

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JR 1676/2009

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

First Respondent

M J MOLAPO, N.O.

Second Respondent

P FOURIE

Third Respondent

A FOURIE

Fourth Respondent

JUDGMENT

MYBURGH AJ:

Introduction

1. This is an opposed application in terms of section 145 of the LRA¹ for the setting aside on review of an arbitration award and jurisdictional ruling issued by the second respondent ('the commissioner') acting under the auspices of the first respondent ('the

¹ Labour Relations Act, 66 of 1995.

bargaining council’).

2. In his jurisdictional ruling, the commissioner dismissed the point *in limine* raised by the applicant (‘the municipality’) at the first stage of the arbitration to the effect that the bargaining council lacked jurisdiction to arbitrate the dismissal dispute because (so it was contended) the third and fourth respondents (‘Mr Fourie’ and ‘Mrs Fourie’, respectively, and ‘the Fouries’ conjunctively) were not employees of the municipality and were not dismissed by it. In the commissioner’s ensuing award on the merits of the dismissal, which was issued after the second stage of the arbitration, he concluded that the dismissal of the Fouries was substantively and procedurally unfair, and ordered their retrospective reinstatement.
3. It stands to be mentioned at the outset that the municipality does not attack the commissioner’s award on the merits of the dismissal for any reason other than the commissioner’s (alleged erroneous) assumption of jurisdiction following his jurisdictional ruling. Mr Shaba (for the municipality) clarified this in argument before me.
4. Although the municipality attacks the commissioner’s assumption of jurisdiction *inter alia* on the basis that it was unreasonable, the review test in relation to jurisdiction is, of course, correctness. In the result, if the reviewing court comes to the conclusion that a commissioner erred in assuming jurisdiction, then his award falls to be set aside on review. This is so because jurisdiction either exists or does not exist – and cannot be acquired by error (even an unwitting one).²
5. This court’s task is thus to determine whether, on an assessment of the facts and relevant considerations, the commissioner had jurisdiction to arbitrate the dismissal dispute. In undertaking this enquiry, I intend to have regard to the record of both the first and second stages of the arbitration, as opposed to confining myself to the record of the first stage. In this regard, it warrants mention that, in deciding whether a

² *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 ILJ 2337 (LAC) at para 29; *SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others*; *SA Rugby Pty Ltd v SARPU & another* [2008] 9 BLLR 845 (LAC) at paras 40-41; *City of Cape Town v SAMWU obo Jacobs & others* [2009] 9 BLLR 882 (LAC) at paras 27-28.

commissioner has exceeded his jurisdiction in making an award, the reviewing court is not necessarily confined to the record of the arbitration proceedings and may admit extrinsic evidence (i.e. evidence outside of the record) regarding the true facts.³ If this is so, then this court must be entitled to have regard to the record of the second stage of the arbitration in determining the true facts, particularly in circumstances where (as expanded upon below) the municipality, at the second stage of the arbitration, chose to advance in evidence the same case that it had advanced by way of legal argument at the first stage of the arbitration. In circumstances where the municipality took a second bite at the ‘jurisdictional cherry’, this court must be entitled to have regard to the facts that emerged in the process in determining whether the commissioner had jurisdiction. Indeed, Mr Shaba’s position in argument before me was that this court would be entitled to have regard to the transcript of the second stage of the arbitration, insofar as it demonstrated that certain of the submissions made during the first stage of the arbitration were incorrect.

Chronology of events

6. The Fouries were employed by the municipality as inspectors within its community safety department (formerly the Tshwane metro police division).
7. With effect from 29 August 2008, the Fouries resigned from the municipality, and would appear to have sought to emigrate to New Zealand. Both of the termination of services forms completed by the Fouries were signed and accepted by *inter alia* Kris Jooste (acting executive director: community safety operational administration).
8. On 18 September 2008, and while in New Zealand, the Fouries sent an email to Elsabe Burger (who appears to have worked in the same division as the Fouries had worked in) at the municipality requesting the withdrawal and reversal of their resignations.⁴

³ *Spilhaus & Co (WP) Ltd v CCMA & others* [1997] 8 BLLR 1116 (LC) at 1120A-D; *Delpont v Kopjes Irrigation Settlement Management Board* 1948 (1) SA 258 (O) at 260; *Photocircuit SA (Pty) Ltd v De Klerk NO & De Swardt NO & others* 1989 (4) SA 209 (C) at 221F-G.

⁴ Although the municipality has a policy in terms of which employees are entitled to withdraw their resignation during their notice period, this did not apply in the circumstances of this matter, as the Fouries had already left

9. On 18 and 19 September 2008, there was an exchange of emails between (it seems) members of the HR department in relation to the Fouries' request, with different members expressing different sentiments. More than one member pointed out that there was no policy regulating the issue. Significantly, Valerie Steyn (HR – key accounts specialist) and Anel Fourie⁵ were involved in these early exchanges.
10. On 19 September 2008, Ms Steyn prepared a written proposal recommending the withdrawal and cancellation of the Fouries' resignation, and that their period of absence should be treated as unpaid leave. There are two versions of the aforesaid proposal in the record – the first provides for signature / approval by Mr Jooste alone, while the second provides for three levels of signature / approval, namely by G van der Merwe (acting director: road policing), then Mr Jooste, and then Commissioner Mmutle (strategic executive director: community safety).
11. On 22 September 2008, Mr Jooste signed the first version of the proposal / recommendation. The document included this directly above Jooste's signature: '*Approved / not approved.*' While Mr Jooste failed to delete the inapplicable option, as the unfolding chronology confirms, it was accepted by all concerned that, through his signature thereof, Jooste approved the proposal / recommendation ('the Jooste recommendation').
12. Also on 22 September 2008, Pieter Coetzer (an IMATU shop steward) sent an email to Derik Cronje (HR department), which was copied to Ms Steyn, enclosing a copy of the Jooste recommendation. The email records that Mr Coetzer intended to deliver the original to Mr Cronje the following day, and he went on to thank Mr Cronje for his help and assistance. (It was common cause at the arbitration that the Fouries were members of IMATU and that they had enlisted the assistance of their union to secure the withdrawal of their resignation.)
13. On 22 and 23 September 2008, there was an exchange of emails between Martin

the employ of the municipality at the time of making their request.

⁵ Not to be confused with the fourth respondent, Alana Fourie.

Steyn (legal department) and Anel Fourie, with the former having expressed the view that if the Fouries' resignations had been processed, they could not be withdrawn.

14. On 25 September 2008, Simon Mabusela (HR department) sent an email to Keorapetse Tumagole (acting executive director: strategic human resources management), being the head of what I have referred to thus far as the HR department. The email read as follows:

'The above-mentioned employees [i.e. the Fouries] resigned with effect from 29 August 2008. They sent through a request to cancel their resignation on 15/09/2008. Leave pay-out, pro rata bonus and the retirement fund as well as other 3rd parties have been notified. The Department has requested that they be reinstated. Your view is urgently requested.'

The reference herein to the request of 'the department' appears to be a reference to the Jooste recommendation.⁶

15. On the same day, Mr Tumagole replied as follows: *'If no payment has been effected, let's reinstate.'* On the face of it, Mr Tumagole, who was clothed with the necessary delegated authority to reinstate the Fouries (see further below), so advised in circumstances where he was aware that 'the department' was in favour of the withdrawal / cancellation of the Fouries' resignation.
16. About an hour later, Anel Fourie sent the following email to Ms Burger (with whom the Fouries had initially made contact) and copied it to *inter alia* Ms Steyn and Mr Coetzer:

'I have clarified with Martin Steyn that the reinstatement and cancellation of the resignation of [the Fouries] can take place as requested and approved by your department. This will only be supported due to the fact that no monies have yet been paid to them in terms of any of the funds implicated in terms of their resignation and that unpaid leave will be captured for the said period.'

In its terms, the Fouries' reinstatement was confirmed in this email. The significance

⁶ It is unclear whether the Jooste recommendation was actually attached to this email, although it may well have been.

of it having been copied to Mr Coetzer (of IMATU) will become apparent below.

17. A few hours later, Mr Steyn responded to this email by recording that he 'agreed on the proposition that the Fouries' resignation was not finalised and no one was appointed to their current positions'. This email was also copied to *inter alia* Mr Coetzer and Ms Steyn.
18. On 29 September 2008, letters (one in respect of each of the Fouries) emanating from the corporate and shared services department: strategic human resources management division, were addressed to Ms Steyn. The letters reflected Ben Mokgoko as being the contact person and the executive director: strategic human resources management (i.e. Mr Tumagole) as being the author, but were signed by Louis van Wyngaard (HR officer). The letters, which were headed '*cancellation of termination*', recorded that the '*termination of service of the above-mentioned has been cancelled*', and that the period '*from 1 September 2008 until 30 September 2008 [is] being noted as normal unpaid leave*' ('the approval letter/s').
19. On the face of these letters, the Fouries' contracts of employment *had been* reinstated on the same terms and conditions of employment as prevailed before their resignation, with the only caveat being that their absence during the month of September 2008 would be treated as unpaid leave. The evidence at the arbitration was that a copy of the approval letter was given to Mr Fourie by Ms Steyn.
20. During the period 29 September to 1 October 2008, a further series of emails ensued in relation to the withdrawal / cancellation of the Fouries' resignation.⁷ The first email was from Phillip Ratsiane to Messrs Mabusela and Tumagole on 29 September 2008, in which he recorded: '*We have agreed that we are not going to appoint these people because they have resigned and they have their monies. The request does not even have the approval from the SED of the department.*'⁸ Further to this, on 1 October 2008, Bonita Dixon sent an email to Michael Leshilo (copied to Annamarie Marais) which read: '*As I understand it did Mr Tumagole recommend that we reinstate (sic).*

⁷ This being a continuation of the string of emails dealt with above.

⁸ As appears below, Mr Ratsiane was misinformed to some extent.

And our SED did approve the reinstatement of [the Fouries]. Dir Jooste was acting as the SED of the department.’ On the same day, and in response to this, Ms Marais sent an email to Messrs Jooste and Coetzer stating: ‘We are now totally confused. The one day we can reinstate the Fouries, the other day we may not. The Fouries are starting work today.’

21. On 1 October 2008, the Fouries resumed working at the municipality (see further below).
22. On 2 October 2008, the email string concluded with an email from Ms Burger to various people, which recorded the following: *‘Finalised, reinstatement is in order, approved by General Manager K Tumagole.’* (As dealt with below, the fact that the issue was finalised was consistent with the evidence that Mr Fourie gave at the arbitration about his dealings with *inter alia* Ms Burger upon his return to work on 1 October 2008.)
23. On 9 October 2008, Mr Tumagole addressed a letter to Mr Van Wyngaard, in which he sought an explanation from Mr Van Wyngaard as to *‘who gave you authority to sign on my behalf and cancel the termination of [the Fouries]’*. In evidence, Mr Tumagole stated that he had not authorised the drafting of the approval letters. Significantly, it follows from Mr Tumagole’s letter to Mr Van Wyngaard that, as of 9 October 2008 (at the latest), Mr Tumagole was aware that the Fouries were back at work.
24. On 10 October 2008, Mr Tumagole addressed a letter to Mr Jooste and Ms Steyn in the following terms:

‘It has come to my attention that [the Fouries] have been re-employed without having followed the correct procedure and obtaining the necessary authorisation.

According to our records the two persons have voluntarily terminated their contracts of employment on 29 August 2008, and they are therefore no longer employees of the [municipality]. The vacancies created by their departure must be filled in accordance with the provisions of the Recruitment, Selection and Placement Policy. The re-employment of the two without following the procedure that is laid down in the said policy is grossly irregular.

Since there is no new employment contract concluded between these individuals and the [municipality], they are not employees and are requested to vacate the CoT premises with immediate effect. Both of you should indicate to [me] as to who authorised the re-appointment of these people as that function is delegated to [me].

Your response in writing, within seven ... days is awaited.’ (Emphasis added.)

25. Also on 10 October 2008, Ms Steyn sent an unequivocal response to Mr Tumagole, in which she agreed that he had the authority to reinstate / re-appoint, and referred to his email of 25 September 2008 and letters from his office of 29 September 2008 (i.e. the approval letters) in support of her contention that Mr Tumagole had personally authorised the reinstatement of the Fouries.
26. On 16 October 2008, Mr Van Wyngaard responded to Mr Tumagole’s letter of 9 October 2008. The response reads in part as follows:

‘I did not cancel the termination of services of [the Fouries]. The intention of this letter, written by Mr Mokgoko, was to notify the department that the leave provisions, from 1 September 2008 until 30 September 2008, being noted as normal unpaid leave.

The cancellation of the termination of service of [the Fouries], according to Mr Mokgoko, was approved after a report was written by the department. Mr Mokgoko informed me that all system and paper work was done, when he asked me to sign the said letters.’

27. On 17 October 2008, the Fouries were served with letters (dated 16 October 2008) from Mr Tumagole reading as follows:

‘Please note that you voluntarily terminated your employment on 29 August 2008 and that there is therefore no longer an employment contract between you and the [municipality]. As the request to withdrawal your resignation came after the termination of your contract of employment has taken effect, it is unfortunately not possible to reverse the resignation and to reappoint you without following the Selection Placement and Recruitment Policy. It has come to our attention that you have resumed work in the Community Safety Department. You are hereby advised to vacate the premises as you are no longer an employee of the municipality.

You are at liberty to apply for any vacancies that might be advertised in future.’ (Emphasis added.)

28. On 21 October 2008, Commissioner Mmutle addressed a letter to Mr Jooste (on the letterhead of the community safety department) reading as follows:

'Report seeking approval for the cancellation of the resignations of [the Fouries] ... was signed by you on 22 September 2008. Despite the fact that by this date the employment of the two individuals was already officially terminated at the end of August 2008, the aforementioned report was apparently processed or sent to Corporate and Shared Services Department without my approval as the head and accounting officer of this department.

May you kindly explain why a report of this nature was sent out without the approval of the head of department and who allowed the two persons to resume work from 1 October 2008.' (Emphasis added.)

29. In his undated response to Commissioner Mmutle, Mr Jooste recorded *inter alia* as follows:

'The delegation to appoint (and for that matter reinstatement of) any official lies with the Corporate and Shared Services Department. ...

I made the deduction that re-instatement / non re-instatement is just a question of the SED Corporate and Shared Services [i.e. Mr Tumagole] executing his mandate in terms of policies and procedures, and that the Community Safety Department has unfortunately little say in this matter as a final decision should be guided by Council policies and processes.

As the request was brought to my attention by the employees themselves, their union representative and the Key Account Specialist, I submitted the request for reinstatement to the Corporate and Shared Services Department as part of a normal administrative process. According to my understanding the reinstatement was initially approved by Corporate and Shared Services, which allowed the officials to [resume] work.' (Emphasis added.)

30. This response confirms what is an important fact – Mr Tumagole (as he stated in his letter to Mr Jooste and Ms Steyn on 10 October 2008, and repeated during the arbitration) had the delegated authority to reinstate the Fouries. (Mr Jooste (like Ms Steyn) appears to have understood him to have made such a decision.)
31. On 24 October 2008, the Fouries referred an unfair dismissal dispute to the bargaining council.

The first stage of the arbitration and the commissioner's jurisdictional ruling

32. On 16 February 2009, the parties conducted a pre-arbitration conference, at which the municipality notified that it intended raising this point *in limine*: *'The [municipality] states that there was no employment relationship between the parties after [the Fouries'] resignation and disputes the existence of a dismissal.'* Presumably in the light of this, the minutes of the pre-arbitration conference also record that the Fouries would commence adducing evidence in support of their case that *'they were employees of the [municipality] and unfairly dismissed'*.
33. On 17 February 2009, the first stage of the arbitration was conducted. Although it had been anticipated that evidence would be led in respect of the municipality's point *in limine*, the issue was ultimately dealt with purely on the basis of legal argument by the representatives (Mr Geldenhuys for the Fouries and Mr Tema for the municipality) with reference to bundles of documents.
34. On 18 February 2009, the commissioner issued his jurisdictional ruling. In his 'analysis of submissions', the commissioner found as follows:

'The [municipality] did not dispute that the [Fouries] rendered traffic inspectorate services until 16 October 2008 on the instruction of their superiors in its employ. The duties they performed included the issuing of traffic fines. The latter forms part of the [municipality's] business. The [Fouries] had for the duration of their stay since their return, assisted the [municipality] carrying on its business. The fact that they served the [municipality] and the [municipality] did not review and nullify their actions entitled them to remuneration. The [municipality] had collected revenue in the form of traffic fines which were to date lawfully issued by the [Fouries].

In terms of section 200A of the [LRA] ... [quotation of section omitted].

It is not in dispute that the [Fouries] were provided with tools of work or equipment by the [municipality] and worked overtime on the direction of the [municipality].

Section 200A presumes that any such person is regardless of the form of the contract, an employee, unless contrary can be shown.

The [municipality] failed to show the nature of the relationship it had with the [Fouries] when it provided them with assignments and work equipment until 16 October 2008.

I must concur with the [Fouries] that an employment relationship existed as at the date of the alleged dispute.

The [municipality's] argument that the [Fouries'] re-engagements were irregular for lack of authority by the person who processed the resignation withdrawal and approved same cannot be sustained. The fact that persons may have acted ultra vires in the process is a matter for a reviewing judge. The [municipality] did not furnish me with any order from a court rendering the actions of its employees invalid and declaring everything that was done in terms of such lack of authority null and void. The [municipality] is aware that the definition of employee in the LRA is silent on the legality of the contract of employment. There is case law which points to the fact that an illegal immigrant who conformed with the definition of an employee enjoyed the protection of the LRA despite the fact that he worked for another without a work permit. My duty is [therefore] not to enquire and determine the validity of the contract but merely to satisfy myself that the parties' conduct falls within the meaning of an employee.

What is before me is that the [municipality] had not only expressly but also by conduct allowed the [Fouries] to resume their ordinary duties. The [municipality's] conduct was an implied approval of the [Fouries'] request for withdrawal of their resignations. I also accept that the notice dated 16 October 2008 falls squarely within the meaning of dismissal in terms of section 186(1)(a) of the [LRA].'

35. In the result, the commissioner ruled that the bargaining council had jurisdiction to arbitrate the alleged unfair dismissal dispute.

The second stage of the arbitration and the commissioner's award on the merits of the dismissal

36. On 6 and 7 April 2009, the second stage of the arbitration was conducted. The municipality commenced adducing evidence and called these witnesses – Mr Tumagole, Sidney Dreyer (logistics department) and Renier Lubbe (chief security evaluator). The Fouries then each gave evidence, and called Heinrich Spies and Cornel van der Walt (both metro policeman) in their defence.
37. Remarkably, despite the commissioner having already found that the Fouries were employees of and had been dismissed by the municipality, the municipality would appear to have made no attempt during the second stage of the arbitration to acquit itself of the onus of establishing that the Fouries' dismissal was substantively and procedurally fair. Instead, through the evidence of its main witness, Mr Tumagole, the

municipality sought, in effect, to re-run the case it had run during the first stage of the arbitration. This is well illustrated by the concluding paragraph of the municipality's written closing argument at the second stage of the arbitration:

'Based on the arguments above I request the arbitrator to order that there was no employer-employee relationship between [the Fouries] and [the municipality] after the resignation of [the Fouries].

Further that the employer did not dismiss the [Fouries] as they allege.'

38. In his award on the merits of the dismissal dated 3 May 2009, the commissioner noted that, although the issue of whether the Fouries were employees and were dismissed had been dealt with at the first stage of the arbitration, the municipality continued to reintroduce it as its defence at the second stage of the arbitration. For *'the sake of completeness'*, the commissioner restated the reasons for his earlier ruling. Turning thereupon to the fairness of the Fouries' dismissal, the commissioner found that the municipality had made no attempt to acquit itself of the onus of proof resting on it in this regard, and went on to conclude that the Fouries' dismissal was substantively and procedurally unfair. In the result, the commissioner ordered the municipality to retrospectively reinstate the Fouries.

Grounds of review and the parties' submissions in relation thereto

39. The municipality pleads four grounds of review, namely that: (i) the commissioner committed an irregularity and / or misconduct in finding that the Fouries were employees of the municipality between 1 and 15 October 2008 and subsequently dismissed, in circumstances where they failed to prove any of the submissions made on their behalf by their attorney at the first stage of the arbitration; (ii) the commissioner's finding of jurisdiction (premised on the Fouries having been employees of and dismissed by the municipality) was unreasonable; (iii) the commissioner committed an irregularity and / or misconduct in finding that the Fouries were reinstated / re-employed between 1 and 15 October 2008, in circumstances where *'none of the officials of the [municipality] with the requisite authority to order their reinstatement / re-employment had specifically communicated such decision to them'*; and (iv) the commissioner committed an irregularity and / or

misconduct in finding for the Fouries, in circumstances when they '*knew or were expected to know that their re-appointments or re-acceptance to the employ of the [municipality] were irregular as [it] was done by a person with no authority to do so*'.⁹

40. In argument before me, Mr Shaba addressed these five questions: (i) whether the finding that the Fouries were employees of the municipality is assailable? ('the first question'); (ii) whether the finding that the Fouries were dismissed is assailable? ('the second question'); (iii) whether the jurisdictional ruling is assailable? ('the third question'); (iv) whether the Fouries were reinstated / re-employed during the period 1 – 15 October 2008 ('the fourth question'); and (v) whether the Fouries knew or ought to have known that their re-appointment by the municipality (if any) was irregular? ('the fifth question').
41. In addressing the *first question*, the main thrust of Mr Shaba's attack in relation to the commissioner's finding that the Fouries were employed by the municipality at the material time was that (so it was submitted) there existed no formal underlying contract of employment between the parties, and that the municipality had not communicated an acceptance of the withdrawal of the Fouries' resignation to them.
42. In developing his argument, Mr Shaba placed reliance on the judgment of this court in *MEC for the Department of Health, Eastern Cape v Odendaal & others* [2009] 5 BLLR 470 (LC), in which it was found that '*[t]he contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices) remains the basis of the employment relationship*', and that an employment relationship cannot exist without the conclusion of a contract of employment.¹⁰ With reference hereto, Mr Shaba submitted that had the commissioner '*not relied solely on the simplistic approach and literal interpretation*' of the definition of 'employee' in section 213 of the LRA, and instead had regard to the absence of the existence of a contract of employment between the

⁹ The municipality did not pursue in argument the ground of review that the commissioner had committed a reviewable defect in awarding costs against the municipality in his award on the merits of the dismissal.

¹⁰ At paras 51-52.

parties, he would have concluded that there was no employment relationship between the parties.

43. Mr Shaba went on to submit that, insofar as the Fouries sought to rely on any of the communications contained in the record to establish that the withdrawal of their resignation / reinstatement had been accepted by the municipality (and thus that a contract had come into being), all such communications were internal communications amongst officials of the municipality, and that none of them were ever formally and directly communicated to the Fouries. This included the Jooste recommendation, Mr Tumagole's email of 25 September 2008 to Mr Mabusela, and the approval letters.
44. In addition to this, Mr Shaba contended that, in any event: the Jooste recommendation had not been signed by the two other persons reflected in the second version thereof, and, furthermore, Mr Jooste had not indicated whether he approved / disapproved of the recommendation; Mr Tumagole's email of 25 September 2008 was responded to by Mr Ratsiane on 29 September 2008, which response excluded any possibility of the Fouries being reinstated; and Mr Van Wyngaard had since explained his signature of the approval letters and had made it clear that they constituted internal correspondence.
45. In conclusion on the first question, Mr Shaba submitted that the finding by the commissioner '*sets a bad precedent in employment relations and may lead to absurdity wherein any person can avail himself / herself at the work premises of any employer and claim to be an employee based on section 213 of the LRA by virtue of having rendered this or that service or having been furnished with this or that work tool regardless of whether or not such a person has any contract of employment, was appointed, employed or re-employed in accordance with the employer's procedures ...*'
46. Regarding the *second question*, Mr Shaba submitted that, insofar as there had been no pre-existing employment relationship between the parties, the Fouries could not have been dismissed by the municipality. Again, Mr Shaba relied on *Odendaal (supra)*, in which it was held that '*[a]n employee cannot claim to have been dismissed if no*

employment relationship existed'.¹¹ Furthermore, Mr Shaba submitted that Mr Tumagole's letter of 16 October 2008 did not constitute a letter of dismissal, because it was written on the understanding that there existed no employment relationship, and made reference to the fact that the Fouries had elected to attend at the municipality's premises in the absence of being appointed, and that it was not possible to appoint them without following the recruitment policy. Finally, Mr Shaba placed reliance on '*Kylie*' v CCMA & others [2008] 9 BLLR 870 (LC), in which it was held that '*[i]t is clear from the definition of dismissal in section 186(1)*'¹² of the LRA that the existence or prior existence of a valid contract of employment is the necessary condition to found the statutory right to fair dismissal'.¹³ According to Mr Shaba, this principle was not '*tampered with*' by the LAC in the ensuing appeal ('*Kylie*' v CCMA & others [2010] 7 BLLR 705 (LAC)). In the light of this, Mr Shaba submitted that, in the absence of a contract of employment between the parties, the Fouries could thus not have been dismissed within the meaning of section 186(1).

47. Regarding the *third question*, Mr Shaba submitted that the commissioner's jurisdictional ruling was assailable because the Fouries did not qualify as employees (for the reason already submitted), and because there was no evidence, as opposed to submissions by legal representatives, at the first stage of the arbitration upon which the commissioner could have based his ruling. According to Mr Shaba, the commissioner ought to have permitted the adducing of evidence by witnesses before making his jurisdictional ruling, and ought not to have relied simply on submissions by legal representatives, '*some of which turned out to be false when the merits were considered*'.
48. Turning to the *fourth question*, on the basis of the submissions made in relation to the first question, Mr Shaba submitted that the Fouries were not reinstated / re-employed during the period 1 – 15 October 2008. Mr Shaba went on to submit as follows: '*Other than the submissions of Mr Geldenhuys [at the first stage of the arbitration]*

¹¹ At para 44.

¹² Section 186(1)(a) states that dismissal means that '*the employer has terminated a contract of employment with or without notice*'. Section 186(1)(b), (d), (e) and (f) are also all premised on the existence of a contract of employment.

¹³ At para 90.

and allegations (not substantiated by any document) by the [Fouries'] witnesses [at the second stage of the arbitration] that they worked with [the Fouries], for 17 days or so, there was no shred of evidence that [the Fouries] were issued with firearms, new appointment cards, that they issued tickets and fines, etc as initially alleged and submitted at the [first stage of the arbitration].'

49. Regarding the *fifth question*, Mr Shaba submitted that, insofar as the Fouries could rely on internal correspondence that had not been communicated to them, '*none of the writers of any such communications, in particular Jooste and Van Wyngaard, had the requisite authority to order any such re-acceptance or re-appointment [of the Fouries] outside of the [recruitment policy]*'. Mr Shaba went on to submit in this regard that the commissioner ought to have had regard to the principle held in *POPCRU v Minister of Correctional Services* [2006] 4 BLLR 385 (E) that '*[t]he effect of an administrative action that is taken without lawful authority is that it is a nullity*'.¹⁴ On this basis, Mr Shaba submitted that there was no need for the municipality to have obtained an order setting aside any *ultra vires* actions (as the commissioner found). Mr Shaba also referred to other authorities in this regard.
50. In his response, Mr Geldenhuys, in effect, embraced the commissioner's findings. In summary, he submitted that: in circumstances where the Fouries had returned to work and worked, they qualified as employees; once that was accepted, Mr Tumagole's letter of 16 October 2008 was plainly an act of dismissal; the Fouries reinstatement had been properly authorised and was valid; and, in any event, the decision remained valid until it was set aside on review, with reliance being placed in this regard on *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).

The facts relating to what was communicated to the Fouries, and what transpired between 1 and 17 October 2008

51. Before dealing with the five questions addressed by Mr Shaba in advancing the review application, there are two key factual issues that can be conveniently addressed at this stage. The first issue is what was communicated by the municipality

¹⁴ At para 75.

to the Fouries in relation to their reinstatement, bearing in mind that, save for Mr Tumagole's letter of 16 October 2008, none of the written communications referred to above were addressed directly to the Fouries.

52. In his evidence, which appears to have gone unchallenged, Mr Fourie testified as follows. After about two weeks in New Zealand, they called Ms Burger and advised that they wanted to reverse their resignations. On the advice of Ms Burger, they then sent Ms Burger their email of 18 September 2008 and notified IMATU. Further hereto, they received a copy of the Jooste recommendation and were told by Mr Coetzer (of IMATU) that all was in order. (Mr Coetzer, it will be recalled, had been provided with the original of the Jooste recommendation on 22 September 2008, and had been advised of the reinstatement of the Fouries in the email from Anel Fourie on 25 September 2008). They thereupon returned to South Africa, and would not have done so if the status of the withdrawal of their resignation had been uncertain. Upon their arrival back at the municipality:

'... we went to Elsabe Burger for advice. She said she must clarify the matter with Martin [Steyn] from Legal to check if our payments and bonuses were not paid out. After that she gave us appointment certificates (cards). They said we must go to the Safety Department to see Ben Mokgoko.¹⁵ Upon our arrival there [he] said he cannot do that as he had to clarify the matter with Keorapetse [Tumagole, presumably]. He said he phone us that day. He did call and said everything is clarified and we can go ahead. ...

We went to uniform department and found De Jarger and he said he must get something from and received an email from HR and he issued me with complete uniform.'¹⁶ (Emphasis added.)

Mr Fourie went on to testify that he had also been issued with a motorcycle. He also referred to the fact that he received a letter from Ms Steyn (which was probably a copy of the letter of approval, it having been put to Mr Tumagole under cross-examination that the Fouries had received a copy thereof, which he could not dispute).

53. A second key factual issue is what transpired between the period 1 and 17 October 2008. Although Mr Tumagole was sometimes coy in his evidence in this regard, he

¹⁵ He being the contact person in the letters of approval.

¹⁶ This evidence is contained on the reconstructed transcript.

conceded under cross-examination that he was not in a position to dispute that Mr Fourie was issued with a uniform and motorbike and set about issuing traffic tickets until receipt on 17 October 2008 of Mr Tumagole's letter dated 16 October 2008. Messrs Dreyer and Lubbe (who also gave evidence for the municipality) could not take the issue much further – the former stating only that the Fouries had not been reissued with firearms, and the latter that they had not been reissued with appointment certificates / cards upon their return (although he seemingly had no comment on the assertion that they were given back their original appointment cards by someone else).

54. In his evidence, Mr Fourie testified that he had been issued with a uniform and motorbike, but not a firearm, and that he had set about issuing traffic tickets during the course of performing his duties. For her part, Mrs Fourie testified that she had returned to work in the event management unit (where she had worked before her resignation). Messrs Spies and Van der Walt (who testified for the Fouries) corroborated the Fouries' case – the former having testified that he worked with Mr Fourie and the latter that he had worked with Mrs Fourie throughout the period 1 to 17 October 2008.
55. In addition to these facts, it warrants mention that the wording of the municipality's own correspondence reflects that the Fouries returned to work on 1 October 2008. Reference is made in this regard to Mr Tumagole's letter to Mr Jooste and Ms Steyn of 10 October 2008 (the Fouries were '*re-employed*') and Mr Tumagole's letter to the Fouries dated 16 October 2008 (you have '*returned to work*'). Significantly, as mentioned above, Mr Tumagole was aware – at the latest by 9 October 2008¹⁷ – that the Fouries had been '*re-employed*' (as he put it) but only raised the issue with them a week later. Mr Tumagole, being the bearer of the authority to reinstate them, thus allowed the Fouries to continue working for this time before taking decisive action.
56. I turn now to consider each of the five questions (which I have reformulated in some respects) addressed by Mr Shaba in advancing the review application.

¹⁷ When he wrote to Mr Van Wyngaard seeking an explanation as to why he had signed the approval letters.

The first question: were the Fouries employees of the municipality?

57. An ‘employee’ is defined as follows in section 213 of the LRA:

- ‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.’

58. Although the municipality placed reliance on the fact that no formal (i.e. written) contract of employment was in existence between the parties, the conclusion of such a contract is, of course, not a requirement for qualification as an employee.¹⁸ In the circumstances, the essential question is whether the municipality validly communicated its acceptance of the withdrawal of the Fouries’ resignation to them (such as to give rise to a contract).

59. I do not agree with the submission that the municipality did not do so. On my assessment of the evidence, the municipality’s acceptance of the withdrawal of the Fouries’ resignation was communicated to them incrementally by way of *inter alia*: (a) the Jooste recommendation (the original of which was provided to Mr Coetzer – the IMATU shop steward who was representing the Fouries and liaising with them); (b) Anel Fourie’s email of 25 September 2008, which she copied to Ms Steyn and Mr Coetzer; (c) Ms Steyn having provided Mr Fourie with a copy of the letter of approval; and (d) the conduct of Ms Burger, Mr Mokgoko and Mr De Jager (who each undertook various enquiries before, in effect, confirming that the Fouries’ reinstatement was in order) upon the Fouries’ return to work on 1 October 2008.

60. Contrary to what was submitted on behalf of the municipality, in circumstances where they were provided or sent to IMATU, the Jooste recommendation and Anel Fourie’s email of 25 September 2008 do not constitute purely internal communications. Furthermore, to my mind, the fact that the letter of approval was an internal communication is of little consequence – this in circumstances where it was

¹⁸*White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC).

confirmation of what had already been conveyed to Mr Coetzer by Anel Fourie in her email of 25 September 2008 (a few days before the letter of approval) and where Ms Steyn had been liaising with the Fouries throughout (surely to the knowledge of all concerned). In these circumstances, I am not persuaded by the submission of an absence of formality and direct communication.

61. I am also of the view that the submissions summarised in paragraph 44 do not assist the municipality. There is nothing on the record to establish that the Fouries would have had any reason to question the Jooste recommendation, and, despite Mr Jooste not having deleted the 'inapplicable' (as between approved / not approved), all concerned always interpreted him as having recommended the reinstatement of the Fouries. Turning to Mr Ratsiane's email of 29 September 2008, notwithstanding the fact that there is no evidence to establish that the Fouries knew about it, Mr Ratsiane's view (which was in any event misinformed to an extent) did not serve to override the email of 25 September 2008 of Mr Tumagole (who was the bearer of the necessary authority) and which clearly set in train a process that culminated in the approval letters. And, as I have already found, the approval letters cannot simply be styled as internal.
62. In conclusion, in my view, as at 1 October 2008, a contract of employment between the parties was in existence – in the clear and simple terms set out in the letter of approval. (This is, however, linked to the fifth question addressed below.)
63. If I am wrong, and a contract of employment did not come into existence, the question that then arises is whether, as submitted by the municipality, the absence thereof means that the Fouries could not have qualified as 'employees' as defined in section 213 of the LRA.
64. In *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC), Van Niekerk AJ (as he then was) found as follows:

'Taking into account the provisions of section 23(1) of the Constitution¹⁹, the

¹⁹ Which provides that 'everyone has the right to fair labour practice'.

purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of “employee” by this Court²⁰, I do not consider that the definition of “employee” in section 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by the common law may be an “employee” for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for “employees”, the fact that Lanzetta’s contract was contractually invalid only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status.

That, I think, is the short answer to the question that the commissioner had to answer. It was not necessary for the commissioner, as he did in his attempt to overcome the argument that Lanzetta’s employment contract was invalid, to construct a conception of an “employment relationship” and to consider whether Lanzetta was a party to such a relationship. If, as I have suggested, the statutory definition of “employee” is not a sidecar to the motorcycle of the common law contract of employment, the commissioner had simply to ask, when applying the statutory definition of “employee”, whether Lanzetta worked for Discovery Health and whether he received or was entitled to receive remuneration. The answer to both these questions is clearly yes. Therefore, for the purposes of determining the CCMA’s jurisdiction to accept Lanzetta’s referral of a dispute, Lanzetta was an employee and Discovery Health employed him.’²¹ (Emphasis added.)

And further:

‘It was not necessary in this instance for the commissioner to resort to a construction that transcends the employment contract as a whole in order only to address the consequences of the alleged invalidity of Lanzetta’s contract. As I have indicated, the invalidity argument is best dealt with more simply on the basis that because the statutory definition of “employee” extends beyond an employment contract, then contractual requirements (at least as they relate to validity) are not relevant to the application and interpretation of the definition’.²² (Emphasis added.)

65. Allied to this, in ‘Kylie’ (LAC) (*supra*), the LAC, having accepted that the LRA must be read so as to implement section 23 of the Constitution, found as follows:

‘Once it is accepted that the constitutional right to fair labour practices vests in “everyone” and, further that it includes not only parties to a contract of employment

²⁰ Van Niekerk AJ referred in this regard to *Rumbles v Kwa Bat Marketing (Pty) Ltd* [2003] 8 BLLR 811 (LC) at para 17, and *White* (*supra*) at 391C.

²¹ At paras 49-50.

²² At para 52.

*but those persons in an employment relationship, Mr Trengove's submission, to the effect that persons, who engage in services pursuant to an employment relationship such as the appellant, are covered by section 23, becomes particularly compelling.*²³ Emphasis added.)

66. Although not expressly mentioned in *Discovery Health (supra)*, it is noteworthy that paragraph (b) of the definition of 'employee' is significantly wider than paragraph (a). It is not circumscribed by the requirement that remuneration must be paid or that work must be performed. Instead, in order to qualify as an employee, the person need do no more than in any manner assist in carrying on or conducting the employer's business.²⁴ Here, there appears to be no requirement for the existence of a contract of employment in order for a person to qualify as an employee.
67. Regarding this court's judgment in *Odendaal (supra)*, it warrants mention that the court's findings were not made in the context of an interpretation of the definition of 'employee' (to which no reference was made by the court). This notwithstanding, insofar as the court held that the existence of a contract of employment is a necessary prerequisite for an employment relationship, I respectfully disagree and prefer the approach of Van Niekerk AJ in *Discovery Health (supra)*.
68. Accepting, as I do, that a contract of employment is not a necessary prerequisite for qualification as an employee, the question then is whether, on the assumption (for present purpose) that a contract of employment did not come into existence, the

²³ At para 22.

²⁴ Du Toit, *et al*, *Labour Relations Law* (5th ed) at 73-74 opine as follows regarding the reason for the broadened ambit of paragraph (b): 'The principal reason, it would seem, is the fact that a person may be in a de facto employment relationship with another despite the absence of a formal employment contract between them. Thus, where the employing entity is an empty shell owned and controlled by a third party, a person employed by the former may to all intents and purposes be an employee of the latter notwithstanding the absence of an employment contract between them. The definition may also include de facto employees who do not have valid contracts of employment; for example, foreigners without work permits or unassisted minors whose contracts of employment have been repudiated by their legal guardians.' The authors go on to state as follows at 74,fn 82: 'Another example is a purported contractual relationship where one party did not intend to enter into a contract of employment, thus rendering the contract void or voidable Even where consensus ad idem is lacking, however, it is possible that an employment relationship in the broader sense may come into existence.'

Fouries nevertheless qualified as employees. In my view, they did. On the facts, the Fouries worked for the municipality throughout the period 1 to 17 October 2008, with the knowledge of Mr Tumagole (certainly from 9 October 2008 onwards), and, in these circumstances, would surely have been entitled to remuneration, with the result that paragraph (a) of the definition of ‘employee’ was satisfied. Alternatively, the Fouries qualified as employees under paragraph (b), in that, throughout the aforesaid period, they assisted the municipality in carrying on or conducting its business.

The second question: were the Fouries dismissed by the municipality?

69. Accepting, as I have found, that there was a contract of employment between the parties, the facts demonstrate, in my view, that Mr Tumagole’s letter of 16 October 2008 brought that contract to an end.²⁵ At the level of substance, it constituted an act of dismissal in terms of section 186(1)(a) of the LRA, in that the municipality terminated the contract of employment without notice.
70. Insofar as no contract of employment was in existence, but the Fouries nevertheless qualified as employees in terms of the definition thereof (as I have found in the alternative above), the question that arises is whether the Fouries could still have been dismissed within the meaning of the definition of ‘dismissal’ in section 186(1). Mr Shaba answers this question in the negative on the basis of the finding in ‘Kylie’ (LC) (*supra*) that the existence of a valid contract of employment is a necessary condition to found the statutory right to fair dismissal. On my reading of ‘Kylie’ (LAC) (*supra*), the LAC held differently, to the effect that, even if a contract of employment is invalid, an employee who is party to an employment relationship *per se* is entitled to protection from unfair dismissal.²⁶
71. Notwithstanding the above, in my view, ‘contract of employment’ in section 186(1)(a) should be interpreted widely, so as to encompass an ‘employment relationship’. Unless this is done, persons who do not establish the existence of a contract of employment, but nevertheless qualify as employees under the LRA (see

²⁵ *NULAW v Barnard NO & another* [2001] 9 BLLR 1002 (LAC) at paras 23-26.

²⁶ See *inter alia* para 38.

above) would be deprived of protection against unfair dismissal²⁷, which could not have been intended and would be at odds with the constitutional right to fair labour practices.²⁸ This, in my view, is the clear import of the passage from ‘Kylie’ (LAC) (*supra*) quoted in para 65 above.

72. In the circumstances, even if a contract of employment did not come into being between the parties, I am nevertheless of the view that the Fouries were dismissed by way of Mr Tumagole’s letter of 16 October 2008.

The third question: is the commissioner’s jurisdictional ruling assailable?

73. On the basis of my conclusions that the Fouries were employees and that they were dismissed by the municipality, I am of the view that the commissioner correctly found that he had jurisdiction to arbitrate the dismissal dispute. The fact that there are aspects of the commissioner’s reasons that I do not agree with, does not detract from this.
74. Although I am in agreement that, in accordance with what had been agreed between the parties at the pre-arbitration conference, it would have been appropriate for the commissioner to hear evidence at the first stage of the arbitration before making his jurisdictional ruling, in the light of the decision that I have made to determine this matter based on the transcription of both the first and second stages of the arbitration, this does not affect the outcome hereof.
75. Indeed, the fact that Mr Shaba invited me to peruse the transcript of the second sitting of the arbitration to, in effect, determine the true facts (see para 47 above), demonstrates that the issue of jurisdiction should be determined by me on all the material.

²⁷ In *Discovery Health (supra)* at para 52 (second para so numbered), Van Niekerk AJ remarked as follows in this regard: ‘*The definition of dismissal, defined in section 186 of the LRA, inter alia, to include “the termination by an employer of a contract of employment, with or without notice” may present a jurisdictional difficulty to persons who are in engaged in disguised employment relationships and who claim unfair dismissal (because of the specific reference to a “contract of employment”) but his is not one of those cases.*’

²⁸ See for a comparable approach, *Wyeth SA (Pty) Ltd v Manqele & others* [2005] 6 BLLR 523 (LAC).

The fourth question: did the Fouries return to work during the period 1 – 17 October 2008?

76. With reference to my analysis of the facts in paragraphs 53-55 above, I am of the view that the Fouries did in fact return to work during the period 1 – 17 October 2008.
77. The submission made on behalf of the municipality to the effect that the veracity of the evidence of the Fouries' witnesses should be questioned because it was not substantiated by documents, is plainly without merit. Also ignored by the municipality in this regard is the evidence (apparently uncontested) of the Fouries themselves, which clearly established that they went about their duties up until 17 October 2008 – this after having been given back their 'original' appointment cards.

*The fifth question: was the Fouries' reinstatement (if found) ultra vires and void ab initio?*²⁹

78. As set out above, Mr Shaba submitted that, insofar as it is found that the Fouries were reinstated, none of the authors of any of the various communications (including Messrs Jooste and Van Wyngaard) were authorised to effect the Fouries' reinstatement *outside* the recruitment policy. In effect, I understood the submission to be that the process followed in reinstating the Fouries was in breach of the recruitment policy, in that it provides for a formal recruitment and approval process, and that these processes were not followed in reinstating the Fouries. From this basis, I understood Mr Shaba to submit further that the act of reinstating the Fouries constituted administrative action; that such act was *ultra vires* the recruitment policy (for the aforesaid reasons) and thus unlawful; and that such act was void *ab initio* (and thus visited with a nullity).
79. In his response, I understood Mr Geldenhuys to submit that this point (which I refer to as the '*ultra vires* point') is different to the municipality's pleaded grounds of review. There are only two paragraphs that could conceivably cover the *ultra vires* point – paragraph 6.4 of the founding affidavit and paragraph 3.1 of the supplementary

²⁹ This is the essence of the submission, although Mr Shaba's fifth question was formulated as follows: '*Whether the [Fouries] knew or ought to have known that their re-acceptance / re-appointment by the [municipality] (if any) was irregular?*'

affidavit. The first of these paragraphs alleges that the commissioner committed a reviewable defect in finding that the Fouries had been reinstated during the period 1 – 15 October 2008, in circumstances ‘*where none of [the] officials of the [municipality] with the requisite authority to order their reinstatement ... had specifically communicated such decision to them*’. The second paragraph alleges, in turn, that the commissioner committed a reviewable defect by finding in favour of the Fouries ‘*when [they] knew or were expected to know that their re-appointments or re-acceptance to the employ of the [municipality] were irregular as [it] was done by a person with no authority to do so*’. While, in both instances, there is a complaint of a lack of authority, there is no reference in either paragraph to the recruitment policy – let alone to a breach thereof being *ultra vires* and the ensuing reinstatement being void *ab initio* as a consequence. In the absence of the *ultra vires* point having been pleaded, I find that the municipality is not entitled to rely upon it in these proceedings.³⁰

80. But even if I am wrong in so finding and was to entertain the *ultra vires* point, it is, in my view, not a point that can succeed in the absence of the municipality having put up the recruitment policy. This is so because it would only be upon a thorough analysis of the recruitment policy (read in the light of any applicable statutory framework, to which I have also not been referred) that a conclusion could be drawn as to the consequences of a breach of its terms.³¹ It certainly does not follow, as appears to have been advanced on behalf of the municipality, that a breach thereof would necessarily result in the reinstatement of the Fouries being void *ab initio*.
81. Insofar as the municipality persists with the ground of review pleaded in paragraph 6.4 of the founding affidavit, I am of the view that it is without merit. Leaving aside the recruitment policy, which has not been brought into the review, the person that

³⁰ *Rustenburg Platinum Mines Ltd v CCMA & others* [2004] 1 BLLR 34 (LAC) at para 15.

³¹ It is, of course, not every omission or defect which entails the drastic penalty of invalidity. In this regard: ‘No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts ... to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed’ (*Howard v Bodington* (1877) 2 PD 203).

had the authority to reinstate the Fouries was Mr Tumagole. To my mind, despite his claim in evidence that it only amounted to some form of preliminary indication, Mr Tumagole clearly approved of the Fouries' reinstatement in his email of 25 September 2008 in response to a request from the department (which is how the Jooste recommendation was described in Mr Mabusela's email, to which Mr Tumagole replied). The only condition that Mr Tumagole set was that no termination payments should have already been made to the Fouries, with Anel Fourie having confirmed that no monies had been paid over and that the Fouries would thus be reinstated in her email sent to Mr Coetzer (of IMATU) about an hour later. The fact that Mr Tumagole did not himself convey this to IMATU does not mean that the communication was wanting.

82. The evidence further establishes, in my view, that Mr Tumagole then did something of an about turn in his letter of 10 October 2008 to Mr Jooste and Ms Steyn. Furthermore, as stated above, Mr Tumagole then allowed the Fouries to continue working until taking decisive action in his letter to them dated 16 October 2008.
83. Insofar as the municipality persists with the ground of review pleaded in paragraph 3.1 of the supplementary affidavit, it was not, in my view, established in evidence that the Fouries had the knowledge that they are alleged to have had. In the result, I find there also to be no merit in this ground of review.

Summation

84. The main findings of the court are that the Fouries were employed by the municipality during the period 1 – 17 October 2008; that the Fouries were dismissed by way of Mr Tumagole's letter dated 16 October 2008 (which they received the following day); and, accordingly, that the commissioner was correct in assuming jurisdiction over the dismissal dispute.

Order

85. In the result, the following order is made:

1. The application is dismissed.
2. The applicant is to pay the costs of the third and fourth respondents.

A.T. MYBURGH

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 12 APRIL 2011

DATE OF JUDGMENT: 23 JUNE 2011

FOR THE APPLICANT: Adv Shaba on the instruction of M S Molebaloa Attorneys

FOR THE 3RD & 4TH RESPONDENTS: Mr Geldenhuys of Geldenhuys C J @ Law Inc