

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

**Reportable
Case No. JA 129/2022**

In the matter between:

NGOAKO MOROPENE

Appellant

and

COMPETITION COMMISSION OF SOUTH AFRICA

First

Respondent

TEMBINKOSI BONAKELE

Second Respondent

MAKGALE MOHLALA

Third Respondent

Heard: 27 February 2024

Delivered: 26 April 2024

Coram: Molahlehi AJP, Nkutha-Nkontwana JA, Jolwana AJA

JUDGMENT

JOLWANA, AJA

Introduction

- [1] This appeal concerns the dismissal of the appellant in circumstances in which no formal disciplinary inquiry was conducted before his dismissal for his failure to declare his

previous criminal convictions to his employer. The appellant referred his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the said referral culminated in settlement negotiations between the parties. One of the main contentious issues before the Labour Court was whether those settlement negotiations resulted in the settlement of *all* the appellant's claims emanating from the said dismissal. The appellant had approached the court *a quo* by means of motion proceedings seeking reinstatement or in the alternative, damages to vindicate his contractual right to a formal disciplinary inquiry which he claimed he was entitled to prior to being dismissed. The court *a quo*, per Mahosi J, concluded that the settlement negotiations did not result in the full and final settlement of all his claims. It further concluded that the first respondent had a discretion on whether or not to hold a formal disciplinary inquiry. The court, on that basis, dismissed the appellant's claim. The appeal is against the court *a quo*'s dismissal of the appellant's claim. The respondents have also lodged a cross-appeal against the court *a quo*'s finding that the matter had not been settled in full.

The parties

- [2] The appellant was an employee of the first respondent and had risen to the position of a Principal Investigator in the first respondent's Cartel's Division at the time of his dismissal.
- [3] The first respondent is the Competition Commission of South Africa (Commission), a statutory body established in terms of the Competition Act¹. Some of the Commission's stated purposes in the Act are that it is responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position and business mergers. It also promotes and maintains competition in the business sector so as to provide consumers with competitive prices amongst other things.
- [4] The second respondent was the Commissioner and therefore the chief executive officer of the Commission at the time of the appellant's dismissal. In his capacity aforesaid, he dismissed the appellant. The third respondent was the Divisional Manager in the Cartel's Division of the Commission. He was, therefore, the immediate supervisor of the appellant and he was alleged to have participated in the appellant's dismissal.

Factual background

¹ Act 89 of 1998.

- [5] The facts in this matter are largely common cause and are largely without any controversy. In June 2005, the appellant was employed as a graduate trainee in the Commission's Enforcement and Exemptions Division. In September 2006, he was appointed to the position of a graduate trainee in the Legal Services Division. In July 2007, he was promoted to the position of Legal Counsel in the Legal Services Division. In January 2012, he was again promoted to the senior position of Senior Legal Counsel in the Legal Services Division. He served as such until the end of June 2016. In July 2016, he was appointed to the last senior position of Principal Investigator in the Cartel's Division. He served in that position until he was dismissed on 29 November 2019.
- [6] On 28 November 2019, the second respondent wrote a letter to the appellant giving him 48 hours within which to show cause why he should not be dismissed with immediate effect. This was apparently because the second respondent had discovered that the appellant had criminal conviction records for house-breaking with intent to steal and theft which occurred in 1999, before he joined the Commission as a graduate trainee. It was alleged that his last two positions with the Commission were senior positions. It was common cause that the appellant had failed to disclose the said criminal convictions when he applied for the position of Senior Legal Counsel in the Legal Services Division and when he was appointed to the position of Principal Investigator in the Cartel's Division. The failure to make the disclosures when he was being considered for the two senior positions was deemed as constituting misrepresentation of a material nature in respect of the appellant's pre-employment history.
- [7] On 29 November 2019, the appellant's attorneys wrote a letter on his behalf informing the second respondent that the appellant's criminal record was already expunged prior to these senior positions being advertised. It was indicated therein that the said expungement was in terms of section 271B of the Criminal Procedure Act². Despite this

² Act 51 of 1977. Section 271B reads:

'(1)(a) Where a court has imposed any of the following sentences on, or has made any of the following orders in respect of, a person convicted of an offence, the criminal record of that person, containing the conviction and sentence or order in question, must, subject to paragraph (b) and subsection (2) and section 271D, on the person's written application, be expunged after a period of 10 years has elapsed after the date of conviction for that offence, unless during that period the person in question has been convicted of an offence and has been sentenced to a period of imprisonment without the option of a fine...

response from the appellant's attorneys, the second respondent wrote a letter to the appellant on 29 November 2019 dismissing him with immediate effect. The appellant contended that this dismissal was an unlawful termination of his employment contract which still had 20 months left before it expired at the time of its termination. He contended in the Labour Court that his dismissal was unlawful as it offended the constitutional principle of legality and sought specific performance of reinstatement and, in the alternative, damages in the sum of R3 500 000.00 being the remuneration he would have earned had his contract of employment been allowed to run its full course.

[8] The appellant's contention was that, in terminating his employment contract without a formal fully fledged disciplinary hearing, his right to a disciplinary inquiry was infringed and that such infringement rendered the dismissal unlawful as his contractual right to a hearing before he was dismissed was not observed as required. He relied on various provisions of his employment contract and the Commission's disciplinary policy which he contended, was incorporated into his contract of employment.

[9] In their answering affidavit, the respondents raised two points in *limine* including that the appellant was bound by the cause of action he elected to pursue in making a referral to the CCMA. During the hearing of the appeal, it was however placed on record that this point in *limine* had been specifically abandoned even in the court *a quo* and that it was no longer in issue. This left the respondents with the singular point that the matter was settled consequent upon the negotiations that were embarked upon during the CCMA arbitration processes.

[10] With regard to the issue of settlement, the respondents contended that on 9 December 2019, the appellant referred the dispute arising from the termination of his employment to the CCMA. In his referral form, he stated that what he was referring to the CCMA was the fact that the Commission had terminated his employment contract for no lawful

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of a person referred to in subsection (1), issue a certificate of expungement, directing that the criminal record of that person be expunged, if the Director-General is satisfied that the person applying for expungement complies with the criteria set out in subsection (1).

(3) The Director-General: Justice and Constitutional Development must submit every certificate of expungement that has been issued as provided for in subsection (2) to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with section 271D.'

reason and that the desired outcome was compensation equivalent to 19 months' remuneration being in respect of the remainder of the term of his employment contract. Secondly, he claimed 12 months' remuneration for having been dismissed in a procedurally unfair manner. Therefore, what the appellant challenged at the CCMA was both the alleged unfairness and unlawfulness of the termination of his employment contract, so went the submission.

[11] When that dispute remained unresolved, the appellant's attorney referred it for arbitration on 6 January 2020. In the referral form for arbitration, it was indicated that the issues that were being referred for arbitration were the unlawful/unfair dismissal. Furthermore, the desired outcome was the declaration that the dismissal was unfair and/or unlawful. The second desired outcome was stated as being 24 months' remuneration in respect of the unlawful/unfair dismissal. On this basis, the respondents contended that the dispute that was referred to the CCMA was both the alleged unfairness and the alleged unlawfulness of the termination of the appellant's employment contract. It was further submitted that whether or not the appellant could challenge the unlawfulness of the termination of his employment contract at the CCMA did not detract from the claim he referred to the CCMA.

[12] That was the nature of the dispute that was set down for arbitration on 16 March 2020. During arbitration, the appellant was represented by both his attorney and counsel while the Commission was represented by its attorney. In the pre-arbitration minute, the appellant, for the first time, limited the relief he sought to a maximum of 12 months' compensation and further stated that he challenged both the procedural and substantive fairness of the dismissal. A further mediation process was conducted by a CCMA commissioner to which both parties consented and participated. The said mediation process culminated in the appellant's attorney Mr Finck sending an email to the Commission's attorney, Mr Naidoo, on that very same day, 16 March 2020, setting out the basis on which the appellant would agree to a settlement.

[13] In that email, the appellant's attorney indicated that the appellant would accept the equivalent of eight months' salary as compensation to settle the unfair dismissal dispute. The understanding on the part of those representing the Commission was that the settlement negotiations were intended to resolve all claims arising out of the

appellant's dismissal. The Commission's attorney, with that understanding, had a consultation with the third respondent on 16 March 2020 in which the proposed settlement was discussed. Those discussions took place on the foreground that the proposed settlement was intended to resolve all claims arising out of the termination of the appellant's employment contract in terms of the nature of the dispute as described in the referrals to conciliation and arbitration. It was submitted that, on that understanding, the respondents mandated Mr Naidoo, to accept the proposed settlement offer.

[14] However, in light of the fact that the email sent to Mr Naidoo by Mr Finck referred to the offer to settle the unfair dismissal dispute only, Mr Naidoo called Mr Finck, on 17 March 2020 before the Commission's acceptance of the offer was communicated to the appellant's attorneys. In their telephonic conversation, he sought confirmation that, in accordance with their discussions at the CCMA on 16 March 2020, the offer was in respect of both disputes referred to the CCMA which included the issue of the unlawfulness of the dismissal and all claims arising out of the termination of the appellant's employment on 29 November 2019. During the telephonic discussion between Mr Finck and Mr Naidoo, the former confirmed to the latter that the offer contained in Mr Finck's email of 16 March 2020 was in respect of the dispute referred to the CCMA and all claims arising out of the termination of the appellant's dismissal, which was what Mr Naidoo had understood in their discussions at the CCMA.

[15] After their telephonic communication, Mr Naidoo immediately wrote a letter to Mr Finck on that very same day, 17 March 2020 confirming their discussions. In that letter, Mr Naidoo confirmed his telephonic conversation of 17 March 2020 with Mr Finck and the settlement offer contained in Mr Finck's email of 16 March 2020. He further confirmed that Mr Finck had confirmed that the said settlement offer was in respect of the CCMA unfair dismissal claim and all claims arising out of the termination of the appellant's employment contract by the Commission on 29 November 2019. Lastly, Mr Naidoo communicated the respondents' acceptance of the offer. Mr Naidoo's email of 17 March 2020 reads:

'1. We refer to the email transmitted to Komeshan Naidoo at approximately 12h22 on Monday, 16 March 2020 in which you set out your client's settlement offer.

2. We also refer to the telephone conversation between you and Komesan Naidoo earlier today in which you confirmed that your client's settlement offer, as contained in your email referred to above, is in respect of the CCMA unfair dismissal claim under case number GATW19832/19 and all claims arising out of the termination of your client's employment by our client on 29 November 2019.

3. We are instructed to inform you that our client accepts your client's offer.'

[16] On 18 March 2020, Mr Finck sent email correspondence to Mr Naidoo. In that email, Mr Finck enquired about the actual amount that would be paid to the appellant which was the agreed equivalent of eight months' remuneration. He raised no issue or controversy about Mr Naidoo's email of 17 March 2020 or the content of their telephonic conversation which was specifically referred to therein. Most importantly, he did not dispute the assertion that he and Mr Naidoo reached an agreement that the proposed settlement was in full and final settlement of the CCMA unfair dismissal claim and all claims arising out of the termination of the appellant's employment.

[17] The next communication from Mr Finck was a letter dated 19 March 2020 which was a Thursday but was, for some reason, only transmitted on Monday 23 March 2020. In that letter, Mr Naidoo's letter dated 17 March 2020 is again not mentioned nor is reference made to the telephonic communication between Mr Naidoo and Mr Finck on 17 March 2020. Most importantly, there is no refutation to Mr Naidoo's understanding of what they agreed upon in their telephonic communication on 17 March 2020. Furthermore, in Mr Finck's letter dated 19 March 2019, the discussion or its content, especially the assertion that Mr Finck and Mr Naidoo reached an agreement in the terms confirmed by Mr Naidoo, are not disputed. Mr Finck's letter reads:

- '1. Our without prejudice email sent to you from the offices of the CCMA, together with your email regarding your 8 months offer refers.
2. We have been instructed to reiterate that the without prejudice proposal was as per our email of the 16 March 2020, that he would accept compensation equivalent to 8 month's salary to settle the unfair dismissal dispute under case number G18W19832/2019.
3. We have further been instructed to highlight that there are various other matters pending between your client and ours. Also, your client needs to appreciate that the fixed term contract which our client had was to run until 31 July 2021. Accordingly, our

client's employment was curtailed by 20 months. It is our client's intention to approach the High Court on the basis of the breach of the contract of employment of the fixed term contract of employment.

4. For these reasons, the settlement proposal of 16 March 2020, as requested by yourselves, should be read as per our email of 16 March 2020.
5. In the event however that your client would wish to settle any and all disputes of the employment relationships between our client and yours, our client is willing to accept 14 months in full and final settlement of all such disputes.
6. In the circumstances, kindly consult your client and revert specifically on the aspect of the unfair dismissal dispute under case number G18W1982/2019 and then further on the proposal herein regarding full and final settlement of any and all claims, pending or future in respect of the employment relationship between our client and yours.'

[18] On the same day, 23 March 2020, Mr Naidoo responded to Mr Finck's letter making it clear that Mr Finck's offer which was clarified as including all claims arising out of the termination of the appellant's employment was accepted by the Commission on the basis of that understanding. Furthermore, Mr Finck was advised that the Commission was processing the payment which would be made as soon as a tax directive was received from the South African Revenue Services. It was also pointed out that any attempt to pursue any other claim arising out of the termination of the appellant's employment would be resisted. On 12 May 2020, payment was made in respect of the settlement. Based on all the above, it was contended on behalf of the Commission that a settlement agreement was concluded on 17 March 2020 when the Commission accepted the appellant's offer of settlement which resolved all claims arising out of the termination of the appellant's employment on 29 November 2019.

[19] In his replying affidavit, the appellant submitted that with the CCMA commissioner having made it clear that the CCMA only had jurisdiction in respect of the unfair dismissal claim and not in respect of the unlawful dismissal claim, he abandoned the unlawful dismissal claim. Therefore, so contended the appellant, the settlement reached was not in full and final settlement. In particular, the unlawful dismissal claim was not settled hence he came to the Labour Court to pursue it. He came before the Labour Court to enforce his contractual rights as the claim consequent upon their breach had

not been settled. The implicated contractual right essentially was the right to a formal disciplinary inquiry which would include a right to an appeal process. The appellant disavowed any notion that the settlement went beyond the unfair dismissal dispute and in particular, that the settlement was in respect of any and all claims of whatever nature arising out of or relating to the termination of his employment with the Commission.

The analysis

[20] The appellant denied that the settlement went beyond the unfair dismissal dispute. For this contention, he relied on the fact that the CCMA does not have jurisdiction to deal with claims arising from unlawful dismissals. I must hasten to point out that the parties' attorneys discussed the settlement terms and exchanged correspondence about such terms as earlier indicated. Those settlement discussions were not subject to the jurisdiction of the CCMA and do not appear to have been overseen by the relevant commissioner hence the settlement agreement was not reached at the CCMA. Therefore, the argument about the CCMA having no jurisdiction in unlawful dismissal disputes is difficult to understand. The appellant further relied on Mr Finck's letter sent to Mr Naidoo on 23 March 2020 and the contents thereof regarding a proposed remuneration equivalent to 14 months of his salary. However, the appellant did not, in his replying affidavit, directly deal with Mr Naidoo's letter dated 17 March 2020, which he did not even mention, in which Mr Naidoo confirmed their discussion and Mr Finck's alleged confirmation that the payment equivalent to eight months' remuneration would be in full and final settlement of all claims. It is common cause that Mr Finck never communicated with Mr Naidoo in any shape or form to indicate to him that Mr Naidoo might have misunderstood their conversation or was otherwise misrepresenting it.

[21] It is not without significance that Mr Finck never wrote to Mr Naidoo to refute any suggestion that he, Mr Finck, ever agreed to a settlement in the terms asserted by Mr Naidoo as would have been expected of him if that was not the case. The only time that the appellant himself got anywhere near dealing directly with Mr Naidoo's assertion that the discussion between Mr Naidoo and Mr Finck had culminated in a settlement agreement being reached in full and final settlement of all claims arising from the termination of the appellant's employment is a singular paragraph in his replying affidavit. Therein the appellant said:

'80. Save to admit that my legal representative transmitted an email to Naidoo on 16 March 2020 wherein we offered to accept 8 months' remuneration to settle the unfair dismissal dispute, the rest of the paragraphs are denied. The said email was sent, in my presence, whilst we were still at the CCMA offices. The balance hereof is denied. Finck did not have instructions as per paragraph 40.2 of the answering affidavit and did not inform Naidoo as alleged, hence the letter dated 19 March 2020 (Annexure "TB6" to the answering affidavit) to clarify my position. Finck's confirmatory affidavit is also attached as "NM8".'

[22] Nowhere in the appellant's papers was the crucial letter from Mr Naidoo dated 17 March 2020 mentioned and dealt with nor were its contents disputed. There was no denial that the conversation between Mr Naidoo and Mr Finck alleged therein ever took place. There was no assertion by Mr Finck or the appellant himself that Mr Naidoo somehow misunderstood or misrepresented what was discussed and agreed upon beyond bare denials and an assertion that Mr Finck did not have instructions to agree to the terms asserted by Mr Naidoo. There was no postulation by Mr Finck or even an attempt to put up a different content and context to their conversation. Essentially Mr Naidoo's assertions about the settlement were not directly confronted – not in the replying affidavit of the appellant, not in Mr Finck's confirmatory affidavit and not even in any letter written by Mr Finck.

[23] I have no reason to doubt Mr Finck's competence and I have no doubt that he would have refuted any suggestion by his colleague, Mr Naidoo which sought to stretch the parameters of the settlement agreement between them beyond what he understood to be the position or misrepresent their discussions if indeed Mr Naidoo was not recording their agreement accurately. This is more so if he had no instructions from the appellant to accept the terms clearly articulated in Mr Naidoo's letter dated 17 March 2020 as having been the outcome of their discussions. As a matter of setting the record straight and even on the basis of his professional duty to his client, the appellant, Mr Finck would have immediately corrected any misrepresentation of any discussion that took place between himself and Mr Naidoo. He would have immediately not only set the record straight but also put up his own recollection of their discussions in response to Mr Naidoo's letter dated 17 March 2020. He did not do any of those things which

ultimately resulted in the payment on the then undisputed terms contained in Mr Naidoo's letter dated 17 March 2020.

- [24] Interestingly, even in his confirmatory affidavit, there is no direct assertion by Mr Finck that the settlement was not reached in the terms set out by Mr Naidoo as one would have expected. All that Mr Finck said in that confirmatory affidavit was that he had read the founding and replying affidavits and he confirmed their contents in so far as they related to him. Having received Mr Naidoo's letter dated 17 March 2020 in which Mr Naidoo stated the terms of the settlement agreement with no equivocation and stating what those terms were, Mr Finck would have been expected to immediately and clearly refute that settlement was reached on the terms asserted by Mr Naidoo. Instead, on 18 March 2020, he wrote an email enquiring about the actual amount that would be paid to his client saying nothing about the contents of Mr Naidoo's letter. The amount he was enquiring about could only have been in respect of the appellant's dismissal or termination of his employment on 29 November 2019 on the terms clearly stated in Mr Naidoo's letter dated 17 March 2020. This is so because those were the terms of the agreement reached between the two attorneys in their discussions which Mr Finck never disputed up to the time payment was made.

Dispute of fact

- [25] These proceedings were instituted on the face of what must have been clearly conflicting views between the appellant and the Commission if the correspondence referred to earlier is taken into account. To be precise, the dispute of fact is about whether the settlement agreement resolved all the issues arising from the dismissal of the appellant, namely the unfair dismissal in terms of the Labour Relations Act³ (LRA) and breach of contract in terms of section 77 of the Basic Conditions of Employment Act⁴ (BCEA). The appellant elected to proceed by way of motion proceedings regardless. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁵ (*Wightman*), Heher JA expressed the legal position as follows:

³ Act 66 of 1995, as amended.

⁴ Act 75 of 1997.

⁵ [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para 12.

‘Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A – 153C with which I respectfully agree...’

[26] The appellant, being fully aware of the correspondence exchanged between his attorney Mr Finck and the Commission's attorney Mr Naidoo and the divergent positions they held on settlement, the appellant who had the benefit of legal representation at all material times in addition to the fact that he himself is a legally trained person elected to bring his case before the court *a quo* through motion proceedings. The Commission's assertions, regarding the matter having been fully settled as agreed, are certainly not far-fetched and are far from being untenable. On any reading of the papers especially the correspondence exchanged between the parties' attorneys, the conclusion can only be that the parties telephonically agreed that the agreed settlement was in full and final settlement not only of the unfair dismissal claim but also of all and any other claim arising from the termination of the appellant's employment with the Commission. The appellant's unsubstantiated and quite frankly bare denials in that regard are of no assistance to his case. In any event, it would have made no sense for them not to even try to settle all the claims arising from the appellant's dismissal and instead choose to settle only a portion of the claims that had been referred to the CCMA. That defies all sense of logic.

[27] There is no genuine and *bona fide* dispute of fact about the terms of the settlement agreement on the papers. Therefore, this matter must be determined on the acceptance of the Commission's version of the terms of such agreement which is backed up by evidence in the form of correspondence. To the extent that it may be suggested that a dispute of fact exists based on the appellant's bare denials and vague assertions in his replying affidavit a postulation that the appellant never dealt with even after it was

specifically raised by the Commission, the legal position as stated by Heher JA which, with respect, still holds true to date puts paid to any such suggestion. The learned Judge of Appeal further said in *Wightman*⁶:

‘A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’

[28] In all the circumstances, the respondents’ point in *limine* about the matter having been settled in the manner contended for by the respondents must be upheld. The conclusion reached by the court *a quo* to the effect that the matter was not settled in full did not take into account all the facts, especially the discussions between the parties’ attorneys. It did not take into account the fact that the terms of the settlement agreement which

⁶ *Wightman* supra at para 13.

was reached were confirmed by Mr Naidoo in writing and were never disputed by Mr Finck.

The expungement of the criminal record

- [29] The appellant, who also appeared as counsel as he of course is a practicing advocate, passionately argued that the matter raised the issue of expungement of his criminal record. Given that this matter is disposed of on the basis that it had been settled in the manner contended for by the respondents, it is not necessary to venture into the issue of expungement of the appellant's criminal record as it is now moot.⁷ I have also taken into account the fact that the circumstances of this case do not justify the exercise of a discretion, in the service of the interests of justice, to traverse the merits of an issue that is moot.⁸ The issue of expungement of the appellant's criminal record was, in any event, ancillary to the main issue that served before the court *a quo*; that is, the appellant's claim to vindicate his procedural rights in terms of his employment contract. That being the case, I will not be venturing into any discussion on the expungement of the criminal record. In all these circumstances the appeal falls to be dismissed.

Costs

- [30] The last issue is that of costs. The appellant approached the Labour Court relying on section 77(3) of the BCEA. He said in his founding affidavit:
- '17 ...[T]he Labour Court has power (sic) to hear and determine contractual disputes or to make orders pronouncing on the lawfulness of a breach of contract or granting relief in the form of specific performance and/or damages in the exercise of jurisdiction under section 77 (3) of the Basic Conditions of Employment Act (the BCEA).'
- [31] In such circumstances, the Labour Court operates on the same basis as the High Court. Therefore, costs do follow the results as is the norm in civil courts. It is axiomatic that section 162 of the LRA is of no application when the Labour Court exercises its jurisdiction in terms of section 77(3) of the BCEA.
- [32] In the result, the following order is made.

Order

⁷ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* [1999] ZACC 17; 2000 (2) SA 1 (*National Coalition*) at para 21; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC) at para 11.

⁸ *National Employers' Association of SA (NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 14 -17.

1. The appeal is dismissed with costs.
2. The cross-appeal is upheld with costs.
3. The judgment of the court *a quo* is varied to read that the respondents' point in *limine* to the effect that the parties concluded a settlement agreement in full and final settlement of all claims arising from the termination of the appellant's employment on 29 November 2019 is upheld.

JOLWANA AJA

With Molahlehi AJP et Nkutha-Nkontwana JA concurring

APPEARANCES:

FOR THE APPELLANT: N. Moropene

Instructed by Finck Attorneys

FOR THE RESPONDENTS: A. Myburgh SC

Instructed by Cheadle Thompson & Haysom Inc.