



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable / not reportable

Case no: C636/2014

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

NGOAKO MASHAO

Second Applicant

SIYABONGA LINOSE

Third Applicant

BHEKITHEMBA NHLEKO

Fourth Applicant

and

**ESKOM HOLDINGS SOC LTD (GENERATION, KOEBERG
OPERATING UNIT)**

Respondent

Heard: 25 August 2017

Delivered: 25 July 2018

Summary: Contractual claim for breach of contract of employment and damages arising from suspension from training programme (not employment) – special plea of issue estoppel arising from prior CCMA arbitration upheld in part – breach of contract not established – claim dismissed

JUDGMENT

MYBURGH, AJ

Introduction

- [1] This is a contractual claim in terms of section 77(3) of the BCEA. The applicants¹ were recruited by Eskom to be trained as nuclear reactor operators (ROs) at Koeberg.² They essentially claim that Eskom breached their contracts of employment by removing them from the training programme, and seek damages of some R1.7-million each as a consequence. Each of the applicants remain employed by Eskom in different capacities.
- [2] An unusual – and taxing – feature of this litigation is that it was preceded by an unfair labour practice claim (relating to training) in terms of section 186(2)(a) of the LRA in the CCMA. Following a marathon 14-day arbitration, the commissioner found that Eskom's decision to remove the applicants from the training programme was based on fair reasons, but that it was procedurally unfair, and thus awarded each of them six months' salary as compensation. Not content with this outcome, the applicants have re-engineered their claim into a contractual one. Unsurprisingly, Eskom has raised a special plea of issue estoppel.
- [3] By agreement between the parties, the entire arbitration record – running to 3000 odd pages – was entered as evidence before this court, and was supplemented by half a day of live oral evidence. Inevitably, the magnitude of the record has contributed to the delay in handing down this judgment.

¹ I use this as shorthand for the second, third and fourth applicants, and refer to the first applicant as NUM.

² Koeberg Nuclear Power Station.

- [4] The structure of this judgment is as follows: the broad factual matrix is outlined; the issues for determination by this court are defined; the commissioner's award is analysed; Eskom's special plea of issue estoppel is then dealt with; and this is followed by a consideration of each of the alleged breaches of contract relied on by the applicants.

The broad factual matrix

- [5] Koeberg needs little introduction. Owned by Eskom, it is the only nuclear power station in Africa. As a nuclear facility, it is regulated locally by the National Nuclear Regulator (NNR) and internationally by both the World Association of Nuclear Operations (WANO) and the Institute of Nuclear Power Operations (INPO). This involves an exceptionally high level of regulation, which is aimed at the assurance of nuclear safety due to the extremely high risks involved, as evidenced by the Chernobyl and Three Mile Island disasters.
- [6] The three applicants aspired to be ROs manning the control room at Koeberg (the epicentre of a nuclear power station), a job rightly described in evidence as one of the most dangerous in the world, where there is simply no room for error. Given the peculiar nature of the job, ROs are required to have an array of cognitive skills and personality and emotional traits, which are tested by way of psychometric assessments, at the time of recruitment and thereafter. Just how dangerous and unique this job is, is demonstrated by the fact that the NNR prescribes the appointment of a certified station psychologist at Koeberg, whose primary function is to keep ROs (and SROs³) under continuous psychological surveillance. If a deficiency is detected, they are often suspended, pending what is known as remediation.
- [7] There are potentially three routes to becoming an RO: (i) the nuclear cadet programme (aimed at school leavers⁴); (ii) the non-licensed operator programme (where nuclear plant operators (NPOs) progress through the ranks to become ROs); and (iii) the direct reactor operator (DRO) programme (a pilot project aimed at attracting persons with tertiary qualifications who are placed

³ Senior reactor operators.

⁴ Which has been shelved.

on accelerated training). Although the training programme for NPOs and DROs is the same, the DROs spend less time performing work on the plant, which results in accelerated training.

- [8] The DRO programme commenced in 2005, with the first intake being referred to as ILT⁵ 7/8. The applicants were part of the second intake of DROs, which was known as ILT 10/12, and commenced employment as trainee ROs in July 2007. Both DROs and NPOs were engaged on ILT 10/12. Initially there were 22 learners, which reduced to 18 before the events material to this matter.
- [9] In March 2007, before being selected for employment, the applicants were subjected to psychometric assessments, which were conducted by an external firm of industrial psychologists called Psymetric.⁶ Each of the applicants were “*recommended with reservation*” by Psymetric. What this meant is that certain psychometric risks or negative indicators had been identified, but that these were not considered so severe as to exclude employment as a trainee RO.
- [10] In terms of the applicants’ contracts of employment:
 - a) the training programme comprised of four phases and shift work to facilitate training, with the four phases being: phase 1 – entry level operator training; phase 2 – generic fundamentals course, and systems instrumentation course (SIC); phase 3 – initial licence training (ILT); and phase 4 – NNR examination;
 - b) the training programme was to commence on a date to be set by Mr Engel (Koeberg’s plant manager) “*and end upon completion of the programme but not exceeding a period of 48 months*”;
 - c) if the applicants failed to complete the training programme, they would be liable for a *pro-rata* portion of the training costs, unless a mutually

⁵ Initial licence training.

⁶ Psymetric Human Capital Assessment Inc.

acceptable reason existed for non-completion or Eskom elected to waive the obligation;

- d) on successful completion of the training programme, the applicants were required to work as ROs for a minimum period of five years, with a breach also being subject to a penalty clause; and
- e) all of Eskom's policies and procedures (including safety regulations) are incorporated into the contract.

[11] During the course of evidence, a plethora of policies and procedures were referred to, which are relevant to this matter. Prime amongst them were the NNR licensing guide,⁷ the Koeberg license document,⁸ and administrative procedure KAA-591.⁹

[12] ILT 10/12 was run in parallel with ILT 7/8 and the previous intake, known as ILT 6,¹⁰ with the learners being at different phases of their training. An issue in relation to each of these prior intakes is of particular relevance to this matter.

[13] In August 2007, a decision was taken to remove an ILT 6 learner from the training programme due to psychological factors. In the process, it was identified that while he had undergone a psychometric assessment by Psymetric before being appointed in 2005 and had been recommended (albeit with psychometric reservations) for appointment, he had not been tested for the "*primary disqualifying conditions*" set in the NNR licensing guide.¹¹ (These are: (i) alcoholism and alcohol abuse; (ii) drug abuse; (iii) psychopaths; (iv) schizophrenics; (v) pronounced affect distortion; (vi) criminal offences; and (vii) "*any other condition considered by the psychologist or the council to be*

⁷ Its full description being "A guide to the requirements for medical and psychological surveillance and control of licensed operators at licensed facilities" (LG-1019), which was issued by the NNR.

⁸ Its full description being "Requirements for medical and psychological surveillance and control at Koeberg Nuclear Power Station" (LD-1077).

⁹ Its full description being "Medical and psychological surveillance and control of radiation workers and licensed operators" (KAA-591).

¹⁰ This being a purely NPO training programme.

¹¹ Appendix B: Psychological criteria for rejection.

potentially or actually detrimental to the promotion and maintenance of nuclear safety standards of licensed operators”.) Why this had not occurred is because these are clinical criteria, with no clinical tests having been included in the battery of psychometric tests undertaken by Psymetric in 2005. This in circumstances where Psymetric are industrial and not clinical psychologists.

- [14] As a result of this, a new improved battery of psychometric tests were developed and introduced in 2008 by the then station psychologist, Ms Nkosi. They were subsequently approved by the NNR. I refer to them as “the new battery of tests”.

- [15] In July 2009, a considerable problem arose in relation to ILT 7/8, which (to repeat) comprised the first group of DROs. All but one of the RO learners – a number of whom had also been recommended with psychometric reservations by Psymetric – failed their licensing examination. (A process of remedial training was thereupon undertaken, and they retook the examination successfully a few months later.) Management’s investigation report records the root causes of this as including the *“inappropriate selection of a relatively large group of learners with psychometric reservations onto an accelerated and pilot (DRO) training programme”*.

- [16] After the ILT 7/8 experience, management appears to have taken the decision that it was no longer going to allow candidates with *strong* psychometric reservations onto the training programme.

- [17] On 1 July 2010, Dr Theron took up the position of station psychologist at Koeberg, taking over from Dr Jungschläger (a private practitioner who had been contracted to perform the role following the resignation of Ms Nkosi in mid-2008). For about six months, Dr Theron was trained by Dr Jungschläger, with the NNR having formally accredited Dr Theron in January 2011. The overall role of the station psychologist is to give an assurance to the NNR that the public is safe – this from the perspective of the psychological well-being of Koeberg employees.

- [18] In November 2010, Dr Jungschläger assessed seven NPO candidates on ILT 10/12 using the new battery of tests, two of whom were not recommended. The assessment appears to have been undertaken in preparation for learners commencing with phase 3 (ILT) of their training. This involves simulator training in a replica of the Koeberg control room, and is really the business end of the training programme.
- [19] In the first quarter of 2011, Dr Theron raised with Mr Aploon (Koeberg's operations manager) her concerns about the psychometric assessments of the 13 DROs on ILT 10/12, who were about to start phase 3 of their training. Her concerns were informed by the following. Firstly, their 2007 psychometric assessments by Psymetric suffered from the same limitation as identified in relation to ILT 6, i.e. they had not been tested for primary disqualifying conditions. Secondly, their appointment suffered from the same limitation as identified in relation to ILT 7/8, i.e. they were appointed despite being recommended with reservation by Psymetric. Thirdly, their psychometric assessments were now four years old, with it being generally accepted in the profession that such assessments are only valid for 12 months. Fourthly, given that the NPO learners on ILT 10/12 had been tested using the new battery of tests, it would have been inconsistent for the DRO learners not to be tested on the same basis. Later on in her evidence, Dr Theron also made mention of the fact that the 2007 assessments conducted by Psymetric were deficient in that only one instrument was used to evaluate temperament / personality, whereas the best practice was to use multiple tests.
- [20] On the advice of Dr Theron, Mr Aploon decided that the RDOs should undergo psychometric assessments using the new battery of tests before the start of phase 3 of their training.
- [21] In May 2011, Mr Aploon and Mr Lombard (Koeberg's operations training manager) met with the DROs and explained the need for them to undergo another psychometric assessment. Although displeased, no one refused to do so. At this point, it was not anticipated that the results would be such that anyone would be suspended from the training programme, albeit that there were no guarantees.

- [22] Around about 13 May 2011, Mr Butler (the section head for ILT) put up a schedule in the training room, which reflected a training contingent of 18 reduced to 12 learners on ILT 10/12. This arose in circumstances where some capacity constraints had been experienced and some planning considered.
- [23] On 3 June 2011, using the new battery of tests, Dr Theron assessed the 13 DROs on ILT 10/12. Six of them were recommended with reservation, with three of the six being recommended with “*strong reservation*”.¹² The applicants were the ones recommended with strong reservation. This in circumstances where certain cognitive, and EQ and personality limitations were identified in respect of each of them. The details were set out in Dr Theron’s psychometric assessment summary reports (which were sent to the applicants on 8 September 2011). By way of example, these sorts of reservations were identified: very slow processing speed; extremely high perfectionism and rule adherence (which inhibits problem solving); and selective and divided attention becomes problematic under increased stress / pressure. Significantly, Dr Jungschläger agreed with Dr Theron’s assessment of the applicants.
- [24] After having undertaken the psychometric assessments, Dr Theron met with Mr Aploon to discuss the results. On the advice of Dr Theron, Mr Aploon decided that the six learners in question needed to be suspended from ILT 10/12 pending remediation. The decision was based in part on the experience with ILT 7/8, where allowing learners who had been recommended with reservation (let alone strong reservation) onto the programme had contributed to a huge failure rate.
- [25] On 24 and 25 August 2011, Dr Theron gave each of the applicants feedback on a one-on-one basis (this in circumstances where the results were confidential). During the course of her feedback, Dr Theron explained to the applicants that “*it doesn’t mean not recommended forever and that the development areas have been identified and that my plan is to work with them*”

¹² No issues appear to have arisen in respect of the balance of the 13 DROs.

on these development areas to put them in a better position for a following course”.

- [26] Directly after Dr Theron had given her one-on-one feedback, Mr Butler held a meeting with the applicants, and explained to them the decision to suspend them from ILT 10/12 pending remediation. Mr Aploon had asked Mr Butler to stand in for him as he was on a business trip at the time.
- [27] The suspended DROs were given a choice – either complete SIC (the component of the training programme they were busy with), which would shorten recovery time in respect of their deferred completion of the training, or return to shift work immediately. Messrs Nhleko¹³ and Linose¹⁴ chose to complete SIC, while Mr Mashao¹⁵ decided not to do so, and asked to be seconded elsewhere. SIC started in September 2011 and was completed towards the end of the year.
- [28] On 13 September 2011, the aggrieved DROs met with Mr Aploon during the course of which they raised their concerns about being suspended and about the delay in the completion of their training. Before this, and despite it being apparent for some time that ILT 10/12 was well behind schedule, the DROs had never raised the issue. (In fact, by the time that the applicants were suspended from ILT 10/12 in August 2011, four years had already lapsed, and they had only completed two of the four training phases. There were various reasons for this delay.)
- [29] In January 2012, after the applicants had returned from annual leave, Dr Theron met with their shift managers (Mr Frew in respect of Messrs Nhleko and Linose, and Mr Weckesser in respect of Mr Mashao) to discuss the applicants’ remediation plans, which she had prepared in that month. In broad summary, what was required was that the applicants should job shadow a RO in the control room who would mentor them, and that they would be offered a referral (paid for by Eskom) to an external clinical psychologist, Mrs Kapnias,

¹³ Fourth applicant.

¹⁴ Third applicant.

¹⁵ Second applicant.

to assist them with identified developmental areas. (The former was referred to as “*cognitive remediation*” and the latter as “*EQ remediation*”.) Mrs Kapnias had assisted Koeberg with the remediation of employees for many years.

- [30] The shift managers, in turn, conveyed the remediation plans to the applicants. While Mr Nhleko was positive about undergoing remediation, Messrs Linose and Mashao were disinclined to do so. Mr Linose’s reluctance to engage with Mrs Kapnias stemmed from his insistence that he first receive his psychometric assessment scores from Dr Theron, which she had refused to release (otherwise than to an appointed clinical psychologist) for ethical reasons.
- [31] On 10 February 2012, Mr Aploon, Mr Engel and Dr Theron held a meeting with the applicants, at which the deterioration in the parties’ relationship was discussed.
- [32] On 20 March 2012, Mr Aploon sent so-called “*deployment*” letters to the applicants, which read as follows (in part):

“As previously communicated, your participation in the Direct Reactor Operator Program has been suspended. In the interim you will be redeployed to your originating shift. As a Direct RO, the only qualifying criteria for re-joining the program at the next course (March 2013 tentatively) is the successful completion of RO psychometric testing.

Your personal grade and basic remuneration will remain unchanged.”

- [33] Further to this, NUM (on behalf of the applicants) referred an unfair labour practice dispute in relation to training to the CCMA. The arbitration of the matter ran intermittently between 7 September 2012 and 19 April 2013, with the award being issued on 13 May 2013.
- [34] It was only after the award was issued that Mr Nhleko – and he alone – decided to take up the offer to consult with Mrs Kapnias. They held six consultations during the period 18 July 2013 to 17 October 2013. Mrs Kapnias assisted Mr Nhleko with the EQ component of his remediation, while the cognitive component thereof was undertaken in the plant.

- [35] On 30 July 2014, the applicants' contractual claim was referred to this court by way of the filing of a statement of case.
- [36] The 11 learners who ultimately remained on ILT 10/12 were subsequently split into two groups, of six (DROs) and five (NPOs) respectively. The first group commenced with simulator training (phase 3) in August 2011 and were licensed in October 2013. The second group commenced with simulator training in August 2013 and were licensed two years later. This in circumstances where only one simulator was available, or Eskom only had the resources to operate one.
- [37] After having completed his remediation with Mrs Kapnias and at the plant during his shifts, Mr Nhleko was positively re-assessed by Dr Theron in 2016. He re-joined phase 3 of the training in August 2016, and is due to qualify as a RO in August 2018 (albeit that there is no guarantee of this).
- [38] Given the problems experienced with ILT 10/12, the DRO programme has been abandoned. Furthermore, the training period for RO learners has been extended.
- [39] Finally, there are a few points relating to the CCMA arbitration and action in this court that can also be conveniently dealt with under this head. The first is to record the witnesses who testified in the CCMA, namely: Mr Moses (an applicant in the CCMA who settled), Mr Linose and Mr Mashao (for NUM); and then Dr Theron, Mr Aploon, Mr Butler and Mr Frew (for Eskom). The second is to record the witnesses who testified in person before this court, namely: Mrs Kapnias and Mr Nhleko (for NUM); and then Mr Engel (for Eskom). The third is to record that the applicants effectively seek damages for the lost opportunity of qualifying as ROs, with their claim being based on the short fall in their earnings. Each claim is for some R1.7-million.

The issues for determination by this court

- [40] As mentioned above, Eskom has raised a special plea of issue estoppel, which stands to be determined at the outset.

[41] The next issue for determination is whether Eskom breached the applicants' contracts of employment, which involves the determination of the following issue, as per para 146 of the pre-trial minute:

"146.1 Whether the respondent acted unlawfully and in breach of contract by:

- 146.1.1 failing to ensure that the employees completed the training programme within 48 months;
- 146.1.2 removing second to fourth applicants from the training programme prior to completion of the programme;
- 146.1.3 requiring second to fourth applicants to undergo psychometric assessment in June 2011;
- 146.1.4 removing the employees from the training programme based on the June 2011 psychometric test results;
- 146.1.5 refusing to furnish the employees or Dr Myburgh (who had been nominated by the applicants) with copies of their psychometric assessment results.

Alternatively

146.2 If it is found that it was a term and condition of employment to require the applicants to undergo psychometric testing in 2011 whether:

- 146.2.1 clauses 16 and 18 of the Rules of Conduct Pertaining Specifically to Psychology precluded Dr Theron from subjecting the employees to psychometric assessments;
- 146.2.2 the identification of psychometric reservations allowed the suspension of the employees from the training programme;
- 146.2.3 the respondent could withhold the psychometric assessment reports from the employees."

[42] In the event of a breach of contract being determined, the final issue for determination is whether the applicants are entitled to damages, and if so, the quantum thereof.

The commissioner's award

[43] As a prelude to the determination of Eskom's special plea of issue estoppel, it is necessary to deal with the findings made by the commissioner in his award in some detail.

[44] The commissioner framed the issue in dispute as being "*whether the respondent's conduct in removing the applicants from a training programme for reactor operators, amounted to an unfair labour practice*".¹⁶

[45] The award reflects that the applicants raised the following three central issues, which they contended led to the decision to remove them from the training programme being substantively unfair:¹⁷ firstly, that "*it was [not] an NNR licensing requirement to subject them to psychometric assessments during the tenure of their training*"; secondly, that they "*should [not] have been subjected to psychometric assessments before ILT*"; and thirdly, that Eskom "*had a prior ulterior plan to reduce the number of candidates*" on the training programme.

[46] The commissioner determined each of these issues in favour of Eskom. Regarding the first issue (i.e. the NNR licensing requirement issue), the commissioner found:

"27. The Applicants denied that it was an NNR licensing requirement to subject them to psychometric assessments during the tenure of their training. The only psychometric assessments that employees were subject to were at the recruitment stage and when people applied for positions at a higher job level. Since they had started they were unaware of any previous RO candidates having been subjected to psychometric assessments during the course of their training.

28. The Respondent, however, referred to a plethora of documents to support its case. These consisted of NNR licensing documents as well as certain internal policies and procedures.

¹⁶ Award: para 3.

¹⁷ For present purposes, no regard need be had to the commissioner's findings on procedural unfairness, which led to the award of six months' compensation.

29. LG1019 is a Guide to the Requirements for Medical and Psychological Surveillance and Control of Licensed Operators at Licensed Facilities. It is clear from the preface (at 1B) that the guide also applies to recruits for licensed operator positions at licensed facilities. The document also requires licensees such as the Respondent to implement a program of medical and psychological surveillance and control in order to provide assurance that no adverse impact on the safe operation on the plant will result from the medical or psychological deficiencies in such personnel (paragraph 1, page 1C). The Station Psychologist, who at the time was Dr Theron, needs to give the NNR the assurance that licensed operators and recruits are psychologically fit. A failure to comply with the requirements of medical and psychological surveillance and control may become a licensing issue for the Respondent.

30. Appendix B of LG1019 (page 1R) records the 'Psychological Criteria for Rejection' as *'The following shall be considered primary disqualifying conditions in respect of licensed operators or candidates: (1) alcoholism and alcohol abuse; (2) drug abuse; (3) psychopaths – severe antisocial behaviour; (4) schizophrenics; (5) pronounced affect distortion (e.g. depression and manic states); (6) criminal offences; (7) any other condition considered by the psychologist or the council to be potentially or actually detrimental to the promotion and maintenance of nuclear safety standards of licensed operators.'*

31. Dr Theron testified that the above conditions required clinical diagnosis which could not have been carried out by Psymetrics as they were industrial psychologists who were not qualified to conduct clinical assessments. Hence, on this basis, Dr Theron asserted that the psychometric assessments conducted at recruitment phase was incomplete and this was one reason for the Applicants to have undergone another round of psychometric assessments which also included a clinical component. Dr Theron's evidence could not be controverted and thus is accepted.

32. KSV-001 records the 'Recruitments for Medical and Psychological Surveillance and Control of Radiation Workers and Licensed Operators'. It states that *'All potential license candidates must undergo psychological and psychometric evaluation for suitability'* (paragraph 5.3.7.1, page 48). It also stipulates certain of the primary disqualifying conditions as stated above and obliges the licensee to give the assurance to the NNR that RO's and by implication, 'potential licence candidates', meets the medical and psychological criteria.

33. The Applicants argued that the documents do not specify that psychometric assessments, *per se*, be carried out, but rather that the policies refer to 'psychological surveillance'. The evidence of Dr Theron, who was the only expert called to testify was clear that psychometric assessments formed part of psychological surveillance, which may also be conducted in other ways such as observations and interviews.

34. I am satisfied, that as a general requirement, the Respondent had to give the NNR the assurance that RO's and license candidates were psychologically fit and that the means whereby the Respondent chose to do so was through psychometric assessments. I am further persuaded that the Respondent was dutybound to check for primary disqualifying disorders given that such assessments were not previously done. I cannot find that the Respondent had acted on a whim or with a *mala fide* motive." (Original italics and underlining.)

[47] Regarding the second issue (i.e. the assessment before ILT issue), the commissioner found:

"35. The witnesses of both parties confirmed that it was not the norm to subject RO candidates to psychometric assessments before ILT. The Applicants as well as Mr Aploon were unaware of this requirement. The directive for the psychometric assessment to be conducted came from Dr Theron.

36. KAA-591 deals with 'The Medical and Psychological Surveillances and Control of Radiation Workers and Licensed Operators'. This document is applicable to all persons occupationally disposed to radiation, licensed operators and license trainees (paragraph 2.1).

37. In terms of appendix 8 '*All Licensed Operators and Initial License Trainees have to undergo specific medical and psychological assessments to establish their physical and psychological fitness to work under stressful conditions and to make sound independent decisions when required to do so. These assessments are to be conducted before employment and at regular intervals set out in the license document LD1077 rev. one. Additional assessments may be necessary, as determined by the Site Appointed Medical Practitioner and/or the Site Appointed Psychologist.*'

38. In terms of the Psychological Surveillance Protocol when it comes to selection and training, it provides for the '*comprehensive psychometric assessment of all*

potential operators' as well as the 're-assessment of candidates for initial licence training once they are selected for potential licensing'.

39. KAA-788 records 'The Process for the Recruitment and Selection of Operators'. This document also applies to Initial License Training Candidates i.e: *'a person who was selected in accordance with an authorised process and who was undergoing all the required training to obtain an operator license'* (paragraph 3.1.1).

40. Applicable to this document are LG-1019 and KAA-591. In terms of the 'Workflow Responsibility Matrix for SRO and RO Initial Licence Candidate Recruitment and Selection' (paragraphs 12 to 16) the psychologist must perform psychometric testing, compile psychometric reports, decide on potential candidates and thereafter she must inform the NNR of the candidates and forward the psychometric reports to the NNR.

41. Clearly, in terms of these policies, there is sufficient evidence to suggest that the Respondent had good reason to pursue psychometric assessment before ILT.

42. Furthermore, Dr Theron also testified that the results of psychometric assessments were valid for a period of 12 months with cognitive functioning and aspects of the psychological profile potentially having changed. Although the Applicants challenged this statement, given her level of expertise, and in the absence of any contradictory evidence, I am prepared to accept her expert viewpoint.

43. Given that the Applicants last had a psychometric assessment four years prior to ILT, she was not in a position to use those results as a measure of assurance for the NNR and thus proposed that the Applicants subject themselves to a second batch of psychometric assessments. I do not find this to be an unfair reason.

44. A further reason given by the Respondent for the re-assessment was that the battery of psychometric assessments had changed. In August 2007, an ILT-6 candidate was removed from the programme due to certain clinical issues which had arisen and had not been identified during the initial psychometric assessments at recruitment phase. The battery was reviewed during 2008 by Ms Thoko Nkosi, the previous Station Psychologist and Dr Willem Jungschläger, the contract psychologist.

45. Another reason proffered was that after the high failure rate of the ILT 7-8 group in July 2009, a root cause analysis was done which found that a huge contributor to the failure rate was the *'inappropriate selection of a relatively large group of learners with psychometric reservations'*. Given that the Applicants had initially been 'recommended with reservations' there was nothing untoward about subjecting them to a re-assessment given the debacle of ILT 7-8.

46. Also, in November 2010, Dr Jungschläger assessed seven NPO candidates from the ILT 10-12 group with the improved psychometric battery. In Dr Theron's view it was important that the DRO component of the ILT 10-12 group, which included the Applicants, be subjected to the same battery of assessments for purposes of uniformity and consistency.

47. Purely on a substantive basis, I am satisfied that the reasons provided by the Respondent for the re-assessment are reasonable and not within the realm of being 'arbitrary or capricious'. I am persuaded that given the import of the RO positions, coupled with the regulatory framework and the Respondent's prior negative experience with other ILT groups, that the decision to re-assess the Applicants was based on a sensible and rational approach to hopefully fostering a successful group of ILT candidates who meet the criteria as established by the NNR." (Original italics and underlining.)

[48] Regarding the third issue (i.e. the ulterior motive for removal issue), the commissioner found:

"49. The ILT course is experiential and scenario-driven. It is largely conducted in a simulator which simulates incidents that may occur during real life. Candidates are put in small groups and spend time in the simulator responding to these scenarios.

50. The Respondent only had one simulator at Koeberg. In the past the Respondent also made use of a simulator in France for ILT training. At some point a decision was taken not to use the simulator in France any longer, and rather for the Respondent to acquire and install a second simulator. During mid-2011, Mr Butler and Mr Chris Lombard, the Operations Training Manager travelled to Canada to test the new simulator, but because it was found to be unsuitable it was not procured.

51. Mr Butler testified that although it would have been better to have two simulators on site, the Respondent could still cope with one simulator. He spoke about various methods that could be implemented such as staggering the groups or running them in series. Although either method would have caused the programme to be prolonged, I cannot find, even on a balance of probabilities, that the fact of one simulator was a decisive factor in reducing the number of candidates. The current status of the ILT group is that eleven candidates are left and have been divided into two groups comprising of six and five candidates respectively. The candidates have sought that the course be run in series which has been acceded to. This implies that the Respondent has acceded to the commensurate delay in finalisation of the second group. I am satisfied that the Respondent would have dealt with the existence of a bigger group as would have been necessary and come up with a plan.

52. Mr Linose also testified to the fact that during May 2011, Mr Butler had put two schedules on the wall for the upcoming ILT training. The one schedule was for eighteen RO candidates and the other for twelve candidates. According to the Applicants this was a firm indicator that the removal of six candidates was a foregone conclusion. Mr Butler testified that at the time, the plan was always to have two simulators, and thus the removal of candidates because of a lack of resources was not part of any plan. The alternative schedule was designed in the event of the non-arrival of the second simulator and there had to be a delay of a group. There was discussion between the candidates and Mr Butler around how the group would be reduced. Mr Linose testified that the response was that issues such as tardiness, sick leave records and the pass rate of quizzes would be looked at whereas Mr Butler testified that he would be looking at performance. He had no power to remove anyone from the course, and the alternative was simply a forward plan to deal with a group that would be delayed.

53. I do not believe that I need to make a definitive finding on this particular issue, save to say that although it appears to be an irresistible conclusion that the numbers have been pre-planned, it is clear that for such a devious plan to work, a conspiracy had to be driven by a group consisting of Mr Aploon, Dr Theron, Mr Lombard and Mr Butler. The evidence could not provide a nexus between these people in hatching such a plan. I thus reject this line of argument as mere conjecture and am not persuaded that this was the actual reason for the removal of the Applicants from the programme.

54. The Applicants were given a letter headed 'Deployment' by Mr Aploon which was dated 2011-03-19. They thus contended that their suspension was decided at least a year prior to them being offered redeployment.

55. The Applicants' argument in this regard is two-fold. Firstly, the date on the letter 2011-03-19 indicates when the letter was drafted and secondly, the list of Directors at the foot of the letter shows that the letter could not have been drafted in 2012 as certain persons such as R M Godsell and P J Maroga were no longer directors in 2012.

56. Mr Aploon's evidence is that he simply over-wrote an old letter containing an old letterhead. Mr Aploon's explanation is that neither Mr Godsell, nor Mr Maroga was a director in 2011. Both had left the employ of the Respondent in about 2009. Furthermore, he had erroneously recorded the year as 2011 rather than 2012.

57. Mr Aploon's evidence is also borne out of the fact that the email to which this letter was attached as a PDF file, was emailed to the Applicants on the following day, 20 March 2012.

58. For this line of argument to succeed, I should believe that Mr Aploon had drafted the letter one year ago and therefore it was pre-dated. He then saved the letter in order to use it one year later. The date on the PDF file is simply coincidental. Surely, such an argument cannot reasonably be believed. It is more likely that the date on the letter was an error, and thus I reject this submission.

59. Much was made of the fact that Dr Theron had overshot her authority, had come in as a new Station Psychologist intent on stamping her expertise and wanting to change things that were not found problematic in the past. I have already found that Dr Theron had acted within the scope of her practice and in compliance with NNR regulations and internal policies. I accept that she precipitated changes but find that the reasons for doing so were well-founded and within the ambit of her expertise and the procedures that governed her. Whether the manner in which this was done was fair, remains to be discussed.

60. I do not deem it a critical point to determine whether or not Dr Theron had to give the Applicants their scores. She was prepared to share it with a fellow clinical psychologist as is proposed by the ethical code of her profession. She used her discretion in not providing the scores to the Applicants because of possible misinterpretation of the data, and preferred to err on the side of caution. I find this

to be acceptable, and do not find this to be unfair. In my view, this issue is not particularly germane to the main issue of their removal from training.”

[49] The commissioner went on to conclude that “[o]n a broad conspectus, I cannot find that the reasons for seeking the applicants to undergo the psychometric assessments, to have been arbitrary, capricious or in bad faith”; that “the reasons for the assessments [were] fair and valid”; and that Eskom’s “actions were ... based on fair reasons”.¹⁸

Eskom’s special plea of issue estoppel

(i) *Formulation of the special plea and the applicants’ opposition*

[50] In summary, Eskom formulates its special plea as follows.

- a) Having referred to the issues for determination by this court as set out in para 146 of the pre-trial minute¹⁹ and to the three main issues determined by the commissioner,²⁰ it isolates these five findings by the commissioner:
 - i. Eskom had to give the NNR the assurance that the applicants were psychologically fit for duty. Eskom was accordingly dutybound to check for primary disqualifying disorders given that such assessments had not previously been done (award: para 34);
 - ii. Eskom had good reason to pursue psychological assessments before ILT (award: para 41);
 - iii. given the import of the RO positions, coupled with the other ILT groups, the decision to psychometrically re-assess the applicants was based on a sensible and rational approach to hopefully

¹⁸ Award: paras 61, 76 and 77.

¹⁹ See para 41 above.

²⁰ See para 45 above.

fostering a successful group of ILT candidates who meet the criteria as established by the NNR (award: para 47);

iv. Dr Theron acted within the scope of her practice and in compliance with NNR regulations and internal policies (award: para 59); and

v. Dr Theron's refusal to release the psychometric scores to the applicants was acceptable (award: para 60).

b) It contends that the commissioner's "*findings directly address the same issues that the applicants have again raised for determination before this court*", and that they should thus be estopped from doing so.

c) It concludes that in the event that this court finds that the applicants are bound by the findings in the award, "*the factual foundation for the applicants' claim would lack merit and the claim should accordingly be dismissed*".

[51] The applicants' opposition is based on the contentions that the plea of issue estoppel should fail because:

a) the same issue does not arise, since the commissioner was required to determine an unfair labour practice claim and this court a breach of contract claim;

b) none of the findings that Eskom wishes to make binding on this court are of any relevance to the contractual claim;

c) the findings of the commissioner involving the interpretation of the NNR regulations are wrong and involve questions of law, which this court is in as good a position to determine; and

d) the findings of the commissioner based on the alleged expert evidence of Dr Theron are wrong because she is not an expert in the areas she ventured her opinion about, and, in any event, are wrong on the merits.

(ii) *Legal principles: issue estoppel*

[52] Harms²¹ provides this typically succinct statement about issue estoppel with reference to current case law:²²

“The ambit of the *exceptio rei judicata* has been extended by the relaxation in appropriate cases of the common-law requirements that (a) the relief claimed and (b) the cause of action be the same.

Where the circumstances justify the relaxation of these requirements those that remain are that (a) the parties must be the same and (b) the same issue must arise. The latter involves an inquiry into whether an issue of fact or law was an essential element of the judgment on which reliance is placed. It has become commonplace to speak of ‘issue estoppel’ when the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed.

The defence remains one of *res judicata*. The recognition of the defence in such cases requires careful scrutiny. Each case depends on its own facts. Relevant considerations include questions of equity and fairness to the parties and also to others.”

[53] The purpose of issue estoppel is to prevent the repetition of lawsuits between the same parties, the harassment of a respondent by a multiplicity of actions and the possibility of conflicting decisions by different courts or tribunals on the same issue.²³ Put differently, issue estoppel is founded on public policy to avoid a multiplicity of actions – this in order to conserve the resources of the courts and litigants. But there is a tension between a multiplicity of actions and the palpable realities of injustice, which may be caused by the rigid application of issue estoppel. It must thus be determined on a case-by-case basis without

²¹ Harms *Amler's Precedents of Pleadings* (8th ed, 2015) at 323.

²² Including *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* 2014 (5) SA 297 (SCA) (“*Goldex*”); cited with approval in *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* (2015) 36 ILJ 1261 (LAC) (“*Wanli Stone*”).

²³ *Goldex* at para 23.

rigidity, with the overriding or paramount consideration being overall fairness and equity.²⁴

- [54] Whether considerations of fairness and equity militate against upholding a plea of issue estoppel will depend on the facts and circumstances of a particular case.²⁵ For instance, where it was not necessary for the first court to have arrived at any final decision on an issue in order to dismiss a claim or where the first court decided a disputed factual issue in motion proceedings without the benefits inherent in the hearing of oral evidence, fairness demands that reliance on issue estoppel should not succeed.²⁶ Along similar lines, where a decision is clearly wrong and insupportable or obtained by deceit or misrepresentation (and thus patently wrong), it has been held that fairness and equity will not permit a respondent to shelter behind the decision, and effectively non-suit the applicant.²⁷ In such a case, the exigency of conserving the resources of the courts and litigants are outweighed by the palpable reality of injustice.²⁸

(iii) *Evaluation and findings*

- [55] On an analysis thereof, the findings of the commissioner relied on by Eskom (see para 50(a) above) fall within the ambit of the issues defined in paras 146.1.3, 146.1.5, 146.2.1 and 146.2.3 of the pre-trial minute. But they do not cover the balance of the issues for determination by this court. Indeed, the commissioner made no finding on the 48-month training limit. He also did not deal with the propriety of removing / suspending the applicants from the training programme discretely from the issue of whether they could be subjected to psychometric re-assessment, save for having considered the ulterior motive issue and made negative findings of procedural fairness in relation to the

²⁴ *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BHC) at 566I-J.

²⁵ *Goldex* at para 26.

²⁶ *Estoppel* in *LAWSA*, vol 18 (3rd ed) at para 75.

²⁷ *Holtzhausen and Another v Gore NO and Others* 2002 (2) SA 141 (C) at 156B-D; *Wanli Stone* at paras 30-40. This applies only to issue estoppel. Where all the requirements of *res judicata* are met, the validity of the plea is not affected by the fact that the judgment relied upon was wrong: *African Farms and Township Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-G.

²⁸ *Holtzhausen* at 156D; quoting words from *Bafokeng Tribe* at at 566I-J.

applicants' removal / suspension.²⁹ It follows that the special plea in relation to issues other than those defined in paras 146.1.3, 146.1.5, 146.2.1 and 146.2.3 of the pre-trial minute must fail on this basis alone.

- [56] Should the special plea in relation to the issues defined in paras 146.1.3, 146.1.5, 146.2.1 and 146.2.3 of the pre-trial minute be upheld?
- [57] To begin with para 146.1.3, the applicants contend that Eskom acted unlawfully and in breach of contract by requiring them to undergo psychometric assessments in June 2011, with their case being that none of Eskom's policies and procedures authorised this. As appears from the award, whether Eskom was entitled to subject the applicants to psychometric assessments in June 2011 was the essential issue that the commissioner was tasked with determining. The commissioner found that Eskom was entitled to do so – this with reference to various policies and procedures and to the evidence of Dr Theron given in relation thereto, and in circumstances where it was common cause that all such policies and procedures were incorporated into the applicants' contracts of employment.
- [58] To my mind, the applicants are estopped from re-contesting this issue before this court, for these reasons.
- a) There is a clear commonality of the underlying issue: did Eskom's policies and procedures permit the psychometric re-assessment of the applicants? The fact that the causes of action are different in the two sets of proceedings is not relevant because a commonality of cause of action is not a requirement for issue estoppel.³⁰

²⁹ Award: para 73.

³⁰ As Wallis JA put it in *Aon South Africa (Pty) Ltd v Heever NO and Others* [2017] 3 All SA 365 (SCA) at paras 40-41: "My conclusion is that the claims advanced in these proceedings ... involve the reconsideration of the very evidence and issues that were the subject of the determination in the previous action. ... With respect, the court below erred in holding otherwise by looking mechanically at the elements of the causes of action in the two cases, instead of examining the issues that had been determined in the previous case and comparing them with the issues that would need to be determined

- b) In any event, it flows from the commissioner's finding that Eskom was authorised in terms of its policies and procedures to re-assess the applicants that this was contractually compliant, because the policies and procedures were incorporated into the applicants' contracts of employment.
- c) This leaves only the question of whether, in the interests of fairness and equity, the special plea should not be upheld on account of the finding allegedly having been wrong. While I accept that there are cases where the courts have adopted this position, it seems to me that this should be the exception and not the rule – otherwise a plea of issue estoppel would effectively be rendered worthless and the public policy considerations underlying it undermined. To my mind, it is only in cases where the decision is clearly wrong that an otherwise good plea of issue estoppel should be assailable on this basis. This will be the case where, for example, a clear cut error of law or patent mischief³¹ gave rise to the initial decision. But this is by no means such a case. Indeed, it seems to me that the commissioner's decision was correct – he having had the benefit of hearing the witnesses and engaging over the matter for an extensive period of time.³²
- d) In the circumstances, this is not a case where a palpable injustice stands to outweigh the exigency of conserving the resources of the courts and litigants. This is particularly so given that the resources of this court are scarce, and given that Eskom has already been put through a marathon CCMA arbitration on the very issue in question. Labour law dispute resolution is unique given the jurisdictional divide between the CCMA and this court.³³ Where applicants seek a second bite at the cherry by bringing

if the present case went to trial. ... The elements of *res judicata* in the form of issue estoppel were accordingly satisfied and the special plea should have been upheld."

³¹ *Wanli Stone* is a good example of this.

³² Consistent with the commissioner's findings, it is noteworthy that in his evidence in this court, Mr Nhleko conceded (unambiguously) that he was aware from the outset that he could be required to undergo a further psychometric assessment at any time as part of the station psychologist's duty to undertake the psychological surveillance of employees. He went on to concede that, in the circumstances that transpired, Dr Theron was perfectly entitled to require him to undergo a psychometric test in 2011.

³³ Section 158(2) of the LRA is a means to bridge this divide.

successive claims in the CCMA and then in this court, and where the claim in this court involves a material issue that was determined by the CCMA, it seems to me that the doctrine of issue estoppel should be readily applied. Not to do so will promote forum shopping,³⁴ and undermine the effective resolution of labour law disputes.

[59] Turning to paras 146.1.5, 146.2.1 and 146.2.3 of the pre-trial minute, all of these issues fall within the ambit of the commissioner's findings about Dr Theron made in paras 59 and 60 of his award. I can find no basis not to uphold the special plea in this regard. (In any event, Mr Euijen SC, who appeared for the applicants, did not pursue these claims against Dr Theron in argument.)

[60] I accordingly rule – in the exercise of my discretion – that the special plea of issue estoppel is upheld in respect of the issues defined in paras 146.1.3, 146.1.5, 146.2.1 and 146.2.3 of the pre-trial minute, but is dismissed in respect of the balance of the issues defined in para 146 of the pre-trial minute.

[61] I turn now to deal with each of the issues for determination set out in para 146 of the pre-trial minute.

Alleged breach of contract by Eskom in failing to ensure that the applicants completed the training programme within 48 months (PTM: para 146.1.1)

(i) *The claim and the background thereto*

[62] The applicants' claim is based on this clause in their contracts of employment concluded in August 2007:

"This training programme will commence on start date to be confirmed by Kevin Engel and end upon completion of the programme but not exceeding a period of 48 months."

³⁴ As found in *Gcaba v Minister for Safety & Security & others* (2010) 31 ILJ 296 (CC) at para 57, "forum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered."

- [63] On the applicants' interpretation of this clause, Eskom was obliged to ensure that the training programme was completed within 48 months. Eskom, on the other hand, contends that the provision is a best endeavour clause for its benefit; that it did not constitute a guarantee; and, in any event, that the applicants tacitly consented to the extension of the programme and elected to carry on with it.
- [64] In his evidence, Mr Engel (who was involved in interviewing the applicants and drafting the contract) explained that he reserved to himself the right to determine when the training would start so as to ensure flexibility in relation to Eskom's operational requirements, which he said applied to each of the phases of the training programme. In relation to the 48-month period, Mr Engel testified that this was there to "*protect the company*", in the sense of compelling trainees to apply themselves and complete the training – this in circumstances where they were relatively highly paid, where the training itself was very expensive, and where Eskom needed qualified ROs as there was a shortage of them. According to Mr Engel, the clause by no means constituted a guarantee that the training would be completed in 48 months, but this was his "*best guesstimate*" based on past practice. Mr Aploon echoed this in his evidence.
- [65] Consistent with this, Mr Nhleko conceded under cross-examination that Eskom was not able to predict with certainty exactly how long the training would take – this in circumstances where the RDO programme was a new programme. And under re-examination, Mr Nhleko made it clear that "*there can't be any guarantees*" when it comes to dates for the completion of training.
- [66] By the time the applicants were suspended from ILT 10/12 in August 2011, they had already been on the training programme for four years, and had only completed two phases of the programme. The reasons for the delay included the following. Firstly, numerous outages had been experienced at Koeberg – the repair of which took priority, with the applicants having been involved in this. Secondly, delays had been experienced in completing ILT 7/8 due to the problems discussed above, which had a knock on effect. Thirdly, at the time that the applicants were employed (in July 2007), it was anticipated that a

second simulator would be commissioned in 2009, but this was delayed for over two years.

[67] Significantly, the first time that the applicants ever complained about the delay was during the September 2011 meeting with Mr Aploon. But this was in the context of them having been suspended from the training programme at that point. Before this, despite knowing full well for an extended period of time that the training would not be completed within 48 months, the applicants raised no objection whatsoever.

(ii) *Evaluation and findings*

[68] Even if I were to accept that the 48-month clause is reciprocal and not simply for the benefit of Eskom (as Mr Euijen submitted I should do), I have difficulty in accepting that the clause constituted a contractual guarantee that the training programme would be completed within 48 months. When regard is had to background and surrounding circumstances to the enactment of the clause, this seems inconceivable, let alone “*insensible or unbusinesslike*”.³⁵ As the facts demonstrate, the vagaries associated with nuclear reactor operator training are simply too vast to allow for this.

[69] The conduct of the parties bears this out. For four years before their suspension from the training programme, the applicants never asserted any right to the completion of their training within 48 months. Clearly, they did not do so because they accepted that, when it came to the completion of their training, exact predictions were impossible – and there were simply no guarantees.

[70] I am thus in agreement with Mr Boda SC, who appeared for Eskom, that the 48-month clause was, in effect, directory and not mandatory. Alternatively, it seems to me that there may well be force in Eskom’s contention that the

³⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18. See also, *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

applicants tacitly agreed to and condoned the extension of the 48-month period. Either way, the breach of contract claim under this head must fail.

- [71] Finally, the applicants' right to receive training ultimately was still subject to them being qualified for training. It follows from this that if Eskom had the right to subject them to a further psychometric assessment (as the commissioner found) and to suspend them from the training programme (issues that I deal with below), then an independent claim based on a breach of the 48-month clause cannot succeed.

Alleged breach of contract by Eskom by requiring the applicants to undergo psychometric assessments in June 2011 (PTM: para 146.1.3)

- [72] Having upheld the special plea of issue estoppel in respect of the issue defined in para 146.1.3 of the pre-trial minute, I dismiss this claim. This in circumstances where the commissioner's findings, in effect, cut across the claim and are dispositive of it. (See para 58(b) above.)

Alleged breach of contract by Eskom suspending / removing the applicants from the training programme prior to its completion based on the June 2011 psychometric test results (PTM: paras 146.1.2, 146.1.4 and 146.2.2)

(i) *The claim and the main lines of argument*

- [73] It is the applicants' case that even if this court finds that Eskom was permitted to subject them to a second set of psychometric assessments (as I have done), in the absence of any primary disqualifiers (which are not applicable in the matter), Eskom was not permitted to suspend, remove or otherwise delay the completion of their training as a consequence.

- [74] In argument, Mr Euijen advanced the applicants' case as follows. The "*strong reservations*" identified by Dr Theron meant only that the simulator training would be more difficult for the applicants and that (if not attended to) they were more likely to fail (as the ILT 7/8 experience had shown). But this, so it was contended, did not serve as a lawful basis to suspend the applicants from the training programme. Instead, the applicants should have been remediated

while simultaneously undergoing the simulator training, as occurred (so it was contended) with ILT 7/8.

[75] In the alternative, and insofar as this court finds that it was lawful for Eskom to make the offer contained in the deployment letters of 19 March 2012, Mr Euijen submitted that the offer was hollow and was not fulfilled.

[76] Finally, Mr Euijen submitted that, in truth, Eskom had an ulterior motive in suspending the applicants from ILT 10/12, namely that it had a capacity problem and needed to find a way to reduce the group from 18 to 12. (I deal, in turn, with each of these legs below.)

(ii) *A lawful basis for suspension from training?*

[77] Flowing from the commissioner's findings that Eskom was entitled to subject the applicants to psychometric assessments prior to them commencing with the simulator training (which I have found binding on the applicants), it seems to me that Eskom must have had the right to suspend the applicants from the training programme pending remediation, in appropriate circumstances. While the various policies and procedures (the core of which were referred to by the commissioner) may not provide for this expressly,³⁶ to interpret them as prohibiting the suspension of initial license trainees, as the applicants seek to do, would be insensible and unbusinesslike. On the applicants' construction, Eskom would be stuck with having to provide hugely expensive simulator training to learners suffering from serious psychometric reservations come what may, which would be absurd. Not only is there a risk that such limitations will cause the learners to fail, but there is also the risk that they might cause the whole group to fail. In the result, I find that Eskom had the discretion to suspend pending remediation, which had to be exercised properly and in good faith.

³⁶ KAA-591, appendix 8, p 24 (applicable to both licensed operators and initial license trainees) provides for the suspension of operators. KAA-591, appendix 1, p 10 (applicable to licensed operators) does likewise. The suspension of initial license trainees in the circumstances discussed here is not irreconcilable with this.

[78] Dr Theron's expert opinion was that given the extent of the applicants' psychometric reservations, they needed to be suspended from the training programme, and then remediated and reassessed before undertaking the simulator training. As far as she was concerned, given that both processes were taxing, the applicants could not successfully undertake remediation and the simulator training together – it would be unfair on them and negatively impact on the whole group, leading to delays and the slowing down of training. It was also entirely impracticable for the applicants (and others with reservations) to be split out into their own (weak) group. According to Mr Aploon, the serious psychometric reservations that had been identified in respect of each of the applicants posed a threat to the success of the ILT 10/12 group as a whole – this in circumstances where the simulator training is undertaken in teams. Mr Butler echoed this – these candidates would hold back the others; more and more training time would have to be added because of them; and it was extremely difficult for them to undertake remediation while continuing on the programme. According to Mr Engel, he had accepted Dr Theron's expert advice, and was not at liberty to ignore it. He also explained that it would not have been possible for the applicants to have been interposed in the simulator training that was underway after they had completed their remediation. For his part, Mr Nhleko fairly conceded under cross-examination that given the cost of the simulator training and the fact that Eskom's experience in the past was that candidates with psychometric reservations failed, there was nothing wrong with it having decided to "*fix the problem*" before allowing the applicants to embark on the simulator training. His concern related to the amount of time it took in relation to him.

[79] Also of relevance are the facts in relation to ILT 7/8. While it is true that they were remediated as a group without having been suspended from the training programme, the circumstances were different, as Mr Engel testified. They had completed their training, but failed their examination, and were then remediated, resulting in them passing the second time round. In the present case, the simulator training was about to begin and Eskom wanted to protect itself against the potential failure of certain candidates and the potential of them pulling down the whole ILT 10/12 group.

[80] Having regard to the brief survey of evidence undertaken above, it seems to me that the applicants' case must fail on two grounds. The first is that the decision to suspend the applicants from the training programme was not simply motivated by a reasonable apprehension that they would fail, which, in itself, may well have been a valid ground for their suspension. Instead, there was also a very real concern that their continuation on the programme would imperil the success of the entire group, which seems to me to have been an altogether valid and lawful basis for their suspension pending remediation. Secondly, on the case advanced in argument, the applicants accepted that they had to be remediated before they could become ROs, with the dispute thus boiling down to when this should occur. To my mind, the applicants did not assail Eskom's case that this could not be undertaken simultaneously with the simulator training; nor that they could not have been introduced midway into the simulator training after having been remediated. In short, I am unable to fault the expert advice that Dr Theron provided to Eskom, and consider that in exercising its discretion to suspend the applicants on the basis thereof, Eskom acted lawfully.

[81] There is a further issue advanced by Mr Boda in argument that resonates with me. It is the flip side of the same coin: in order for the applicants to qualify for the simulator component of the training (referred to as the ILT component), they were required to successfully demonstrate that they did not have any psychological conditions that required attention before the simulator training. And for as long as they were unable to do so and thus unable to perform, Eskom was entitled to withhold performance of its obligations.³⁷ Eskom thus did not act unlawfully. Although the *exceptio non adimpleti contractus* was not pleaded by Eskom, the applicants suffer no prejudice because all the relevant facts were traversed in evidence.

(iii) *Was the offer of remediation hollow and not fulfilled?*

[82] The applicants' case in this regard is based on these factual contentions:

³⁷ This is known as the principle of reciprocity and the *exceptio non adimpleti contractus*.

- a) the applicants were advised of their suspension from the training programme on 24 / 25 August 2011;
- b) thereafter two of the applicants elected to complete SIC, while the third was sent back to his originating shift;
- c) Dr Theron only devised remedial plans for the applicants during January 2012, but did not discuss them directly with the applicants (but rather with their shift managers) and did not provide them with the plans;
- d) thereafter, matters were left entirely in the hands of the applicants and the shift managers, with neither Dr Theron nor anyone else monitoring progress (different to what occurred with ILT 7/8);
- e) it was only on 19 March 2012 that the applicants were provided with deployment letters advising that if they passed another psychometric assessment, they would be accepted onto the next intake of simulator training (then scheduled to commence in March 2013);
- f) Mr Nhleko completed his remediation with Mrs Kapnias by 17 October 2013, and had shadowed a licensed RO (this being his cognitive remediation), yet he was not allowed to re-join ILT 10/12 when the second group undertook simulator training in September / October 2013;
- g) the second simulator arrived by the end of 2013, but still Mr Nhleko was not placed on simulator training; and
- h) Mr Nhleko was placed on the next simulator training programme, which commenced in August 2016 and will be completed in August 2018.

[83] To my mind, these facts do not paint the complete picture, as it emerged in evidence. Amongst others, these additional facts are relevant:

- a) shortly after the applicants were advised of their suspension in August 2011, the first ILT 10/12 group commenced with their simulator training (running for two years), which the applicants could not join midway through;

- b) in the result, plans to remediate the applicants were not necessarily urgent;
- c) Mr Mashao appears to have elected to no longer participate in the RDO programme in August / September 2011;
- d) Dr Theron explained the delay in producing the remediation plans – SIC was undertaken until the end of 2011 and the applicants went on leave at the end of the year;
- e) Dr Theron's decision to discuss the remediation plans with the shift managers in January 2012 must be seen in the context of the fact that it had been decided that cognitive remediation would be undertaken on the job (in the control room), which fell within the domain of the shift managers;
- f) Dr Theron got feedback from the shift managers – Mr Nhleko was interested, but the other two applicants were not;
- g) although there was a delay in issuing them, the deployment letters (dated 19 March 2012) confirmed what the applicants had been told from the outset – they were suspended from the training programme pending remediation;
- h) shortly after this, NUM referred an unfair labour practice dispute to the CCMA, which took until 13 May 2013 (when the award was issued) to resolve;
- i) before this, Mr Mashao had elected not to continue with the RDO programme, while Messrs Linose and Nhleko decided against remediation (at least with Mrs Kapnias) pending the outcome of the CCMA arbitration process (where they sought an award of reinstatement onto the training programme without having to submit to any psychometric assessments³⁸);

³⁸ This being apparent from para 76 of the award.

- j) after the award was issued on 13 May 2013, it appears that Mr Linose persisted with his refusal to undergo remediation;
- k) after the award was issued on 13 May 2013, Mr Nhleko, on the other hand, decided to consult with Mrs Kapnias (which he did from 18 July 2013 to 17 October 2013) – the delay having been caused by his decision not to do so pending the outcome of the CCMA arbitration;
- l) the second ILT 10/12 group commenced with their simulator training in August 2013,³⁹ by which time Mr Nhleko's EQ remediation with Mrs Kapnias was not complete;
- m) furthermore, it is by no means clear whether Mr Nhleko's cognitive remediation had been completed by then – it having been his evidence that he undertook job shadowing in the control room from 2012 until 2014;
- n) in any event, as Mr Engel testified, the second ILT 10/12 group continued training as a group pending them commencing simulator training in August 2013, and it would have been seriously disruptive to introduce a new member;
- o) as Mr Engel also testified, given that a large number of instructors left Eskom's employ around this time, Eskom did not have the capacity to extend the simulator training; and
- p) it was a condition for Mr Nhleko's re-joining the training programme that he be positively reassessed by Dr Theron, which she did in 2016, further to which Mr Nhleko commenced with simulator training in August 2016.

[84] When assessed in the light of the above, I find it difficult to understand how the remediation issue can possibly be advanced in respect of Mr Mashao and Mr Linose.

³⁹ Not September / October 2013.

[85] This leaves Mr Nhleko. He hedged his bets until the outcome of the CCMA arbitration on 13 May 2013, and then agreed to consult with Mrs Kapnias, with his EQ remediation (at least) having been completed by 17 October 2013. The delay up to this point was attributable to Mr Nhleko's own litigation strategy, and cannot be laid at the door of Eskom. While this in itself meant that he missed the boat for the simulator training commencing in August 2013, it also appears that his cognitive remediation continued for a significant period thereafter, which meant that the first time that he could undertake the simulator training was in August 2016. In these circumstances, I cannot find that Eskom unlawfully delayed his remediation and training.

[86] In all the circumstances, I do not consider there to be any merit in the applicants' contention that the offer of remediation was hollow and unfulfilled.

(iv) *Did Eskom have an ulterior motive in suspending the applicants?*

[87] The applicants' essential submission under this head is that Eskom was looking for a reason to at least delay six DROs from completing their training with the remainder of ILT 10/12 (due to capacity constraints), and when it was provided with the psychometric assessments, it seized the opportunity this presented. Put differently, the contention is that Eskom was *mala fide* in using the psychometric assessments to achieve the purpose of reducing the number of learners on the simulator training.

[88] As dealt with above, "*whether [Eskom] had a prior plan to reduce the number of candidates*" was one of the three key issues determined by the commissioner. I have quoted his findings in full in para 48 above.

[89] Having considered the evidence myself, I concur with the commissioner's conclusion that there is no merit in the applicants' contention. To my mind, it is utterly improbable that, *inter alia*, Dr Theron and Messrs Butler, Aploon and Engel would have engaged in the sort of conspiracy that inevitably underlies the applicants' contention.

[90] In all the circumstances, the applicant's claim based of the alleged unlawful removal of the applicants from the training programme arising from the June 2011 psychometric assessments is dismissed.

Alleged breach of contract in relation to Dr Theron subjecting the applicants to psychometric assessments and withholding the results / reports (PTM: paras 146.1.5, 146.2.1 and 146.2.3)

[91] Having upheld the special plea of issue estoppel in respect of the issues defined in paras 146.1.5, 146.2.1 and 146.2.3, I dismiss these claims. This in circumstances where the commissioner's findings, in effect, cut across these contractual claims and are dispositive of them. The commissioner found, in effect, that Dr Theron was entitled to act as she did. The fact that her / Eskom's conduct is now attacked from a contractual perspective does not change anything in this regard.

Conclusion and order

[92] Having found that the applicants have failed to establish any breach of contract on the part of Eskom, the issue of damages does not arise.

[93] Given the continuing relationship between NUM and Eskom, I do not consider it appropriate to make any order as to costs.

[94] In the result, the following order is made:

- a) the applicants' claim is dismissed;
- b) there is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: M Euijen SC instructed by Cheadle, Thompson & Haysom (Cape Town)

For the respondent: F Boda SC instructed by Cliffe Dekker Hofmeyr (Cape Town)

LABOUR COURT