



**REPORTABLE**

CASE NO: SA 70/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**SWAKOP URANIUM**

**Appellant**

and

**EMPLOYEES OF SWAKOP URANIUM AS PER  
SCHEDULE ANNEXURE "POC1"**

**ABEDNEGO KARIAB & 720 OTHERS**

**Respondents**

**Coram:** SMUTS JA, ANGULA AJA and UEITELE AJA

**Heard:** 28 October 2022

**Delivered:** 14 November 2022

**Summary:** The respondents are 721 employees of the appellant. The respondents instituted two separate actions in the court *a quo* for overtime remuneration which they allege is payable in terms of their contracts of employment. The two actions were consolidated and together amounted to claims in excess of N\$55 million. Their identical contracts of employment states that the conditions of employment 'are subject to the provisions of the Labour Act 11 of 2007 (the Act) or any other relevant Act which may regulate the employment relationship from time to time'. The

respondents' particulars of claim allege that the employees were each employed in a continuous operation on a shift basis and worked 56 hours per week, resulting in them working 11 hours per week in excess of ordinary hours permitted under the Act. They each claimed overtime in respect of these hours during the period March 2015 to September 2016. Their schedules were attached to both particulars of claim setting out the particulars of each employee and how that employee's claim was calculated. The appellant filed a special plea to the particulars of claim, the gist of which is that the High Court had concurrent jurisdiction to hear the claims but because they amount to disputes as defined in the Act, the time bars applicable to disputes would apply to the claims and that they had become extinguished after one year by virtue of the time limit in s 86(2)(b) of the Act. Essentially, the special plea sought the dismissal of all claims as being time barred under s 86(2)(b) of the Act and further declaring that those which arose more than three years before the service of summonses had prescribed under the Prescription Act 68 of 1969 (the Prescription Act).

The *court a quo* dismissed the appellant's special plea with costs, with reference to the approach in *Nghikofa v Classic Engines CC 2014 (2) NR 314 (SC)* which found that the Act did not exclude the jurisdiction of the High Court in respect of common law claims for damages arising from contracts of employment. The *court a quo* found that the employees were entitled to pursue their common law contractual claims in the High Court. With regards to the special plea raising forum shopping, the *court a quo* considered that the claim was for damages for breach of contract and that an arbitrator is only authorised to make an award of compensation and not damages. It found that, by choosing to initiate their claim in the High Court did not amount to forum shopping. The appellant is appealing against the judgment and order of the High Court.

On appeal, the court enquired on its own accord as to whether the High Court had jurisdiction to hear the matter – an issue which had not been raised by the special plea and also heard argument on that issue.

*Held that*, like the position in South Africa (as set out in *Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA)*), the Act is not exclusive of the rights and remedies that accrue to employees and employers upon termination or upon a breach of an employment contract. The Supreme Court's finding in *Nghikofa* makes that clear. Recognisable common law contractual remedies of repudiation, interdicts and a

damages actions may arise from a breach of contract of employment which are enforceable in the High Court.

*Held*, the fact that a breach of an employment contract may also, independently of the Act, give rise to the enforcement of a common law contractual remedy and may also amount to a dispute but this would not mean that the time bars contained in s 86(2)(b) would apply when those rights are enforced in that manner in the High Court. The time bars in s 86(2)(b) apply to the remedies invoked in the Act when referring disputes under the Act.

*Held that*, the appellant's approach as set out in their special plea is bad in law. This does not however mean that the High Court had jurisdiction to hear the employees' claim – the High Court would still need to have jurisdiction to hear the claims.

*Held that*, an examination of the nature of the cause of action and right(s) being asserted in support of the claims was required in order to determine whether the High Court has jurisdiction or not. If the right asserted solely arises from the Act and the Act provides a remedy for the breach of that statutory right in the form of referring a dispute, resulting in arbitration, then it would follow that the employee or employer would be limited to asserting that right (breach of the statutory right) and seek the remedy for its breach within the structures provided for by the Act.

*Held that*, the right asserted by the employees in this case is to require the appellant to comply with its statutory obligation to pay overtime as provided for in s 17 of the Act. This obligation does not arise independently under the common law of contract. It arises solely from the Act and has no basis under the common law of contract for the claims.

*Held that*, the right to payment for overtime within the context of shifts in a continuous operation arises from s 17, read with s 8 in Chapter 3 of the Act. The Act thus creates the rights and obligations in s 17 and creates a specific remedy to enforce the non-compliance with or contravention of those rights in the form of reporting a dispute to the Labour Commissioner who must in turn refer the matter to an arbitrator. A dispute of this nature falls squarely within the definition in s 84 as a complaint relating to the breach of basic conditions of employment set in the Act. The referral of such a dispute

is subject to the time limit in s 86(2)(b) of the Act and must be referred by a complainant to the Labour Commissioner within one year after the dispute arising in terms of s 86(2) of the Act.

It thus follows that the High Court lacked jurisdiction to hear this matter.

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## APPEAL JUDGMENT

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SMUTS JA (ANGULA AJA and UEITELE AJA concurring):

### Introduction

[1] The respondents are 721 employees of the appellant (Swakop Uranium), a firm conducting a uranium mine near Swakopmund. The employees instituted two separate actions in the High Court for overtime remuneration which they allege is payable in terms of their contracts of employment. The two actions were consolidated and together amount to claims in excess of N\$55 million.

### Pleadings

[2] The employees' claims were brought as actions in the High Court as contractual claims for amounts due under their employment contracts for overtime as a form of specific performance. Their identical employment contracts include a term which states that the conditions of employment 'are subject to the provisions of the Labour Act 11 of 2007 (the Act) or any other relevant Act which may regulate the employment relationship from time to time'.

[3] The particulars of claim allege that the employees were each employed in a continuous operation on a shift basis and worked 56 hours per week, resulting in them working 11 hours per week in excess of ordinary hours permitted under the Act. They each claim overtime in respect of these hours during the period March 2015 to

September 2016. Schedules were attached to both particulars of claim setting out the particulars of each employee and how that employee's claim was calculated.

[4] The appellant filed a special plea to the particulars of claim and pleaded over on the merits of the claims.

[5] The precise terms of the special plea are pertinent to this appeal, given the argument advanced on behalf of the appellant in this court, and are set out in full:

'1. The defendant pleads as follows:

- 1.1 The plaintiffs' claims have been instituted in the High Court of Namibia;
- 1.2 The High Court has concurrent jurisdiction to hear the matter as its jurisdiction has not been ousted, subject to what is stated below;
- 1.3 The plaintiffs' claims arose at least as on the date indicated in their particulars of claim, but at each and every end of the month in which the alleged shifts were worked;
- 1.4 The combined summons in Case No HC-MD-CIV-ACT-CON-2018/01449 (the Kariab action) was served on the defendant on 26 April 2018;
- 1.5 The combined summons in Case No HC-MD-CIV-ACT-00N-2018/04327 (the Amuthenu action) was served on the defendant on 5 November 2018;
- 1.6 Although the plaintiffs are entitled to institute their claims in the High Court of Namibia, the claims remain disputes as envisaged in section 86 of the Labour Act, 11 of 2007 ("the Act");

- 1.7 In terms of section 86(2)(b) of the Act such disputes must be instituted within one year after it (*sic*) arose, and in terms of the Prescription Act, 1969, within three years after they arose;
  - 1.8 Some of the disputes in this matter arose more than three years before summons was served, while all the disputes in this matter arose more than one year prior to the summons being served on the defendant.
2. The defendants special plea is accordingly threefold:
- 2.1 The High Court has concurrent jurisdiction to hear a dispute as envisaged in section 86 of the Act. However, the High Court does not have jurisdiction to hear a dispute after a twelve month period has lapsed. The High Court has concurrent jurisdiction, not superior jurisdiction.
  - 2.2 Alternatively, the High Court does not have power to hear a dispute instituted after the lapse of one year as envisaged in section 86(2)(b) of the Act. The disputes instituted in the High Court are indeed disputes as so envisaged. While an employee may have the right to institute a claim in the High Court (even in circumstances where the Labour Commissioner would also have jurisdiction to hear the matter), an employee cannot put himself/herself in a better position (as far as the lapsing of claims/disputes is concerned) by engaging in forum shopping. In short, the one year period is also applicable in circumstances when the employees instituted the claim/dispute in the High Court.
  - 2.3 Alternatively, those disputes which arose more than three years before summonses were served, are prescribed as envisaged in the Prescription Act, 1969. The dates are mentioned in the Particulars of Claims.'

[6] The special plea sought the dismissal of all claims as being time barred under s 86(2)(b) of the Act and further declaring that those which arose more than three years before the service of summonses had prescribed under the Prescription Act 68

of 1969 (the Prescription Act). This latter aspect is no longer in issue as the respondents correctly accepted in the court below that claims which arose more than three years before service of summons had become prescribed.

[7] The gist of the special plea, as pleaded, is that the High Court has concurrent jurisdiction to hear the claims but that, because they amount to disputes as defined by the Act, the time bars applicable to disputes would apply to the claims and that they had become extinguished after one year by virtue of the time limit in s 86(2)(b) of the Act.

#### The approach of the High Court

[8] The High Court dismissed the appellant's special plea with costs. The court referred to the approach of this court in *Nghikofa v Classic Engines CC*<sup>1</sup> which found that the Act did not exclude the jurisdiction of the High Court in respect of common law claims for damages arising from contracts of employment.

[9] This court in *Nghikofa* found that there was an absence of a clear legislative provision which required the respondent in that matter to bring its counterclaim for damages under an employment contract in dispute proceedings under the Act.

[10] The High Court found that there was a distinction between an expiry period in legislation in respect of claims against institutions like the police and the referral of disputes under the Act. The former relate to the institution of an action and the latter concerns the right of a party to refer a dispute. The court found that the dispute process and remedies in the Act for disputes are only available to parties if they refer their disputes within the specified periods in the Act in order to exercise the remedy

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<sup>1</sup> *Nghikofa v Classic Engines CC* 2014 (2) NR 314 (SC).

provided for in the Act. The court found that these time bars in the Act did not have an impact on the underlying nature of the debt in question and would not prevent the employees from bringing an identifiable action based on contract in the High Court.

[11] The court below concluded that the employees were entitled to pursue their common law contractual claims in the High Court.

[12] As to the alternative special plea raising forum shopping, the High Court referred to the elaborate dispute resolution system to resolve disputes in a speedy and cost-effective manner. The court found that exceptions to this scheme concern contractual claims for breach of employment contracts. The court considered that the claim was for damages for breach of contract and that an arbitrator is only authorised to make an award of compensation and not damages. By choosing to initiate their claim in the High Court did not, according to the court below, amount to forum shopping.

[13] The appellant appeals against that judgment and order.

#### Submissions on appeal

[14] In their written argument, counsel for the appellant contended that the respondents had sought to 'camouflage' a dispute as envisaged by s 84 of the Act by characterising it as a contractual claim so as to avoid the expiry periods for pursuing disputes under the Act.

[15] Counsel pointed out that s 86 of the Act required that a dispute of the kind pursued in the action must be instituted within one year after it arose and argued that



the employees' claims were instituted outside of the time bar provided for. Counsel confirmed that the appellant's special plea was that the claims were time barred and that the special plea did not raise the High Court's jurisdiction to hear the claims.

[16] In the course of oral argument, counsel submitted that the employees' claims fall within the definition of dispute and that their remedy lies within the provisions of the Act. Counsel pointed out that the claim invoked a right created in Chapter 3 of the Act and argued that the employees' remedy lay within the Act. The court enquired of its own accord as to whether the High Court had jurisdiction to hear the matter – an issue which had not been raised by the special plea – and counsel for the appellant later moved for an amendment to the special plea invoking a lack of jurisdiction. Counsel also correctly accepted that this court can of its own accord raise the question as to whether the High Court had jurisdiction and consider that issue, even if not raised in the special plea. Despite the terms of the special plea, counsel contended that it was not open to the employees to seek to enforce their claims in the High Court and thereby circumvent the time limitation contained in the Act.

[17] Counsel submitted that the Act put in place an elaborate dispute resolution system and that the court below had 'impermissibly allowed the (employees) to avoid the specialised institutions of the Labour Court and its specialised procedures by dismissing the appellant's special plea and allowing the matter to proceed before it'. This despite the appellant not raising a plea of jurisdiction in the High Court.

[18] It was further argued on behalf of the appellant that the employees had the option to report a dispute to the Labour Commissioner 'but did not have the option to refer the same dispute to another forum, in this instance, the High Court when they

realised that the exact same claim will be statutorily barred, if it is instituted in the Labour Tribunal' (*sic*).

[19] Counsel for the employees accepted that their claim for overtime pay falls within the definition of dispute in the Act and would amount to a complaint relating to the breach of contracts of employment. But, so it was submitted, this would not detract from the fact that the claims also amounted to common law contractual claims. Counsel referred to the approach of this court in *Nghikofa* where this court held that the High Court had jurisdiction in that matter to adjudicate upon a contractual claim asserting common law contractual remedies even if it also fell within the definition of dispute in the Act. Counsel for the employees also argued that an evaluation of the facts in this matter gave rise to causes of action under the common law, in the form of a contractual claim and also a dispute which may be referred for adjudication in Part C of Chapter 8 of the Act.

[20] When the court also enquired from counsel for the employees as to whether the High Court had jurisdiction to hear the matter, given the fact that the cause of action was a contravention of s 17 of the Act, counsel for the employees contended that the jurisdiction of the High Court would only be excluded 'if it is clear that legislation has confined the party to a particular remedy'. Counsel submitted that the Act did not confine parties to the dispute resolution procedure in Part C of Chapter 8 in the event of a contractual claim which also subsisted simultaneously with a dispute as defined. It was contended that the contravention of s 17 also involved a breach of the employees' contracts of employment because the provisions of Chapter 3 of the Act amounted to implied terms of the conditions of employment. This approach, counsel submitted, sat

comfortably with the well-established principle that the High Court's jurisdiction can only be excluded in the clearest language.

[21] It was also argued on behalf of the employees that the time bar in s 86 means that if a dispute is not referred within the prescribed period (of 12 months) only the remedy provided for in the Act is barred – amounting to a 'weak prescription' regime – and that the underlying right is not extinguished. This means that if the right could be pursued as a contractual claim, it was open for a party to do so.

[22] Given the fact that the court raised the question of the High Court having jurisdiction to hear the claims, counsel for the employees was invited to provide supplementary written argument on that question. In a further note filed, counsel for the employees subsequently declined the opportunity to file further written argument, standing by the written heads of argument filed and oral submissions made at the hearing.

#### Issue for determination

[23] Although the issue raised in the pleadings in this appeal is whether the special plea taken against the employees' claims is a good one and should be upheld on appeal or not, it was correctly accepted by both sets of counsel that the issue as to whether the High Court had jurisdiction to hear the matter at all can rightly be raised on appeal. Although its special plea amounted to the case the employees were required to meet and which the court below was required to consider, the antecedent question arises as to whether the High Court had jurisdiction to hear the matter at all.

[24] The special plea essentially pleads that the High Court has concurrent jurisdiction to hear the dispute (and thus does not take issue with the jurisdiction of the High Court to hear the matter) as envisaged in s 86 of the Act but pleads that it does not have jurisdiction to hear the dispute after the one year period set out in s 86 (2)(b) has lapsed. That was the appellant's case, which was dismissed by the High Court.

#### Statutory scheme

[25] The pleadings are to be considered and construed in assessing whether the High Court has jurisdiction to hear the claims and in particular whether the claims are of such a nature that they are required to be determined in accordance with the remedies provided for in the Act.<sup>2</sup> In order to determine this question, the statutory scheme of dispute resolution is to be considered.

[26] According to the long title of the Act, it was enacted to 'consolidate . . . the labour law' and 'establish a comprehensive labour law for all employers and employees'. A further objective set out in the long title is to 'regulate basic terms and conditions of employees' and also to 'regulate collective labour relations' and to provide for the 'systematic prevention and resolution of labour disputes'.

[27] Of relevance for present purposes are the provisions of Chapter 3 of the Act, regulating basic terms and conditions of employment, and Chapter 8 dealing with the prevention and resolution of disputes.

[28] Both sides focused their respective written submissions with respect to the chapter relating to disputes and in particular to Part C of Chapter 8. As will be shown,

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<sup>2</sup> *Baloyi v Public Prosecutor & others* 2022 (3) SA 321 (CC) para 33. See generally, *Gcaba v Minister for Safety & Security & others* 2010 (1) SA 238 (CC) para 75.

this only partially addresses the underlying question as to whether the issue raised by the claims can be heard by the High Court. That is because of the way in which the special plea has been pleaded. Its fundamental premise is that the High Court has concurrent jurisdiction to hear the dispute set out in the claims but pleads that, because the claim amounts to a dispute, the court would not have jurisdiction to hear the claims because they are time barred.

[29] The appellant argues that each claim constitutes a 'dispute' for the purposes of s 86(2)(b) as a consequence. It was only in oral argument that the appellant referred to the nature of the underlying statutory right asserted in the claims. The position of the employees is to accept that the claims amount to disputes for the purpose of the Act but that they also amount to a cognisable contractual claim enforceable at common law.

[30] Chapter 8 of the Act deals with the prevention and resolution of disputes. It includes Part C which establishes arbitration tribunals for the purpose of resolving disputes as defined in that Part.

[31] Section 84 defines disputes for the purpose of Part C in these terms:

'For the purposes of this Part, "dispute" means –

- (a) a complaint relating to the breach of a contract of employment or a collective agreement;
- (b) a dispute referred to the Labour Commissioner in terms of section 46 of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998);
- (c) any dispute referred in terms of section 82(16); or
- (d) any dispute that is required to be referred to arbitration in terms of this Act.'

[32] Section 86 in turn provides for the process of arbitration and includes s 86(2) which sets time limits for the referral of disputes to arbitration:

'(2) A party may refer a dispute in terms of subsection (1) only –

(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or

(b) within one year after the dispute arising, in any other case.'

[33] Disputes concerning dismissals must thus be referred within six months whilst one year applies to any other dispute as defined in s 84. Those time periods are peremptory,<sup>3</sup> because of the use of the term 'only' and given the statutory intention for disputes to be resolved and determined expeditiously, acknowledging the need for finality and certainty in the realm of employment relations.

[34] The fact that the employees' claims constitute disputes for the purpose of s 84 does not however mean that the time bar in s 86(2)(b) results in the High Court not having jurisdiction if the time limit has expired, as the appellant would have it. If the employees' claims also amounted to the assertion of an identifiable cognisable common law contractual claim separate and additional to the right referred to as a dispute, the High Court would have jurisdiction to hear the claim in accordance with the approach of this court in *Nghikofa*, as was correctly found by the High Court. In that event if the employees' claims amount to a separate claim enforceable as a common law contractual claim, then prescription would be determined in accordance with the Prescription Act.

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<sup>3</sup> *Lüderitz Town Council v Shipepe* 2013 JDR 0573 (NmL), *Namibia Development Corporation v Philip Mwandingi & others* LCA 87/2009 [2012] NALC 41 (3 December 2012).

[35] In *Nghikofa*, this court was concerned with a claim for damages arising from an employment contract. The appellant in that matter had referred a dispute for an unfair dismissal under the Act and the parties settled that claim. The respondent thereafter issued summons out of the High Court against the appellant for damages on the basis of making 'secret profits' causing the respondent employer to suffer damages. The appellant denied the High Court's jurisdiction to hear the claim because it related to a dispute arising from a contract of employment in terms of s 86 of the Act and that it was furthermore time barred under the Act.

[36] This court, per O'Regan AJA, held:

[16] Section 84 of the Act defines "dispute" to include "a complaint relating to the breach of a contract of employment of a collective agreement." Section 86 then provides that a party to a dispute may refer the dispute in writing to the Labour Commissioner or any labour office, which, in turn, may then be referred to conciliation as happened here.

[17] It appears that at no stage during the proceedings before the Labour Commissioner did the respondent raise the question of the contractual damages it had suffered. The Act does not expressly confer the power to determine contractual damages upon an arbitrator although s 86(15)(d) of the Act empowers an arbitrator to make "an award of compensation" but does not expressly mention damages. The High Court judge, in his judgment in this matter, expressed the view that an arbitration tribunal acting in terms of s 85 of the Act has no power to determine claims based on damages arising from contracts of employment. It is not necessary for this court to determine that question here. It is only necessary for this court to determine the narrower question: assuming that the respondent could have raised its damages claim before the Labour Commissioner, was it compelled to do so?

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

ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation.

...

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.'

[37] In *Fedlife Assurance Ltd v Wolfaardt*<sup>4</sup> cited with approval by this court, the respondent in that appeal had in South Africa instituted an action in the High Court claiming damages for the breach of a fixed term contract of employment. The respondent's claim was based on a repudiation of the contract by terminating his employment. The appellant had filed a special plea asserting that the Labour Court had exclusive jurisdiction in terms of the (South African) Labour Relations Act 66 of 1995 (LRA). The Supreme Court of Appeal (SCA) held that the clear purpose of the legislature in introducing a remedy against unfair dismissal in LRA was to supplement the common law rights of employees whose employment could otherwise be lawfully terminated at the will of an employer, by providing an additional right to an employee where an otherwise lawful termination was unfair.<sup>5</sup> The court proceeded to hold:

'[17] The 1995 Act does not expressly abrogate an employee's common law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.'

And, after analysing the nature of the claim in that matter, the court concluded:

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<sup>4</sup> *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

<sup>5</sup> Para 13 at 57F-H.



[21] . . .

In the present case a clearly identifiable and recognisable common law claim for damages has been pleaded. The disclosure of the employer's professed reason for repudiating the contract was mere surplusage and did not signal a resort to a claim under Chap 8.

[22] In my view Chap 8 of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the 1995 Act itself I do not think the respondent has been deprived of the common law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.<sup>6</sup>

[38] Turning to the questions as to whether the South African Labour Court had exclusive jurisdiction to hear a contractual damages claim relating to employment, the SCA held:

[25] Furthermore s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. . . . Its exclusive jurisdiction arises only in respect of "matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court". Various provisions of the 1995 Act identify particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed (see for example sections 9, 24(7), 26, 59, 63(4), 66(3), 68(1), 69 etc). In my view those are the "matters" that are contemplated by s 157(1) and to which the Labour Court's exclusive jurisdiction is confined . . .<sup>7</sup>

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<sup>6</sup> Paras 21 and 22.

<sup>7</sup> Para 25.

[39] Like the position in South Africa, the Act is not exclusive of the rights and remedies that accrue to employees and employers upon termination or upon a breach of an employment contract. *Nghikofa* makes that clear. Recognisable common law contractual remedies of repudiation, interdicts and a damages action may arise under common law which are enforceable in the High Court. A breach of a restraint of trade term in an employment agreement is but one example of the latter. It is not necessary for present purposes to delineate which common law contractual remedies in an employment setting are capable of being heard in the High Court. Some of these may simultaneously also constitute disputes under s 84 because they may arise from issues relating to a breach of contract of employment, as was held in *Nghikofa*.

[40] The fact that a breach of an employment contract would also, independently of the Act, give rise to the enforcement of a common law contractual remedy and may also amount to a dispute would not mean that the time bars contained in s 86(2)(b) would apply when those rights are enforced in that manner in the High Court. The time bars in s 86(2)(b) apply to the remedies invoked in the Act when referring disputes under the Act.

[41] The approach set out in the special plea in its present formulation is thus bad in law. It is furthermore incorrect to assert that the High Court has jurisdiction to hear disputes under the Act, although there was a retreat from this position in oral argument.

[42] It does not however follow that the unsoundness of the special plea means that the High Court has jurisdiction to hear the employees' claims. That court would still need to have jurisdiction to do so.

[43] In determining this issue, this entails an examination of the nature of the cause of action and right(s) being asserted in support of the claims in order to determine whether the High Court has jurisdiction or not. If the right asserted solely arises from the Act and the Act provides a remedy for the breach of that statutory right in the form of arbitration, then it would follow that the employee or employer would be limited to asserting that right (breach of the statutory right) and seek the remedy for its breach within the structures provided for by the Act.

[44] The right asserted by the employees is to require the appellant to comply with its statutory obligation to pay overtime as provided for in s 17 of the Act. It does not arise independently under the common law of contract. It arises solely from the Act and has no basis in the common law of contract for the claim.<sup>8</sup> Section 17 prohibits an employer from requiring or permitting an employee to work overtime except in accordance with an agreement to do so but that such an agreement must not require an employee to work more than ten hours overtime a week and not more than three hours of overtime a day. When overtime arises, s 17(2) requires an employer to pay an employee at a rate of one and one half of the hourly basic wage for overtime worked on Sundays and public holidays.

[45] Section 17 is contained in Part C of Chapter 3 of the Act. Section 9 states that the provisions set out in Parts C through to F of Chapter 3 are basic conditions of

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<sup>8</sup> See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 21 explaining the dictum in *Khumalo v Potgieter* 2001 (3) SA 63 (SCA) 66B.

employment which constitute the terms of employment contracts except where contracts contain more favourable terms. Where a dispute arises about the non-compliance with, contravention, application or interpretation' of Chapter 3 rights and obligations including s 17, s 38(1) of the Act provides a remedy to refer the dispute to the Labour Commissioner. The Labour Commissioner must then in terms of s 38(3) refer the dispute to an arbitrator to resolve through arbitration in accordance with Part C of Chapter 8 of the Act. That latter part includes s 86 which sets out the procedure and time limits within which such a dispute is to be referred.

[46] The employees' particulars of claim assert that their 'conditions of employment are governed by the provisions' of the Act and their attached contracts of employment. The attached written contract does not have any provision setting out the right to payment for overtime, but merely states that the contract is 'subject to the provisions' of the Act. Counsel for the employees correctly accepted that the basis for the claims is the right contained in s 17.

[47] The right to payment for overtime within the context of shifts in a continuous operation arises from s 17 of the Act, read with s 8. The particulars seek to enforce those statutory provisions.

[48] The Act thus creates the rights and obligations in s 17 and creates a specific remedy to enforce the non-compliance with or contravention of those rights in the form of reporting a dispute to the Labour Commissioner who must in turn refer the matter to an arbitrator. A dispute of this nature falls squarely within the definition in s 84 as a complaint relating to the breach of basic conditions of employment set in the Act. The referral of such a dispute is subject to the time limit in s 86(2)(b) and must be referred

by a complainant to the Labour Commissioner within one year after the dispute arising in terms of s 86(2).

[49] The Act, having created the rights and obligations set out in Chapter 3, has in my view confined a party complaining of non-compliance with those rights and obligations to the remedy expressly provided for in s 38. That party would have no further remedy arising from the non-compliance with those statutory rights and obligations. That is clear from the language employed by the legislature in the Act construed as a whole.

[50] This also applies to a dispute concerning an unfair dismissal under s 33 of the Act to which s 38 also applies. The Act creates the right not to be unfairly dismissed and if that right is asserted, a party is confined to the remedy contained in the Act for the contravention of that right by virtue of s 38.<sup>9</sup>

[51] If employees however also have contractual rights under the common law which may arise from a termination of employment, they may be asserted with their common law remedies, if applicable, in the High Court, as follows from *Nghikofa*.

[52] The labour forums created by the Act to provide remedies for the breach or interpretation of the rights and obligations under the Act have the exclusive power to enforce those statutory rights – to the exclusion of the High Court. This is also the position in South Africa as is spelt out in the incisive analysis of the SCA in *Makhanya*,<sup>10</sup> where the court found that a right under LRA is enforceable only in the forums created by the LRA:

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<sup>9</sup> This approach accords with the obiter remarks of the Deputy Chief Justice in *Masule v Prime Minister of the Republic of Namibia & others* 2022 (1) NR 10 (SC) para 38.

<sup>10</sup> *Makhanya* para 18 and 25.

[18] Thus to summarise:

- The Labour Forums have exclusive power to enforce LRA rights (to the exclusion of the high courts).
- The high court and the Labour Court both have the power to enforce common law contractual rights.
- The high court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.'

And concluding

[26] In the present context exclusive jurisdiction to enforce LRA rights has been assigned to the Labour Forums. But in respect of the enforcement of both contractual and constitutional rights the high courts retain their original jurisdiction assigned to them by the Constitution.'

[53] To sum up, as I have been at pains to point out, the employees' claims in this matter are based upon and arise from the right to overtime pay created in s 17 of the Act in Chapter 3. This right does not arise under their contract of employment even though that contract generally refers to the Act. Their action seeks to enforce that right to overtime payment under s 17. Section 38 expressly provides a remedy and a forum for the breach of that right. It is an expeditious, informal and inexpensive remedy in the form of a referral to the Labour Commissioner which is to be exercised within the time period specified in s 86(2)(b). That is the forum created by the Act and is to the exclusion of the High Court.<sup>11</sup> That is clear from the Act construed as a whole. That remedy is after all subject to an appeal or review to the Labour Court which is a division of the High Court.<sup>12</sup>

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<sup>11</sup> See also *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727 per Kotzé AJA.

<sup>12</sup> See generally *Masule v Prime Minister of the Republic of Namibia & others* 2022 (1) NR 10 (SC).

[54] The High Court accordingly lacked jurisdiction to hear the matter.

#### Conclusion and costs

[55] The special plea to the claims was unsound and was dismissed by the High Court. A special plea raising the jurisdiction of the High Court to hear the matter was not pleaded and should have been. Even in its absence, it is open to and indeed incumbent upon a High Court to be satisfied that it has jurisdiction to determine matters which come before it and for this court to be satisfied that the High Court had jurisdiction to hear the matter even if not dealt with there. This court pertinently raised the issue with both sides and invited argument on the question and permitted the filing of additional written argument because it had not been raised in the appellant's special plea. An amendment was sought during oral argument by the appellant to include a plea to that effect. In view of the manner in which the issue was raised, it is not necessary to consider that amendment. It could have had an impact upon costs had it been filed at an earlier juncture. Even though the appellant is substantially successful in the outcome of the appeal finding that the claim should have been dismissed for a lack of jurisdiction, this was not a consequence of its special plea, which was not sound in law. The appellant should have taken a special plea of jurisdiction, although possibly did not do so upon an imperfect appreciation of the impact of *Nghikofa* upon the matter.

[56] In our discretion, the appellant, not having properly raised the jurisdiction of the High Court (and even in argument after the issue was raised initially equivocated and contended for concurrent jurisdiction), it should not be entitled to the costs of appeal. It would be equitable in the circumstances if no order as to costs is made on appeal. The

same considerations apply in correcting the order of the High Court, given the fact that this issue was not raised or referred to in that court.

[57] The following order is made:

1. The appeal succeeds in part.
2. The order of the High Court is set aside and replaced with the following order:
  - '(a) The plaintiffs' claims as consolidated are dismissed for lack of jurisdiction of this court to hear and determine those claims.
  - (b) There is no order as to costs.'
3. There is no order as to the costs of appeal.

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**SMUTS JA**

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**ANGULA AJA**

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**UEITELE AJA**

## APPEARANCES

APPELLANT:

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and V Kauta)

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