CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 228/20

In the matter between:

UNION FOR POLICE SECURITY AND CORRECTIONS ORGANISATION Applicant

and

SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LIMITED First Respondent

KENSANI CORRECTIONS MANAGEMENT (PTY) LIMITED Second Respondent

JOHAN WAGENAAR Third Respondent

Neutral citation:	*Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] ZACC 41
Coram:	Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ, and Tshiqi J
Judgment:	Madlanga J (unanimous)
Heard on:	10 August 2021
Decided on:	12 November 2021

ORDER

On appeal from the High Court of South Africa, Limpopo Local Division, Thohoyandou:

1. Subject to paragraphs 2 and 3, leave to appeal is refused.
2. The costs orders granted by the High Court of South Africa, Limpopo Local Division, Thohoyandou and Supreme Court of Appeal are set aside.
3. The parties must each pay their own costs in the High Court, Supreme Court of Appeal and this Court.

JUDGMENT

MADLANGA J (Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ, and Tshiqi J concurring):

Introduction

[1] The applicant, Union for Police Security and Corrections Organisation, a registered trade union, challenges a judgment of the Thohoyandou Local Division of the High Court which upheld two of three exceptions. The exceptions were raised by South African Custodial Management (Pty) Limited, Kensani Corrections Management (Pty) Limited and Mr Johan Wagenaar, the first to third respondents, respectively. I explain the relationship between the parties presently. One of the exceptions that were upheld concerned an alleged breach of sections 23(1) and (2) and 17 of the Constitution.[1] In upholding the exception, the High Court took the view that – in the

[1] I quote these sections later.

face of the Labour Relations Act[2] which gives effect to the rights protected in section 23 of the Constitution – the principle of subsidiarity[3] precluded the applicant from directly relying on the Constitution instead of the Labour Relations Act. Before us, the applicant challenges that holding and persists in its direct reliance on the Constitution.

[2] The second exception that was upheld was about defamation. It succeeded on the basis that the particulars of claim did not disclose a cause of action insofar as the defamation claim was concerned. That was so because there was no discernible defamatory matter in what was alleged in the particulars of claim. The applicant takes issue with this and contends that the High Court failed to follow what this Court held in *Le Roux v Dey*.[4] That is, in assessing whether the published matter is defamatory, a court must look at it "through the prism of the Constitution and in relation to its values".[5]

[3] Must we overturn what the High Court held on these two exceptions? That is the main question. There is an additional question: was the High Court *functus officio*[6] on whether the alleged publication constitutes defamatory matter? The applicant says it was and that, therefore, it ought not to have entertained the exception on this issue. The argument is that this exception followed on a successful opposed application for an amendment. And, because one of the bases for opposing the amendment was that the amended particulars (which, for reasons given later, I call the latest amended particulars) would be excipiable because the alleged publication lacked defamatory matter, the grant of the amendment meant that the High Court had effectively pronounced against the respondents on this issue. Hence the *functus officio* contention.

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[2] 66 of 1995.

[3] In *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 53 the minority judgment by Cameron J held that the principle of constitutional subsidiarity dictates that "a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right". And the majority did not take issue with this holding.

[4] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

[5] Id at para 31.

[6] This is a concept used to signify that once a court has determined an issue, it cannot validly make a determination on the same issue again.

Background

[4] The applicant has members who are in the employ of the first and second respondents (employer respondents). The first respondent, a private company, provides prison services to the Department of Correctional Services in terms of a public-private partnership. It is responsible for the day-to-day operation of the Kutama Sinthumule Correctional Centre (Kutama). The second respondent, also a private company, is responsible for maintenance services and facilitating training, educational and social programmes at Kutama. The third respondent is the acting prison director at Kutama. He is alleged to be an employee of the employer respondents.

[5] Although the applicant makes much of some background material,[7] what I glean from the latest amended particulars of claim is that the dispute between the parties centres around an alleged denial by the respondents of access to Kutama for the purpose of exercising organisational rights. The denial was in response to a request by the applicant. At the time of the denial of access, an organisational rights agreement between the applicant and the employer respondents was in place. It had been concluded on 11 August 2015. Although on 18 December 2017 the employer respondents had given three months' notice to terminate the agreement, the notice period was not up when the applicant was denied access. A later request, also made before the notice period was up, was for the applicant to conduct meetings with its members at Kutama after hours. The latest amended particulars say this too was denied.

[6] In the original particulars of claim and in a first set of amended particulars of claim the applicant alleged that the denial of access constituted an infringement of its and its members' rights protected by sections 23(1) and (2) and 17 of the Constitution.[8]

[7] Around September 2014 the Department set up a task team to address employment related irregularities at Kutama. The task team found that, in respect of their employees, the employer respondents made pension fund contributions that were less than those made by the Department in respect of its employees. The employer respondents contributed 7.5%, whilst the Department contributed 16%. As a result, the task team concluded that these respondents were obliged to make contributions that match those of the Department.

[8] Section 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices". Section 23(2) provides:

As a result of this infringement, the applicant claimed R2 million in constitutional damages. In a later set of amended particulars (these being the latest amended particulars), which is the subject of the exception that is at issue before us, the applicant alleged this same infringement of constitutional rights. But, rather than claim constitutional damages, it now sought "appropriate relief for violation of its rights as envisaged in section 38 of the Constitution, which relief may include an interdict, a mandamus or such other relief as may be required to ensure that the [applicant's] rights [enshrined] in the Constitution are protected and enforced". This comes from the body or substantive part of the latest amended particulars of claim. The corresponding prayer at the end of these particulars is to similar effect. I emphasise that – unlike the original particulars and the first set of amended particulars – in this latest amendment there was no specific claim for an award of constitutional damages.

[7] In another claim, the applicant seeks damages in the sum of R1 million arising from defamation. The basis for the alleged defamation is the respondents' response when the applicant requested access to Kutama. The impugned response, which the applicant quotes word for word, said:

> "1. The application is disapproved.
> 2. ORA (Organisational Rights Agreement) is cancelled."

Presumably the "application" is the request for access.

[8] The applicant alleges that this response is defamatory because a reasonable reader would understand it to convey that—

(a) the applicant is not a registered trade union;

"Every worker has the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike."

And section 17 provides that "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

(b) the organisational rights agreement was no longer in place despite the fact that the notice period was to run for just over three more months;

(c) the applicant was banned from Kutama contrary to section 23 of the Constitution;

(d) the applicant is a trade union that is not disciplined and does not function in an efficient manner;

(e) the applicant was acting unreasonably;

(f) the applicant was not conducting its affairs in a lawful and honest manner; and

(g) the applicant was acting contrary to the provisions of the Correctional Services Act[9] and Regulations made in terms of that Act.

[9] In a third claim, the applicant is also claiming, on behalf of each of its 540 members employed by the employer respondents, damages arising from depression, mood swing disorders, post-traumatic stress disorder, self- and bodily-image disturbance and phobic response behaviour. All these are allegedly caused by the respondents' conduct of denying the applicant access to Kutama. The claim is for R200 000 per member and totals R108 million for all 540 members. And there is a related claim for R2 000 per member for psychological treatment. This totals R1.08 million.

[10] The respondents excepted to the latest amended particulars. The first exception was directed at the first claim, the alleged constitutional infringement and the relief sought in terms of section 38. The ground of exception is to the effect that the principle of subsidiarity precludes the applicant from invoking the Constitution directly (first exception). The applicant should rather rely on, or attack the constitutional validity of legislation enacted to give effect to the constitutional right at issue (the Labour Relations Act, in this instance). According to the respondents, the particulars of claim did not make out a cause of action in this regard.

[9] 111 of 1998.

[11] The second exception was directed at what the respondents described as the applicant's claims for "constitutional damages . . . brought in delict". This exception identified two sets of specific paragraphs in the latest amended particulars of claim.[10] The terms of this exception were copied from an earlier exception noted against the original particulars of claim. Although the two corresponding sets of paragraphs[11] in the original particulars of claim indeed contained claims for damages, the first of the two identified sets of paragraphs in the latest amended particulars of claim did not assert a claim for damages. Only the second set did, and it asserted the third claim, i.e. the claim for damages in respect of emotional harm allegedly suffered by the applicant's members and the cost of related medical treatment. In truth, therefore, the second ground of exception could relate only to the third claim.

[12] The third and last exception claims that the words "[t]he application is disapproved" and the "organisational rights agreement is cancelled" are neither *per se* defamatory nor capable of conveying, to a reasonable reader, a meaning which defames the applicant. Another point raised in the exception is that the person alleged to have communicated the supposedly offensive words is the first respondent's employee, and so is the person to whom the words are alleged to have been communicated. Put simply, on the applicant's own allegations, the words constituted internal communication within the first respondent and there is thus no publication, which is necessary for a defamation claim. For these two reasons, assert the respondents in the third exception, the defamation claim fails to make out a cause of action.[12] In oral argument, the respondents did not press the point about lack of publication. In fact, in their written submissions they proceeded from an assumption that there was publication.

[10] Those two sets of paragraphs were 17-26 and 33-8.

[11] That is, corresponding in terms of the numbering, namely 17-26 and 33-8.

[12] The High Court did not decide the lack of publication point.

[13] For reasons that have not been explained to us, the High Court did not deal with the second exception. It upheld the first and third exceptions. Leave to appeal was refused by both the High Court and Supreme Court of Appeal.

[14] Before us the applicant argues that the principle of subsidiarity does not find application. Relying on this Court's judgment in *Pretorius*,[13] it submits that the application of this principle is complex. In this regard, the Labour Relations Act is not national legislation that gives effect to the section 23 constitutional right. Also, continues the submission, there is no national legislation that gives effect to the section 17 constitutional right; therefore, the principle of subsidiarity does not come into the equation insofar as this right is concerned.

[15] Further, the applicant contends that the way in which the High Court applied the principle of subsidiarity is unacceptably rigid. Relying on *Maoke*,[14] it argues that the High Court ought to have recognised the fact that the Labour Relations Act does not profess to encapsulate every instance of unfair labour practice. For this proposition, reliance was also placed on this Court's judgment in *Pretorius*.[15]

[16] On the exception that concerns the defamation claim, the applicant suggests that the rights to dignity, privacy, assembly and fair labour practices and the right to participate in the lawful activities of a trade union are implicated. It also argues that the question whether the published matter is defamatory must be viewed "through the prism of the Constitution and in relation to its values".[16]

[17] Finally, the applicant raises the *functus officio* point. I have explained it fully above. And I need say nothing more on it.

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[13] *Pretorius v Transport Pension Fund* [2018] ZACC 10; 2019 (2) SA 37 (CC); 2018 (7) BCLR 838 (CC) at para 50.

[14] *Maoke v Telkom SOC Limited* (2020) 41 ILJ 2414 (GP) at para 32.

[15] *Pretorius* above n 13.

[16] *Le Roux v Dey* above n 4 at para 31.

[18] On jurisdiction, the applicability of the principle of subsidiarity is a constitutional issue. Therefore, that aspect does engage our jurisdiction. Coming to the defamation related exception, I do not see how the rights to dignity, privacy, assembly and fair labour practices, which the applicant claims are implicated, bear relevance to what is at issue. Before us is not whether these rights have been infringed. Nor does the applicant give an explanation on their possible relevance. On the question whether there is any defamatory matter, let me first quote what this Court held in *Le Roux v Dey*:

> "The High Court was correct in concluding that, in assessing whether the publication is defamatory a reasonable observer would look at it through the prism of the Constitution and in relation to its values. This means that a court too must do the same. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. When a court assesses whether a publication is defamatory through the prism of the Constitution, it is concerned with the interpretation, protection and enforcement of the Constitution."[17]

[19] I am not convinced that in the present case anything at all has been alleged to indicate how a constitutional lens would make a difference. That for me was crucial in the present case, i.e. where, based on the High Court judgment, the assertion that the matter in issue is defamatory is tenuous. This is not going against the authority of *Gcaba*[18] where this Court – relying on *Chirwa*[19] – held that "[j]urisdiction is determined on the basis of the pleadings . . . and not the substantive merits of the case".[20] But then "[a]n issue does not become a constitutional matter merely because an applicant calls it one".[21] If – upon a mere allegation that the matter in issue is defamatory and without more – our jurisdiction is engaged, then every matter in which there is a contest on whether there is defamatory matter will engage our jurisdiction. We may not entertain

[17] Id.

[18] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[19] *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR (CC) at para 169.

[20] *Gcaba* above n 18 at para 75.

[21] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

the matter only if – for whatever reason – it is not in the interests of justice to do so. That cannot be. This is not a floodgates point. Rather, it is a question of jurisdiction.

[20] My conclusion is that on both bases the applicant has failed to show how our jurisdiction is engaged on the third exception. It has succeeded in merely dressing its challenge to the High Court's holding on the third exception in constitutional garb, which is unavailing.

[21] Lastly on jurisdiction, there is no elucidation on how exactly the contention that – when deciding the third exception – the High Court was *functus officio* raises a constitutional issue. And this *functus officio* point has been pleaded in so mundane a manner that I just do not see how it could possibly engage our jurisdiction.

[22] This leaves us with only the exception that relates to the principle of subsidiarity, which – as I have held – does engage our jurisdiction. Is it in the interests of justice to grant leave to appeal in respect of this exception? As indicated earlier, examples of the relief claimed by the applicant in respect of the alleged breach of constitutional rights which the applicant specifically itemises are "an interdict, a mandamus or such other relief as may be required to ensure that the [applicant's] rights [enshrined] in the Constitution are protected and enforced". The alleged denial of access occurred while the organisational rights agreement had just over three months to run. Nothing stopped the applicant from enforcing compliance with the agreement through seeking an interdict, a mandamus or any other suitable relief. In fact, the organisational agreement itself provided for a dispute resolution mechanism. It made provision for referral to the Commission for Conciliation, Mediation and Arbitration.[22] And none of this required directly invoking section 23 of the Constitution. Indeed, the right of access to the workplace is protected in section 12 of the Labour Relations Act. To the extent that

[22] For completeness, here is what it provided:

> "Any dispute shall be referred to the CCMA in accordance with the Labour Relations Act. Any party not satisfied with the outcome of arbitration has the right to take the outcome on review. Any party can approach any court including the Labour Court for any matter relating to the dispute as provided for in the Labour Relations Act."

only just over three months were left, the applicant could have sought to enforce the agreement by way of urgency.

[23] The application lacks reasonable prospects of success. In the circumstances of this case, this interests of justice factor is dispositive of the application. Leave to appeal must be refused.

[24] Finally, the applicant challenges the costs orders granted against it by both the High Court and Supreme Court of Appeal. The applicant argues that *Biowatch*[23] ought to have applied since the respondents are acting as organs of state and because the applicant has consistently raised constitutional issues.[24] I agree. I do not think the fact that the applicant failed to establish a constitutional issue in respect of some of its arguments must alter the position. It is so that the claims, or at least some of them, are – to put it mildly – questionable, but I do not think the applicant strayed beyond the protection afforded by *Biowatch*.[25] Thus, the costs orders of the High Court and Supreme Court of Appeal must be set aside, and the parties must each pay their own costs in those Courts and in this Court.

Order

[25] The following order is made:

1. Subject to paragraphs 2 and 3, leave to appeal is refused.
2. The costs orders granted by the High Court of South Africa, Limpopo Division, Thohoyandou and Supreme Court of Appeal are set aside.
3. The parties must each pay their own costs in the High Court, Supreme Court of Appeal and this Court.

[23] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-3.

[24] See *Allpay Consolidated Investment Holdings (Pty) Limited v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 52 for an example of where a private entity was treated as an organ of state. See also *Ferguson v Rhodes University* [2017] ZACC 39; 2018 (1) BCLR 1 (CC) at para 20 and *Hotz v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC); 2017 (7) BCLR 815 (CC) at para 22.

[25] *Biowatch* above n 23 at para 24.

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