

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) 38/2022
CC/0011/2022**

In the matter between -

TAU MAKHALEMELE

APPELLANT

and

**BOARD OF ENQUIRY OF THE NATIONAL
SECURITY SERVICE
1STRESPONDENT**

**NATIONAL SECURITY SERVICE
2NDRESPONDENT**

**MINISTER OF LAW AND JUSTICE
3RDRESPONDENT**

**MINISTER OF DEFENCE
4THRESPONDENT**

**ATTORNEY GENERAL
5THRESPONDENT**

CORAM: KE MOSITO P
P MUSONDA AJA
M CHINHENGO AJA
J VAN DER WESTHUIZEN AJA
NT MTSHIYA AJA

HEARD: 19 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

The jurisdiction of a court is determined on the basis of the pleadings and not the substantive merits of a case. The Notice

of Motion prayed for legislation to be declared unconstitutional and invalid, which is clearly a constitutional issue. Even though the supporting affidavit is vague and refers to disciplinary proceedings, it contains reference to the unconstitutionality of legislation. The High Court, sitting as Constitutional Court with three judges, had jurisdiction.

JUDGMENT

J VAN DER WESTHUIZEN, AJA:

Introduction

[1] The only issue in this appeal is the jurisdiction of the High Court, sitting with one judge as the High Court, *vis a vis* the High Court sitting with three judges as the Constitutional Court. An order of the High Court can be taken on appeal to this Court, the Court of Appeal of Lesotho, comprising of three judges: and an order of the High Court as Constitutional Court to this Court sitting with five judges in a constitutional matter.

In the High Court

[2] The appellant, an employee of the second respondent, approached the High Court, on the basis of urgency, sitting with three judges as Constitutional Court. The relevant prayers in the Notice of Motion sought an order –

“2(a) That the disciplinary case against the applicant before the Board of Enquiry of the National Security Service be stayed pending finalization of these proceedings

(b) ...

(c) That it is hereby declared that legal notice number 85 of 2010 National Security Services Act (Amendment of Schedules) Notice, 2021, is unconstitutional for violating section 70(1) of the Constitution ...”

[3] The first respondent opposed only the alleged urgency of the matter, but its counsel stated from the Bar that should urgency be found to exist, the jurisdiction of the court would be disputed. Urgency was so found. Counsel for both sides made oral submissions on jurisdiction. After the Court had requested written submissions, both sides submitted written argument.

[4] As in this Court, the appellant relied mainly on the wording of prayer 2(c) of the Notice of Motion, calling for an order that a legal notice was unconstitutional because it violated section 70(1) of the Constitution. The first respondent argued, as in this Court, that the founding affidavit had to substantiate and explain how the appellant’s constitutional rights under section 70(1) were affected.

[5] The High Court found that it had no jurisdiction as Constitutional Court. In a thorough judgment with numerous references to case law, it agreed with the argument put forward on behalf of the first respondent.

[6] The High Court’s extensive reasoning included references to several clauses of the Constitution. The core reason for its decision, however, relates to the contents of the pleadings.

{7} In paragraph 17 of its judgment the High Court stated:

“The applicant ... has failed, in his founding affidavit, to articulate the essence of the impugned law and how it allegedly

violate (sic) section 70(1) of the Constitution. Consequently, the court is in the dark as to the actual complaint of the applicant for it to determine whether it has jurisdiction to adjudicate over it.”

[8] This is followed up on in paragraph 19:

“In a nutshell (sic), the applicant has not pleaded any facts upon which he founds the constitutional jurisdiction of this court.”

The High Court especially relied on *Phaila v Director of Public Prosecutions and Others* (Const 24/2018) (2021) LSHC 07 918/3/2021).

Grounds of appeal

[9] According to the appellant, the court a quo “erred in finding ... that it did not have jurisdiction ... because the power to declare any law unconstitutional vests in the High Court in its Constitutional sitting ...”.

[10] The appellant is furthermore of the view that the High Court erred in the procedure it followed around the issue of jurisdiction. Depending on the conclusion reached regarding the first ground, it might not be necessary to deal with the last-mentioned.

Analysis

[11] Life and law are not one-dimensional. Complex legal disputes can often not easily be confined to separate boxes with neat and accurate labels. Thus, differences on the jurisdiction of the High Court in its general capacity and

specialized courts, or the High Court sitting as a specialized court for, for example labour and constitutional matters, fairly regularly have to be adjudicated by the very High Court itself, in one or the other capacity.

[12] Potential litigants have the right to choose which cause of action would best serve their interests; and thus which court or other forum to approach. At the same time though, what is referred to as “forum shopping” should be discouraged for a range of (sometimes obvious) reasons. Therefore the legislature and the courts try to stipulate rules or guidelines as to which forum is the correct one.

Significance of pleadings

[13] Causes of action often overlap. Authorities indicate that the determining factor as far as jurisdiction is concerned, is indeed the pleadings. Counsel for the first respondent relied on *Gcaba v Minister of Safety and Security* 2010(1) SA 238 (CC) at 263:

“Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case In the event of the Court’s jurisdiction being challenged at the outset ... , the applicant’s pleadings are the determining factor.”

The notice of motion

[14] In motion proceedings the Notice of Motion leads the procession of pleadings. In its prayers it states, up front, what relief an applicant wants from a court; or, in simpler language,

what the litigant approaching a court wants that court to do for her, him, or them.

[15] In this case, as indicated in [2] above, the applicant sought a declaration that a notice in terms of the National Security Services Act is unconstitutional. Few things can be a clearer constitutional issue than the constitutional validity or invalidity of legislation. If it does not fall within the jurisdiction of a constitutional court, one wonders what will fall within that jurisdiction.

[16] The appellant referred this Court to *Solé v Cullinan NO and Others* LAC (2000-2004) 572 and several other cases with regard to the practice which had developed over the last approximately 12 years or so that where the High Court exercises its constitutional jurisdiction in a matter which involves a challenge to the constitutionality of legislation or delegated legislation, the matter is heard, if possible, by a bench comprising three judges.

The affidavits

[17] However, the question of jurisdiction does not necessarily end with the Notice of Motion. In the paragraph from *Gcaba* quoted in [13] above, it was stated that –

“not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits ... must be interpreted to establish what the legal basis of the applicant’s claim is ...”.

[18] As indicated above, the court *a quo* was of the view that the applicant’s founding affidavit did not disclose a sufficient link to the constitutional relief mentioned in prayer 2(c) of the

Notice of Motion. The court's concern in this regard is understandable. The supporting affidavit mostly deals with how the applicant felt prejudiced by the disciplinary proceedings imposed onto him by his employer. The affidavit is no model of clarity, especially as far as the constitutional issue is concerned.

[19] However, the affidavit does make a distinction between the pending proceedings regarding the disciplinary process and the allegedly unconstitutional amendment of the National Security Service Act, which impacted on the schedule of ranks in the service. Besides the labour law and other implications of the averments in the affidavit, the unconstitutionality of legislation is referred to. The reference to section 70(1) of the Constitution seems to involve the source of the legislative amendment, rather than a specific right of the applicant.

[20] The remark in *Gcaba*, quoted in [17] above, about the relevance of the supporting affidavits in addition to the Notice of Motion, must be interpreted within the context of that case. The warning against "forum shopping" in [12] above is relevant. The decision dealt with the delineation of the Labour Court vis-à-vis the High Court in South Africa, where litigants tended to choose the one above the other for a range of sometimes doubtful reasons. Thus *Gcaba* points out that an applicant cannot be allowed to found jurisdiction by the merely formal use of terminology in the Notice of Motion, while the substance of the supporting affidavits actually establishes an altogether different cause of action.

[21] As is clear from the quotation in [13] above, *Gcaba* distinguished between the pleadings and the substantive merits of an application, for the purposes of jurisdiction. The court *a quo* seems to have over-emphasised the founding affidavit. The pleadings and the substantive merits were conflated. Whether the applicant has a strong or even just clear case for the relief sought is one thing; the *in limine* determination of which court has jurisdiction to pronounce on that very question is quite another.

[22] The court's reliance on *Phaila* in [8] above, raises a logical question relevant to the distinction between pleadings and substantive merits. In paragraph 11 of that judgment it is stated:

"As a starting point the applicant ... bears the onus to establish the alleged infringement of the Constitution. If there is no infringement then the enquiry ends right there and then ..."

Which enquiry though? Into the question of jurisdiction, or whether the applicant has made out a case for the relief sought? It seems like the starting point and the end point, or conclusion, are being confused. The starting point is to determine whether the court has jurisdiction to adjudicate the end result. It cannot be correct that an applicant has to prove the constitutional infringement simply to establish jurisdiction and get a hearing. If proof of the applicant's case for mere jurisdiction is required, little would, logically, remain to be decided. Conversely, if the applicant's case seems vague, unsubstantiated, or weak, another court may come to that same conclusion and also be left in doubt about its jurisdiction.

[23] A finding by a court that it lacks jurisdiction, does not in the first place mean that another court may also be able to hear the matter. Jurisdiction may only be declined if a court finds that it is not empowered to grant the relief sought. That cannot be said to have been the case before the court *a quo*, constituted with three judges, as required for a constitutional matter. Even though the line might have been a thin one, the court *a quo* incorrectly declined jurisdiction.

Concession

[24] During oral argument before this Court, it was conceded on behalf of the first respondent that the appeal must succeed and that the matter be remitted back to the High Court to be heard by three judges.

Procedure

[25] In view of the conclusion above, it is not necessary to deal with the procedural issues raised regarding the manner in which jurisdiction was raised as an issue.

Costs

[26] There is no reason why costs should not follow the result.

Order

[27] In view of the above, it is ordered that –

(a) the appeal is upheld, with costs; and

(b) the matter is remitted back to the High Court to be heard by three judges.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:



M CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



N MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV LA MOLATI
FOR RESPONDENT: ADV MJ NKU