RESPONDENT**

Identity number: […]

PANAF TRADING (2014/051834/07)
(PTY) LTD **FOURTH RESPONDENT**

Registration number: 2014/051834/07

GAIL FRANCIS BUECHEL **FIFTH RESPONDENT**

Identity number […]

Coram: Norton AJ

Heard: 13 August 2020

Delivered: 20 August 2020

JUDGMENT

Norton AJ

[1] The applicants seek urgent declaratory and interdictory relief arising from the termination of two outsourcing agreements which the first applicant concluded with the first and second respondents respectively in August 2019.

[2] The first applicant, Procare Outsourcing (Pty) Limited (Procare), is an outsourced resources provider which supplies the services of nursing staff and care workers to the residents of facilities managed by the first respondent, PGR Management (Pty) Limited (PGR), and the second respondent, Gragood Developments (Pty) Limited (Gragood). It does so in terms of outsourcing agreements concluded in August 2019 with,

respectively, PGR (the PGR agreement) and Gragood (the Gragood agreement).

[3] The PGR agreement and the Gragood agreement are in identical terms, and I refer to them collectively as 'the outsourcing agreements'.

[4] It is common cause that prior to the conclusion of the outsourcing agreements, PGR and Gragood respectively provided the nursing and care services the provision of which was subsequently outsourced to Procare.

[5] The outsourcing agreements contain detailed provision, under clauses 13.1 to 13.5, for the application and implementation of s 197 of the Labour Relations Act 66 of 1995 (the LRA) in respect of the persons then employed by PGR and Gragood to perform those services. In terms of section 197 of the LRA, the contracts of employment of employees of a business which is transferred as a going concern, are transferred from the transferor (as the 'old employer') to the transferee (as the 'new employer').

[6] It was expressly recorded in clause 13.1 of the outsourcing agreements that the transfer of the services of PGR or Gragood, as the case may be, to Procare would 'constitute a transfer of the whole or part of a business, trade, undertaking or service, as contemplated in section 197 of the LRA, and therefore that the provisions of that section shall apply to this agreement'.

[7] Clauses 13.2 to 13.5 of the outsourcing agreements set out the obligations of PGR and Gragood (as the 'old employers') and Procare (as the 'new employer') in terms of the provisions of s 197 of the LRA.

[8] Clause 13.6 of the outsourcing agreements goes further, providing as follows for the application of s 197 of the LRA on the termination of the outsourcing agreements:

> 'Should this Agreement be terminated for whatsoever reason and, should the Client [ie PGR or Gragood, as the case may be] continue providing nursing and caring services beyond the termination of this agreement, and in that event, said termination will attract the provisions of section 197 of the LRA'.

[9] On 7 July 2020 PGR and Gragood gave Procare two months' notice of their termination of the respective outsourcing agreements in terms of clause 20.4 thereof, which provides that '[e]ither party may terminate this Agreement for convenience upon 2 (two) months' prior written notice to the other Party'.

[10] Procare responded on 10 July 2020 by referring PGR and Gragood to clause 13.6 of the outsourcing agreements and stating as follows:

> 'We are going to proceed with this from our side, but in terms of the LRA, we, you and the staff must engage in a triparty agreement. A complete list of all the current permanent staff will be sent to you shortly and we suggest that you start communicating this decision of yours to the staff without delay to avoid the same misunderstandings that we created when we took over the staff'.

[11] Procare's letter elicited an immediate response from PGR in the following terms:

> 'We wish to categorically state that Palm Gardens Retreat Management (Pty) Ltd will not be providing nursing and caring services and consequently Procare would be well advised to take whatever steps necessary arising from the termination of contract'.

[12] In a letter dated 14 July 2020, Procare's attorneys advised PGR and Gragood that Procare disputed the cancellation as well as their right to cancel the outsourcing agreements until they complied with their obligations under clause 13.6 of the outsourcing agreements.

[13] In a letter dated 16 July 2020, Gragood gave Procare notice of its 'summary termination' of the Gragood agreement on the ground that Procare had been dishonest in respect of 'the agreement between the parties to provide services for Home Based Care and to share the profits thereof' by 'using permanent staff paid for by Gragood and deducting salaries from the reconciliation as an expense and retaining it.'

[14] In a letter dated 22 July 2020 Procare's attorneys claimed the payment by PGR of a total amount of R165 946.68 and the payment by Gragood of a total amount of R328 315.89 in accordance with a reconciliation of accounts which was annexed to the letter.

[15] On 28 July 2020 PGR gave Procare notice of its 'summary termination' of the PGR agreement on the ground that Procare had breached

the agreement by, among other things, failing to supply nine senior staff members over the previous six days.

[16] In a reply to Procare's claim of 22 July 2020, the respondents on 31 July 2020 advised that they disputed the Procare accounts and required time to work through the spreadsheet 'as it appears to be confusing and rife with inconsistencies'.

[17] On 3 August 2020 Procare's attorneys notified PGR and Gragood that (a) they were mandated to launch an urgent application compelling PGR and Gragood to take transfer of the relevant employees in accordance with the provisions of the outsourcing agreements in terms of s 197 of the LRA; and (b) Procare was forced to proceed with the provisions of s 189 of the LRA by giving notice to all the relevant employees of their positions potentially becoming redundant.

[18] It appears from the papers that Procare commenced a process in terms of s 189 of the LRA shortly thereafter.

The application

[19] This application was instituted on 7 August 2020 and heard on 13 August 2020.

[20] Procare is the first applicant in the application and the second applicant is the Agricultural, Food, Fishing and Retail Industry Workers Union (AFRIWU), a trade union which is duly registered in terms of the

LRA and purports to represent 'at least 24 [e]mployees who are members of the 2nd Applicant and employees of the 1st Applicant'.[1]

[21] The employees of Procare who are affected by the termination of the outsourcing agreements (the affected employees) are neither named nor cited as parties in the application.

[22] In addition to PGR and Gragood, three further persons are cited as the third to fifth respondents, but no relief is sought against them (save for an order of costs in the event that they oppose the application, which is not the case). I therefore refer to PGR and Gragood collectively as 'the respondents'.

The issues

[23] The substantive relief sought in the Notice of Motion is as follows:

> '2. A declaratory order that the outsourcing agreement entered into between the First Applicant and the Second Respondent dated 16 August 2019 have been validly cancelled on the 6th of July 2020 subject to two months' notice, and terminating on 31 August 2020.[2]
>
> 3. A declaratory order that the early termination of the outsourcing agreements attracted the provisions of Section 197 of the Labour Relations Act, 66 of 1995.

[1] AFRIWU's standing to do so was challenged, but this was not an issue which ultimately needed to be determined.
[2] It is evident from the contents of the founding affidavit that this relief is sought in respect of both of the outsourcing agreements.

4. An order that the First and Second Respondents and any party acting as its agent of representative must immediately comply with the provisions of Section 197 of the Labour Relations Act, 66 of 1995.

5. An order that the First and Second Respondents and any party acting as its agent or representative of the First and/or Second Respondents must comply with clause 14 of the outsourcing agreements in that the parties will both enter into the Section 197 negotiations as provided for in paragraph [4] above in good faith and will in good faith take all necessary steps to ensure that such negotiations and compliance with Section 197 of the Act is completed by the 30th of August 2020.

6. An order that pending the completion of the Section 197 negotiations, the First Applicant's services are restored and that the First Applicant and its employees are allowed to render its services as provided for in the outsourcing agreements between the parties.

    6.1 An order as consequence of paragraph [6] above, that the placement of the First Applicant's Employees on paid/unpaid leave be lifted and that the First Applicant's Employee's is allowed to return to work and is allowed on the site; and

6.2 An order as consequence of paragraph [6] above, that all services rendered by the First Applicant will be paid by the First and Second Respondents as provided for in the outsourcing agreements in 7 days after the reconciliation is received.

7. An order that the First and Second Respondents pay an amount of R216 029.57 (TWO HUNDRED AND SIXTEEN THOUSAND AND TWENTY NINE RAND AND FIFTY SEVEN CENTS), being the sales order in respect of the permanent staff for the month of July 2020, within 7 (seven) days of this order being granted for the First Applicant's Employees' salaries to be paid.'

[24] The relief sought in the Notice of Motion falls into four categories:

(a) A declaration that the outsourcing agreements were validly cancelled on 6 July 2020, subject to two months' notice, and will terminate on 31 August 2020 (the declaratory relief in respect of termination);

(b) A declaration that the termination of the outsourcing agreements triggers the application of s 197 of the LRA (the declaratory relief in respect of the application of s 197);

(c) An interdict compelling the respondents to take specific steps to implement s 197 of the LRA (the interdictory relief in respect of the implementation of s 197); and

(d) An order directing the respondents to pay an amount of R216 029.57 in respect of services rendered by Procare in July 2029 (the payment relief).

[25] I am satisfied that the matter is urgent.

[26] It is apparent that s 197 of the LRA is at the core of almost all the relief sought by the applicants. Indeed the founding affidavit describes the nature and purpose of the application as follows:

‘3.1 This is an urgent application brought as a result of the early termination of two outsourcing agreements by the First Respondent and Second Respondent.

3.2 The application is brought *in terms of Section 197 of the Act* where a portion of the business of the First and the Second Respondents were transferred to the First Applicant on 30 September 2019. Thereafter the First Applicant took over all the First and Second Respondents employees as per the agreements between them.

3.3 The main reason for this application and what also further substantiates the urgency in this matter, as discussed more infra, is to compel the First and Second Respondents to comply with their contractual obligations and *retake employment of the*

> *employees in accordance with the provisions of Section 197 of the Act*.' (Emphasis added.)

[27] Unsurprisingly, then, the grounds upon which the respondents opposed the application include the preliminary ground that this court lacks jurisdiction to determine the application, on the basis that it falls within the exclusive jurisdiction of the Labour Court.

[28] I therefore deal with the pertinent legal provisions and principles governing the respective jurisdiction of this court and the Labour Court before considering each of the categories of relief sought by the applicants in the light of the point in limine based on jurisdiction and the other grounds of opposition.

[29] I point out as a starting point that it does not avail the applicants to rely on the parties' 'irrevocable' agreement, in clause 29.2 of the outsourcing agreements, that 'the High Court of South Africa has exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).' This court's jurisdiction must be determined in accordance with the applicable law, and not on the basis of the parties' agreement.

Jurisdiction

[30] This court lacks jurisdiction to determine any issue which falls within the exclusive jurisdiction of the Labour Court in terms of s 157 of the LRA.

[31] Section 157 of the LRA provides as follows:

> ‘(1) 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.
>
> (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 Chapter 2 of the Constitution of the Republic of South Africa, 1996, 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
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> (c) the application of any law for the administration of which the Minister is responsible.’

[32] Since no violation of any fundamental constitutional right is alleged in this application, the question whether this court has jurisdiction to determine the application turns on whether the application concerns one or more matters that ‘in terms of [the LRA] or any other law must be determined by the Labour Court’.

[33] The pertinent question is 'whether Parliament has conferred the jurisdiction to determine this dispute upon the Labour Court, in such a manner that it either expressly or by necessary implication has excluded the jurisdiction of the High Court' (*Fredericks and Others v MEC for Education and Training Eastern Cape and Others* 2002 (2) BLLR 119 (CC) para 35).

[34] The Constitutional Court has held that s 157(1) of the LRA must be given a wide scope in order to promote the determination of labour matters by the specialist courts established to deal with matters concerning the employment relationship. In *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC) the Court stated that s 157(1) 'should be given expansive content to protect the special status of the Labour Court',[3] which it described as follows: –

> '[T]he Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law…Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.[4]

[35] The point was reinforced by the Supreme Court of Appeal in *Motor Industry Staff Association v Macun NO & Others* 2016 37 ILJ 625 (SCA):

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[3] *Gcaba*, para 70
[4] *Gcaba*, para 56

> 'The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged.'[5]

[36] In a statement that applies equally to the construction of s 157(1) of the LRA, the Constitutional Court in *Chirwa v Transnet Limited and Others* (2008) 29 ILJ 73 (CC), having described it as an objective of the LRA to establish a 'one-stop court for labour and employment relations',[6] said the following:

> 'While s 157(2) remains on the statute book it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA.'[7]

[37] This Court in *O Thorpe Construction and Others v Minister of Labour and Others* (2015) 36 ILJ 935 found that it follows from the approach in *Gcaba* that if a cause of action concerns an alleged breach of a provision of

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[5] *Macun*, para 20
[6] *Chirwa,* para 119
[7] *Chirwa,* para 123

the LRA, it is a matter which falls within the exclusive jurisdiction of the Labour Court.[8]

[38] It has been recognised that while the labour courts have exclusive power to enforce rights under the LRA, the high courts and the labour courts both have the power to enforce common law contractual rights.[9]

Section 197 of the LRA

[39] Section 197 of the LRA makes detailed provision for the protection of the rights of employees when a business is transferred as a going concern, by imposing specific obligations on the transferor (the old employer) and the transferee (the new employer) and stipulating the terms and conditions which govern the employment relationship between the new employer and the relevant employees.

[40] The issues which are regulated by s 197 (which include the terms and conditions of contracts of employment; the impact of collective agreements and arbitration awards; leave pay and severance pay; and dismissals based on operational requirements) are part of the fabric of the employment relationship as governed by the LRA and the Basic Conditions of Employment Act 75 of 1997.

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[8] *O Thorpe*, para 25

[9] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 18. The Court stated that 'in respect of the enforcement of both contractual and constitutional rights the high courts retain their original jurisdiction assigned to them by the Constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the high courts' (para 26).

[41] In my view the interpretation, application and implementation of s 197 of the LRA are matters which lie within the exclusive jurisdiction of the Labour Court as the specialist court created to deal with the employment relationship and its consequences.

[42] In terms of s 158(1) of the LRA the Labour Court may, in relation to disputes arising from s 197, exercise a wide range of powers which include ordering compliance with the provisions of s 197 (s 158(1)(b)); granting an interdict (s 158(1)(a)(ii)); or granting a declaratory order (s 158(1)(a)(iv)). It is also bound, in terms of s 182 of the LRA, by judgments of the Labour Appeal Court, the specialist appeal court established to deal with labour matters, ensuring the development of a cohesive body of jurisprudence on the interpretation, application and implementation of s 197 of the LRA.

[43] I turn now to consider whether the relief sought by the applicants is within the jurisdiction of this court, and if so, whether a case has been made out for it to be granted.

[44] I consider each of the categories of relief sought by the applicants in turn, as jurisdiction must be determined on the basis of the cause of action, as pleaded (see *Chirwa*, above, para 169) which underlies each category of relief.[10]

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[10] In *Makhanya* the Supreme Court of Appeal recognised that separate causes of action arising from the same incident may coexist, and noted: 'Thus there is the potential … for three separate claims to arise when an employee's contract is terminated. One is for the infringement of his or her LRA right. Another is for the infringement of his or her common law right. And where it occurs in the public sector, a third is for infringement of his or her constitutional right' (para 12). The Court went on to consider how different courts might be engaged in determining these different causes of action: 'Naturally a claim that falls within the concurrent jurisdiction of both the high court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of lis pendens (the claim is pending in another court) or by a

The declaratory relief in respect of the application of s 197 and the interdictory relief in respect of the implementation of s 197

[45] The applicants seek a declaration that the termination of the outsourcing agreements 'attracts the provisions' of s 197 of the LRA as the parties agreed in clause 13.6 of the outsourcing agreements, and an interdict compelling the respondents to take a range of specific steps to implement the provisions of s 197.

[46] In determining this relief, this Court would be interpreting, applying, and implementing s 197 of the LRA, matters which in my view, as I have indicated above, fall squarely within the exclusive jurisdiction of the Labour Court.

[47] The declaration sought by the applicants cannot be granted on the basis of the parties' agreement, in clause 13.6 of the outsourcing agreements, that '[s]hould this Agreement be terminated for any whatsoever reason and, should the Client continue providing nursing and caring services beyond the termination of this agreement, then, and in that event, said termination will attract the provisions of Section 197 of the LRA'.

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plea of res judicata (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of the two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court. But where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts' (para 27).

[48] The question whether or not the provisions of s 197 of the LRA are triggered by the termination of the outsourcing agreements depends on whether, in terms of s 197(1) of the LRA, the termination of the outsourcing agreements will give rise to the transfer of a business by one employer to another employer as a going concern.

[49] The Constitutional Court and the Labour Appeal Court have made it clear that this is a matter to be determined objectively on all the facts, and not on the basis of the intention of the transferor and transferee.

[50] In *South African Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd & Others* (2005) 26 ILJ 67 (LAC) (*SAMWU*) the Labour Appeal Court observed that it is clear from the minority judgment of Zondo JP in the Labour Appeal Court and the judgment of the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town and Others (NEHAWU)*[11] that 'the intention of the transferor and the transferee does not play a critical role, let alone a decisive role' in the determination whether there has been a transfer of a business as a going concern.[12]

[51] Zondo JP stated in his minority judgment in *NEHAWU* that 'there will be cases where the transferor and the transferee agree that the workforce will be taken over by the transferee but the transaction cannot be described as transfer of the business as a going concern if many of the other factors that are relevant to a transfer being one of a going concern are absent'.[13]

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[11] 2003 (3) SA 1 (CC) (*NEHAWU* CC) and 2002 (4) BLLR 311 (LAC) (*NEHAWU* LAC)
[12] *SAMWU,* para 32
[13] *NEHAWU* LAC, para 65

[52] In the Constitutional Court, Ngcobo J said, on behalf of a unanimous court,

> 'The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What must be transferred must be a business in operation "so that the business remains the same but in different hands". Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of business as a going concern has occurred, such as the transfer or otherwise of assets, both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business has been carried on by the new employer.'[14]

[53] This is a determination to be made by the Labour Court, in the light of all the facts placed before it, and on the basis of the extensive jurisprudence developed in the labour courts on the application and implementation of s 197 of the LRA.

[54] I find that the matters raised by the declarator and the interdict sought in respect of the application and implementation of s 197 are matters which

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[14] *NEHAWU* CC, para 56

fall within the exclusive jurisdiction of the Labour Court and therefore outside this court's jurisdiction.

The declaratory relief in respect of termination

[55] The applicants seek a declaration that the outsourcing agreements were validly cancelled, on two months' notice, on 6 July 2020, and will terminate on 31 August 2020.

[56] They do so in circumstances in which PGR and Gragood, having given two months' notice of termination of the agreements in terms of s 20.4 of the outsourcing agreements on 6 July 2020, subsequently (on 16 July 2020 in the case of Gragood and on 28 July 2020 in the case of PGR) purported to terminate the agreements summarily.

[57] The respondents contend that their subsequent 'summary termination' of the outsourcing agreements was the effective termination.

[58] This is not a matter which requires the interpretation, application or implementation of s 197 of the LRA. It can be decided on the application of the facts to the pertinent clauses of the outsourcing agreements. It is accordingly not a matter within the exclusive jurisdiction of the LRA, but within the concurrent jurisdiction of this court and the Labour Court.

[59] However, a valid termination of the outsourcing agreements would be a necessary element of the cause of action of any party seeking a declarator or interdict in the Labour Court in respect of the application or

implementation of s 197 of the LRA to the employees of Procare who have been providing services to the respondents.

[60] I am mindful that if this court were to determine the question whether (and if so, on what date) there has been a valid termination of the outsourcing agreements, the prosecution of any proceedings instituted in the Labour Court in respect of the application or implementation of s 197, might be delayed pending the determination of any appeal against this court's decision in a different set of courts, to the detriment of those seeking relief in the Labour Court, and in particular the affected employees (in respect of whom retrenchment proceedings have already commenced).

[61] The courts have accepted that where a court has jurisdiction over part of a cause of action, it may assume jurisdiction over the whole cause of action, albeit that the remainder of the cause of action would fall under the jurisdiction of another court, on the basis of the common law doctrine of 'continentia causae' (cohesion of a cause of action) where considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause.

[62] The doctrine, first analysed by the Appellate Division in *Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd* 1962 (4) SA 326 (A) at 336D-E and further developed by the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) para 22, has been applied (a) in circumstances where jurisdiction over one cause of action is 'split' between courts in different geographical divisions; and (b) by a court

with jurisdiction over part of a cause of action which assumes jurisdiction over the whole of the cause of action.

[63] However I do not think this means that the doctrine cannot be applied where jurisdiction over a cause of action is split between the High Court and a specialist court such as the Labour Court, nor that this court could not decline to exercise its jurisdiction over part of a cause of action in favour of the Labour Court exercising jurisdiction over the whole of the cause of action. Such an application of the doctrine would in any event, in my view, fall within this Court's inherent jurisdiction under s 173 of the Constitution to develop the common law in the interests of justice.

[64] I find that it is in the interests of justice, convenience and good sense that jurisdiction over this issue should be exercised by the Labour Court and not this court.

The payment relief

[65] Procare seeks the payment by the respondents of the sum of R216 029.57, the total sum reflected in pro forma accounts or 'sales orders' sent to the respondents on 15 July 2020 in respect of services provided to the respondents for the month of July 2020. This relief is sought urgently so that Procare is in a position to pay the relevant employees' salaries.

[66] Procare's cause of action in this instance is based upon the contractual relationship between the parties, and does not require any interpretation or application of s 197 or any other provision of the LRA. It is accordingly not a matter within the exclusive jurisdiction of the Labour Court. Whether or

not the Labour Court shares concurrent jurisdiction with this court is not a matter which I am required to decide, as the matter falls within the jurisdiction of this court and there is in my view no compelling reason based on convenience or any other consideration why the issue should not be determined by this court.

[67] It is common cause that the practice followed by the parties in respect of payment for Procare's services was as follows:

(a) Before the 25th day of every month, Procare would send pro forma accounts or 'sales orders' to PGR and Gragood in respect of permanent staff providing services at the respondents' various facilities.

(b) PGR and Gragood would pay Procare in advance in terms of the pro forma accounts.

(c) Procare would pay its employees' salaries.

(d) At the end of the month, Procare would draw up a reconciliation of its accounts, now including Procare's commission of 15% as well as VAT of 15%, reflecting the amount still due and payable by PGR and Gragood.

(e) PGR and Gragood would pay, in terms of the reconciled accounts, any sum still due and payable to Procare.[15]

[68] Procare concedes that there is a dispute in respect of the full outstanding amount due and payable to it by the respondents in respect of the services of permanent and non-permanent staff for the month of July 2020 as reflected in the accounts provided to the respondents at the end of June 2020. It is expressly stated in the founding affidavit filed on behalf of Procare:

> 'It is common cause that there is a dispute in respect of the full outstanding amount due and payable to the First Applicant. Either party can institute action proceedings in relation to this dispute at a later stage'.

[69] Procare contends that the amount due and payable in terms of the sales orders is on a different footing and can be dealt with in this application.

[70] The respondents, in their answering affidavit, do not deny their indebtedness arising from the sales orders generated on 15 July 2020, but aver that their indebtedness has been extinguished by set-off against it of Procare's indebtedness to them in respect of a counterclaim which they intend to bring.

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[15] The respondents do not deny that this is the practice which has been followed, although it is averred in paragraph 236 of the answering affidavit that '[t]he practice cannot override the terms of the agreement'.

[71] In response to Procare's reliance on the sales orders, the following averments are made in the respondents' answering affidavit:

> '251. First and Second Respondents deny liability to pay any of the sums claimed, *owing to the far larger sum which is owed to it by First Applicant*.
>
> 252. The fact that there may be sales orders does not detract from the fact that *whatever indebtedness there may otherwise have been*, has been extinguished through set-off.' (Emphasis added.)

[72] What has been placed in dispute is not the respondents' indebtedness for the amounts reflected in the sales orders, but the respondents' liability to pay those amounts. The basis on which the respondents deny liability is that they have a counterclaim against the applicants for an amount which exceeds the amount claimed in terms of the sales orders.

[73] However, it is apparent from the relevant averments in the answering affidavit that the counterclaim relied upon by the respondents is an *anticipated* counterclaim based upon the respondents' *suspicion* that Procare has been 'double billing' in respect of certain staff. The counterclaim is still, on the respondents' own version, in the process of being quantified.

[74] The key averments in the answering affidavit are as follows.

- 'The First and Second Respondents *suspect* that the First Applicant has been double billing the First and Second Respondents for permanent and temporary staff.'

- ‘To this end, what is required is for a *full debatement* of all accounts in order to *establish the extent* of the *suspected* double billing, over the full period of the contract term.’

- ‘The First and Second Respondents are of the *prima facie view*, at this stage, that they *will have* a collective counterclaim against the First Applicant for an amount of approximately R1, 500, 000.00 … as a result of the *suspected* double billing.’

- ‘First and Second Respondents contend that the First Applicant owes them in the region of R1,5 million in respect of overcharging on the contracts, charging for personnel that was not supplied and using personnel that was supposed to have delivered services under the parties’ contracts for home based care and getting residents to pay First Applicant directly for this.’

- ‘The parties are in the process of doing a *reconciliation* in this regard.’

(Emphasis added.)

[75] It is apparent from these averments that the respondents have not established a debt which can be set off against their debt to Procare arising from the sales orders.

[76] It is trite that set-off comes into operation when two parties are mutually indebted to each other and both debts are liquidated and due and payable (*Schierhout v Union Government (Minister of Justice*) 1926 AD 286). As explained in *Christie's The Law of Contract in South Africa*:[16]

> 'For set-off to operate the defendant must be in a position to say "the plaintiff owes me a debt", rather than "I have a claim against him". That is to say the debt must be liquidated…"

[77] A debt is liquidated only when it is 'based on a liquid document or is admitted or its money value has been ascertained or in the sense that it is capable of prompt entertainment' and the decision as to whether or not a debt is capable of speedy ascertainment is a matter left for determination to the individual determination of the judge (*Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 469F and 470D).

[78] Set-off does not take place where a claim is based on an account which requires detailed examination (*Bhima v Proes Street Properties (Pty) Ltd* 1956 (1) SA 458 (T) at 460F) or prolonged investigation (*Whelan v Oosthuizen* 1937 TPD 304 at 311).

[79] The respondents have not in my view established a debt owed to them by Procare which is liquidated, or due and payable.

[80] They have accordingly not set up a dispute of fact such as to defeat the grant of the payment relief on the papers.

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[16] RH Christie, GB Bradfield, 6th edition p495

Costs

[81] The applicants have succeeded in respect of only a small portion of the relief sought in their Notice of Motion, and have been substantially unsuccessful. In the circumstances I am of the view that the applicants should pay 80% of the respondents' costs.

Order

[82] I make an order in the following terms:

(a) The applicants' non-compliance with the Uniform Rules of Court relating to the service of documents and timeframes is condoned and the matter is heard as an urgent application in terms of Rule 6(12)(a) of the Rules.

(b) The first respondent shall pay the first applicant the amount of R150 821.82 in respect of sales orders SO024 and SO022 dated 15 July 2020, within seven days of this order being granted.

(c) The second respondent shall pay the first applicant the amount of R65 207.75 in respect of sales order SO023 dated 7 July 2020, within seven days of this order being granted.

(d) The application in respect of the relief sought in prayers 2, 3, 4, 5 and 6 of the Notice of Motion is dismissed.

(e) The applicants jointly and severally shall be liable for 80% of the respondents' costs.

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Michelle Norton
Acting Judge of the High Court
Western Cape Division

APPEARANCES

For Applicants:	T Ellerbeck Instructed by Waldick Jansen Van Rensburg Inc. Centurion c/o Le Roux Attorneys Cape Town
For First and Second Respondents:	R Stelzner SC Instructed by STBB/Smith Tabata Buchanan Boyes Cape Town