



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
17/02/2025	[Redacted Signature]
DATE	SIGNATURE

Case No: 055811/23

In the application between:

NOMSA MOLTAH MAVUSO

First Applicant

NCEBA EMMANUEL MRWEBO

Second Applicant

and

COMMISSION FOR GENDER EQUALITY

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 17 February 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION:

[1] This is an opposed application for the following relief:

- [1.1] an order declaring that the withdrawal by the Commission for Gender Equality (referred to below as “the CGE” or “the respondent”) and termination of the 17% pension benefit of Nomsa Moltah Mavuso (“the first applicant”) and Nceba Emmanuel Mrwebo (“the second applicant”) with effect from 1 April 2020 is unlawful and in breach of the contracts of employment between the first and second applicants (collectively “the applicants”) and the CGE;
- [1.2] ordering the CGE to reinstate the applicants’ 17% pension benefit with effect from 1 April 2020 in terms of the employment contracts between the applicants and the CGE;
- [1.3] ordering the CGE to pay the applicants 17% pension benefit with effect from 1 April 2020 and to continue paying such benefit in compliance with the employment contracts between the applicants and the CGE; and
- [1.4] directing the CGE to pay the costs of the application on an attorney and client scale.

B. RELEVANT BACKGROUND FACTS:

- [2] The first applicant is a Provincial Manager at the CGE and is based at its Mpumalanga Provincial Office.

[3] The second applicant is also a Provincial Manager at the CGE and is based in East London in the Eastern Cape Province.

[4] The factual background below is common cause and has mostly been extracted from the joint chronology filed by the parties and the correspondence referred to therein.

[5] The first applicant commenced employment with the CGE with effect from 1 August 2006 in the position of Provincial Co-ordinator at a salary level 9 which was adjusted to salary level 11 in 2008. The position title was changed in 2017 to Provincial Manager. In terms of the written contract of employment and, in particular, the paragraph titled "*Pension/Provident Funds*", the following was stated:

"The Employee is entitled to an employer pension allowance equal to 17% of his/her gross salary fixed in terms of the Public Services scales."

[6] The second applicant was appointed to the position of Provincial Co-ordinator at the CGE on or about 2 September 2002 at salary level 9. In 2008, the salary level of the position was also adjusted to level 11 and his position title was also changed to Provincial Manager. The second applicant's employment contract contained the same clause regarding "*Pension/Provident Funds*".

[7] On 21 August 2019, a letter was addressed by Keketso Maema, the Chief Executive Officer of the CGE, to the first applicant in which, *inter alia*, the following was stated:

“RE: CONTRACT OF EMPLOYMENT WITH COMMISSION FOR GENDER EQUALITY – 17% PROVIDENT FUND CONTRIBUTION

1. *The above matter as well as the meeting between the senior management of Commission for Gender Equality (“the CGE”) and yourself on Friday, 26 July 2019 bears reference.*
2. *You will note that your appointment as Provincial Coordinator for the CGE on 1 August 2006 (changed to Provincial Manager in 2017) at a salary scale of level 11 benchmarked against Department of Public Service and Administration (“DPSA”) prescripts.*
3. *At all material times, the CGE aligned to the DPSA prescripts in respect of salaries of MMS.*
4. *It is common cause that in 2008, plenary took a decision to award 17% pension contribution to staff appointed at level 11, due to errors in certain level 11 contracts. The decision was applied to all level 11 staff members.*
5. *The decision at the time was an administrative error in contravention of the DPSA prescripts.*
6. *In the plenary meeting of May 2019, Plenary of Commissioners resolved that such a benefit has been an administrative error and in contravention of certain provisions of the Public Service prescripts and should be corrected; the Chief Executive Officer and senior management must carry out the amendments.*

7. *Further, the Commissioners resolved that CGE will not recover the previous portions of the contributions the CGE has already made towards your provident fund, and will absorb the loss, unless compelled otherwise by a court order.*
8. ***However, CGE advises, as we hereby do, that the abovementioned 17% provident fund contribution will be stopped.***
9. *In the final analysis, we advise that going forward, you are required to make the necessary arrangements to ensure that your future provident fund contributions are fully catered for by structuring your cost to company benefits accordingly.*
10. *We thank you for your continued support and contribution to the growth and values of the CGE.*
11. *We trust you find the above in order. Please do not hesitate to contact us should you want to discuss this further.” (sic) (Emphasis added)*

[8] In the joint chronology which was uploaded after the hearing at the request of the Court and, in particular, item 3 thereof, it is confirmed that the decision was taken by the Plenary Committee with “*no prior consultation*”.

[9] On 2 September 2019, a letter was addressed by the first applicant to the CGE requesting, *inter alia*: (i) the plenary resolution minutes of 2008 when the decision was taken; (ii) the plenary resolution of 2019 and the minutes; and (iii) the document used to benchmark the final decision.

[10] On 23 March 2020, a letter was addressed by the CGE to the first applicant, denying her access to the documents requested and confirming the CGE's decision to terminate the first applicant's pension benefits with effect from 1 April 2020. The first applicant was also advised that she had the right to approach a Court of law of competent jurisdiction to ventilate any concerns.

[11] On 24 March 2020 a letter was addressed by the first applicant to the CGE requesting the CGE to hold its decision in abeyance to allow her to exhaust all internal remedies.

[12] On 29 April 2020, a letter was addressed by Keketso Maena of the CGE to the first applicant which stated the following:

- "1. We refer to the above matter, our letter addressed to you on 27 February 2020 and hereby officially advise you that the Plenary resolution has been implemented from 01 April 2020.***
- 2. You are advised that your Basic salary, bonus, pension has been proportionally reduced by 17% amounting to R 11 081.26 per month.***
- 3. You have the right to approach a court of law with competent jurisdiction to ventilate any concerns you may have. Such action would be at your own cost and CGE reserves its rights to oppose such an action should this eventuate.*
- 4. We trust you find the above in order."*

[13] On 12 June 2020, it would appear that the applicants (together with another employee of the CGE referred to as “Napo”) referred the matter to the Commission for Conciliation, Mediation and Arbitration (“CCMA”).

[14] On 17 September 2021, Johnny Mathebula (“Mr Mathebula”), in his capacity as Commissioner of the CCMA, instructed the parties to hold a pre-arbitration meeting and to submit a signed minute.

[15] On 10 November 2021, the Commissioner heard the evidence of the applicants.

[16] One of the cases before the CCMA was settled and payment was effected by the CGE.

[17] On 3 January 2022, Thabo Lebea (“Mr Lebea”) who represented the CGE indicated that Joe Thlapi (“Mr Thlapi”) who had been instructed by Munyai Tshilidzi Attorneys (who represented the applicants before the CCMA) was not an advocate and, after extensive investigations of his credentials, it was discovered that he was not a practising advocate.

[18] Mr Thlapi did not dispute Mr Lebea’s submissions in this regard and confirmed that he was not a practising advocate and had in fact “*gone back to school*”. As a result of this, Mr Lebea had requested that the process, in its entirety, “*be declared a nullity and that the settlement agreement in which Mr Thlapi was involved also be nullified and Napo pay back the money that the respondent had paid to her.*”

[19] On 14 February 2022, a ruling was issued by Mr Mathebula. Under the heading titled “**Analysis of submissions**”, *inter alia*, the following was stated:

- “4. Mr Thlapi obviously mislead the CCMA and perhaps his instructing attorneys. He did not even argue that he was on the roll of non-practising advocates. He said that he had gone back to school. Section 213 of the LRA defines legal practitioner as a person admitted to practice as an advocate or attorney in the Republic.
5. In terms of Rule 25(b), only a legal practitioner has right of appearance at the CCMA as well as a Candidate Attorney. **To the extent that Tlhapi masqueraded as an Advocate, this was prejudicial to the applicants in that the process becomes a nullity because the evidence was adduced under false pretences.** I do not have the power to nullify the settlement agreement because it was signed by the applicant herself.
6. **Below I have established that the referral was defective from the onset.** A settlement agreement was reached under a defective conciliation referral. The respondent should approach the Labour Court in this regard for an appropriate remedy if it so wished. I however could not proceed with the matter.
7. Mr Lebea also indicated that the matter must be re-referred. Upon checking the referral for conciliation, it was pp'd on behalf of the Deputy Director Research Policy and the arbitration referral pp'd on behalf of the Provincial Manager. The referrals can only be signed by the people who are entitled to represent at the CCMA i.e. Legal Practitioners, unions, employer organizations, candidate attorney and an official of an advice office resorting under some oversight body. Also, a referral cannot be pp'd on behalf of the applicants by anyone.” (sic) (Emphasis added)

[20] The following ruling was also issued by Mr Mathebula on 14 February 2022 (“the first CCMA ruling”):

“Ruling

1. ***The arbitration process under case number GAJB15458-21 is accordingly declared a nullity;***
2. *The referral forms for conciliation and arbitration have not been signed by the applicants or their chosen legal representatives, thus making them defective.*
3. *Accordingly, the CCMA lacks the jurisdiction to conciliate and/or arbitrate the dispute and the applicants, if they so wish, may re-refer the dispute and submit a signed referral form accompanied by a condonation application since the 30 days has elapsed.”*
(Emphasis added)

[21] On 15 February 2022, the applicants re-referred the matter to the CCMA with an accompanying condonation application. The CGE raised several preliminary points regarding the re-referral.

[22] A further ruling was issued by Musolwa Rapalalane, as Commissioner of the CCMA on 3 August 2022 (“the further CCMA ruling”) which stated, *inter alia*, the following:

- “4. *I've gone through the CCMA file and noted that the same dispute was referred and dealt with under case number GAJB15458-20. The ruling was issued on 14 February 2022 by Commissioner Johnny Mathebula which reads as follows:*

'9.1 The referral forms for conciliation and arbitration have not been signed by the applicants or their chosen legal representative, thus making them defective.

10. Accordingly, the CCMA lacks jurisdiction to conciliate and/or arbitrate the dispute and the applicants, if they so wish may re-refer the dispute and submit a signed referral form accompanied by a condonation application since 30 days has lapsed.'

5. *I have further noted that the Applicants filed the same defective referral under case number GAJB15458-20 without their signature or chosen legal representative as per the ruling issued on 14 February 2022.*
6. *In the premises, I make the following order:*
7. *The Applicants are directed to comply with the ruling issued by Commissioner Johnny Mathbula on 14 February 2022.*
8. *CCMA services are for free, should the Applicants have any difficulty in interpreting the said ruling they may, if they wish so, approach the CCMA.*
9. *The CCMA must suspend the matter pending the Applicants' compliance with the said ruling."*

[I interpolate to point out that as the first CCMA ruling declared the entire matter a nullity and there was no compliance with the ruling and no proper re-referral, there was no dispute pending before the CCMA when these proceedings were brought.]

[23] On 8 March 2022, almost 2 years after the first correspondence had been sent to the first application, Jamela Robertson, in the capacity as the Chief Executive Officer of the CGE, addressed a letter to the first applicant in relation to the dispute, inviting the applicants to an *ex post facto* consultation. The letter states, *inter alia*, the following:

**“COMMISSION FOR GENDER EQUALITY // MOLTAH MAVUSO –
CONSULTATION ON THE 17% PROVIDENT FUND ALLOWANCE AS
ERRONEOUSLY CONFERRED BY YOUR EMPLOYMENT
CONTRACT:**

1. Introduction

1.1. *We refer to the above matter and the ongoing dispute regarding the 17% provident/pension fund contribution (“the 17% contribution”) of level 11 and above positions with the Commission for Gender Equality (“the CGE or the employer”).*

1.2. *During or around July 2021, the CGE Plenary of Commissioners passed a resolution authorising the Chief Executive Officer to consult with employees who are at level 11 and above who received the 17% contribution from the Employer.*

2. The reasons for the proposed continual consultation are the following

2.1 *The Employer has taken a decision to continue consulting the affected employees with the aim of ensuring that the matter is resolved amicably through a settlement process.*

3. **Process to be followed**

The Employer wishes to ensure that it had invoked a procedurally fair process to you. The Employer will continue consultations with the affected parties and shall consider all proposed alternatives presented during the consultation process.

4. **Issues to be discussed during the consultation**

The Employer will attempt to reach consensus with the affected parties on the appropriate measures which may be proposed to resolve the erroneous contributions.

5. **Commencement of the consultation process**

We propose such consultation process to commence as urgently as possible on mutually acceptable dates. The Employer is available to consult as follows:

DATE: Tuesday, 22 March 2022

TIME: 10h00

VENUE: Ground floor Boardroom
02 Kotze Street
East Wing, Women's Jail
Constitution Hill, Braamfontein

6. **Facilitation process**

6.1. The Employer's legal representatives represent the employer during the consultations.

6.2. *Kindly note that you may attend the meeting with your legal representatives should you so wish, at your own cost.*

6.3. *Further, we kindly request that you confirm your availability by no later than 14 March 2022.*

...” (Underlining added)

[24] On 4 November 2022, a letter of a demand was addressed by the first applicant’s attorneys, demanding that the CGE pay the 17% commission retrospectively. The letter states, inter alia, the following:

“We hereby confirm that we are acting on behalf of Nomsa Moltah Mavuso our Client herein.

We do hereby confirm that there was an allegation that in 2019, the plenary of Commission took a unilateral decision to deduct 17% of Provident Fund Contribution. The said decision was communicated to our Client on the 23rd March 2020.

We pause to say that, that decision was unilateral unlawful and taken without proper consultation as a consequence thereof, it was implemented despite our Client objecting to it.

We further confirm that the decision was rescinded on the 19th July 2021 and as such the unlawful decision is no longer effective and enforceable, despite that you continued to deduct the aforesaid 17% in light of the fact that there was no decision to do so. We further confirm that the aforesaid 17% is a benefit on the contract between yourselves and our Client, we further note that you are in breach of employment contract.

We further note that despite several legal opinions made to the Commission that you must pay our Client, and you continued to deduct 17% from our Client despite legal opinions advising you to pay.

We further note that on the annual report of 2020/2021 on page 109 under heading referred to as 29 and referring to a topic “Events after the reporting date”.

We note that the Commission in its report confirmed the rescission of the decision on the 19th July 2021 and such, advised parliament “thereby rendering the claim by employees retrospectively payable in favour of the employees resulting in an increase of R730 983.00 in employees cost for the reporting period”.

We note that parliament was mislead to believe that the dispute of our Client was finalised and they were paid, despite the Commission not paying the said amount.

We do hereby demand that the Commission pay the aforesaid amount as per the allegation of the report by the Commission to parliament within 15 days, failing which, we shall bring an application to the Labour Court demanding compliance with the report. We further place it on record that, we shall also advise parliament that you mislead them about the dispute having been resolved and paid our client.” (sic)

[The response to the reference to the letter is merely “to the extent that the content of paragraphs 15 to 19 above are a true reflection of the content of the letters cited therein, the allegations herein contained are admitted – at no stage are the allegations about what was conveyed to parliament dealt with.]

[25] On 26 October 2022, a letter was addressed by the CGE's attorneys, Lebea Inc., in which the following was stated in paragraphs 5 and 6 thereof:

"5. *However, on 11 October 2022, the CCMA indicated that the matter is closed until Ms Mavuso complies with the rulings issued by the CCMA.*

6. ***This means that there is currently no live dispute between the CCMA regarding the matter. The likelihood of the matter being resuscitated are up to null as a long period of time has passed without any steps taken by Ms Mavuso. In the premises, the matter at CCMA is currently closed.*** (sic) (emphasis added)

C. **POINTS IN LIMINE:**

[26] The CGE raised the following points in *limine*:

[26.1] prescription;

[26.2] non-compliance with section 3 of the Institution of Legal Proceedings against certain Organs of State Act, 40 of 2002;
and

[26.3] *lis alibi pendens*.

Prescription:

[27] In relation to the first point in *limine*, namely prescription, the applicants correctly pointed out that, in terms of section 12(1) of the Prescription Act, 68 of 1969 (“the Prescription Act”), prescription only starts to run when a debt becomes due and because the 17% pension benefit would become due on a monthly basis when the applicants’ salaries were paid, the entire debt could not have prescribed on or about 30 May 2023 in terms of section 11(d) of the Prescription Act, as alleged by the CGE.

[28] Section 11 of the Prescription Act deals with “*Periods of prescription of debts*” and section 11(d) provides that, save when an act of parliament provides otherwise, the prescription period in respect of a debt other than those referred to in sections (a), (b) or (c) (which are not applicable here) will be three (3) years.

[29] It is well-established that a continuing wrong can result in a series of debts arising from moment to moment.¹

[30] Consequently, the 17% pension fund would become due and payable on a month-month basis and, at best for the CGE, the pension benefits for the months of April and May 2020 would be the only benefits which could have prescribed. These proceedings were instituted on 9 June 2023 and therefore no amounts payable from the end of June 2020 would have prescribed.

¹ *Barnard and Others v Minister of Agriculture and Land Affairs* [2007] SCA 95 (RSA).

Non-compliance with section 3 of Act 40 of 2002:

[31] In *Vhembe District Municipality v Stuarts and Lloyds*,² it was confirmed that where there is a claim for specific performance arising from a contract, section 3 of Act 40 of 2002 does not apply.

[32] There is accordingly no merit in this special plea.

Lis pendens:

[33] The CGE contended that the litigation between the CGE and the applicants is the subject of pending litigation before the CCMA.

[34] The party wishing to raise *lis pendens* bears the onus of alleging and proving the following:³

[34.1] pending litigation;⁴

[34.2] between the same parties or their privies;⁵

[34.3] based on the same cause of action [the requirement of the same cause of action is satisfied if the other proceedings involved the determination of a question that is necessary for the

² [2014] ZASCA 93, para [16].

³ *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) at 310 D, para [28].

⁴ *Van As v Appolus* 1993 (1) SA 606 (C) at 609 E.

⁵ *Ceasarstone Sdot-Yam Ltd v World of Marble and Granite* 2000 CC and Others 2013 (6) SA 499 (SCA) at 511 E.

determination of the present case and is substantially determinative of its outcome];⁶ and

[34.4] in respect of the same subject matter. [This has been found not to mean that the form of the relief claimed must be identical].⁷

[35] In *Nestlé (South Africa) (Pty) Ltd v Mars Inc.* (“Nestlé”)⁸ the Supreme Court of Appeal (“the SCA”) described the features of the plea *lis alibi pendens* as follows:

“The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally.”

[36] The applicants contend that the CGE’s argument based on *lis pendens* is disingenuous because the claim was disposed of by the CCMA in terms of the rulings which were made. In my view the first CCMA ruling confirmed that the proceedings were a nullity and the failure to comply with that ruling and properly re-refer the matter (which never happened) means that there were no proceedings pending before the CCMA when this matter was instituted.

⁶ *Nestlé (SA) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549 A, para [16].

⁷ *Williams v Shub* 1976 (4) SA 567 (C) at 571 H.

⁸ 2001 (4) SA 542 (SCA) at 548 I – 549 B, para [16].

[37] Even the CGE's attorneys, in their letter of 26 October 2022, stated "*...there is currently no live dispute between the CCMA regarding the matter. The likelihood of the matter being resuscitated are up to null as a long period of time has passed without any steps taken by Ms Mavuso. In the premises, the matter at CCMA is currently closed.*" (sic)

[38] At the hearing of the matter, counsel for the CGE submitted that the issue of *lis pendens* was intertwined with the jurisdiction of this court to hear the matter. He indicated that as we are dealing with an "*unfair labour practice*" the matter should have been referred to the CCMA and the Court should refuse to hear the matter. In this regard, I was referred to section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the Labour Relations Act") which provides as follows:

"186 *Meaning of dismissal and unfair labour practice*

(2) ***'Unfair labour practice'*** means any unfair act or omission that arises between an employer and an employee involving-

(a) *unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;...*"

[39] Section 157 of the Labour Relations Act deals with the jurisdiction of the Labour Court and provides as follows:

"157 *Jurisdiction of Labour Court*

- (1) *Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
- (2) *The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-*
 - (a) *employment and from labour relations;*
 - (b) *any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and*
 - (c) *the application of any law for the administration of which the Minister is responsible.”*

[40] It was further argued by counsel for the CGE that the conduct of the applicants constituted forum shopping and that this court lacks jurisdiction as a result of the Constitutional Court decision in *Steenkamp and Others v Edcon Limited*⁹ where the following was stated:

“[130] The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right,

⁹ 2016 (3) SA 251 (CC) at para [130].

specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right. A well-known example is every employee's right not to be unfairly dismissed which is provided for in section 185. In section 186 there is a definition of what dismissal means. In section 187 there is a special category of dismissals, namely, automatically unfair dismissals. In section 188 other categories of dismissals are created, namely, dismissals that lack a fair reason and procedurally unfair dismissals."

[41] However, more recently in *Baloyi v Public Protector and Others*¹⁰ ("*Baloyi*") the Constitutional Court stated, *inter alia*, the following:

"[32] In order to determine whether the High Court lacked jurisdiction to adjudicate Ms Baloyi's claim, it is necessary to determine whether the claim is of such a nature that it is required, in terms of the LRA or the Employment Act, to be determined exclusively by the Labour Court.

...

[33] In Gcaba this court made clear that an assessment of jurisdiction must be based on an applicant's pleadings, as opposed to the substantive merits of the case. It held:

'In the event of the Court's jurisdiction being challenged ... the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court's competence. While the pleadings — including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim

¹⁰ 2022 (3) SA 321 (CC).

is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.'

[34] *Ms Baloyi contends that the cause of action underlying the review relief flows from both public law and contract. The contractual basis for the review relief is that her contract was terminated out of time, well after her probation period had ended and in conflict with its terms relating to termination. In particular, she points out that her contract made it clear that, if the employer neither confirmed nor terminated her contract at the end of the stipulated probation period, the appointment would be deemed to be confirmed. She also notes that certain policies of the Office of the Public Protector, which were incorporated into her contract by reference, were not complied with.*

...

[37] *The High Court held that the matter is essentially a labour dispute arising from an employment relationship that falls within the Labour Court's exclusive jurisdiction. For the reasons that follow, the High Court erred in reaching this conclusion.*

[38] ***It is trite that the same set of facts may give rise to several different causes of action. In some instances the forum in which a particular cause of action may be pursued is prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly.*** Had Ms Baloyi sought to pursue a claim of unfair dismissal, she would have been required, in terms of s 157(1) of

the LRA, to approach the Labour Court. This is because unfair-dismissal claims fall within the exclusive jurisdiction of the Labour Court.

[39] Crucially, however, where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so. Put differently, the fact that a cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that particular cause of action. The respondents cite the dictum of the Labour Appeal Court that —.

'(i)f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established under the LRA for their resolution'. In this case, they submit that, because Ms Baloyi has a claim meeting the definitional requirements of an unfair labour practice or unfair-dismissal claim, she is obliged to pursue that claim in the Labour Court. In this regard, the respondents also place reliance on this court's statement in Steenkamp that '(a) cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanism of the LRA to obtain a remedy provided for in the LRA'.

[40] The mere potential for an unfair-dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right). The following dictum of the Supreme Court of Appeal

in Makhanya, which squarely addressed a contractual cause of action in the employment context, is apposite in this regard:

'The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices. ... Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract. ...

When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'

[41] The approach endorsed in Makhanya aligns with a series of judgments from the Supreme Court of Appeal that have confirmed that a contractual claim arising from breach of a contract of employment falls within the ordinary jurisdiction of the High Court, notwithstanding the fact that the contract is one of employment.

...

[43] In this matter, the High Court based its finding on a holistic assessment of whether the dispute was located 'within the compass of labour law' instead of determining whether the specific causes of action relied on by Ms Baloyi fall within the jurisdiction of the High Court or the Labour Court (or both). This approach is based on a misinterpretation of this court's judgment in Chirwa, where it was

expressly found that the jurisdiction of the High Court is not ousted merely because a dispute falls within the sphere of employment relations.

[44] *The exclusive jurisdiction of the Labour Court is engaged where legislation mandates it, or where a litigant asserts a right under the LRA or relies on a cause of action based on a breach of an obligation contained in that Act. As held in Gcaba, disputes that fall within the exclusive jurisdiction of the Labour Court are 'labour and employment-related disputes for which the LRA creates specific remedies'. The corollary of a litigant's reliance on an LRA right is, of course, reliance on an LRA remedy.*

[45] ***In sum, the mere fact that a dispute is located in the realm of labour and employment does not exclude the jurisdiction of the High Court.*** As this court held in Gcaba:

'(T)he LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. ... If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.'

[46] *Indeed, contractual rights exist independently of the LRA. As the Supreme Court of Appeal has on numerous occasions emphasised, s 23 of the Constitution does not deprive employees of a common-law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for 'unfair dismissal' provided for in the Act. Chapter VIII of the LRA is 'not exhaustive of the*

rights and remedies that accrue to an employee upon termination of a contract of employment'.

[47] *Matters 'concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract', are expressly noted in s 77(3) of the Employment Act as falling within the concurrent jurisdiction of the High Court and the Labour Court. The question whether contractual claims arising from employment contracts fall within the concurrent jurisdiction of the High Court and the Labour Court has not explicitly arisen before this court. However, as noted above, the Supreme Court of Appeal has explained on numerous occasions, with reference to the reasoning of this court regarding jurisdiction over claims based on administrative action in the labour sphere, that the High Court retains its jurisdiction in respect of claims arising from the enforcement of contractual rights in the employment context. This finding is borne out by the plain language of s 77(3) of the Employment Act, quoted above, and ss 157(1) and 157(2) of the LRA."*

[42] Having regard to what is stated in Baloyi, it is clear that the cause of action is based on a breach of contract. This Court therefore does have jurisdiction to hear the matter.

[43] In the light of the above, I am of the view that there is no merit in the *lis pendens* argument or the attack on jurisdiction.

D. MERITS

[44] In essence, the main issue is whether or not the CGE acted lawfully and in breach of the agreements concluded between it and the applicants when it

terminated or withdraw the 17% pension benefit which was payable in terms thereof.

[45] It is common cause between the parties (or cannot genuinely be disputed) that: (i) the contracts of employment provided for payment of an employer pension allowance of 17%; (ii) there was no consultation with the applicant prior to the pension allowance being stopped; and (iii) there was an attempt two years later to *ex post facto* hold consultations.

[46] Where rights of individuals are affected by policy, law or administrative action, it is mandatory that consultation with the affected persons takes place.¹¹

[47] Furthermore, an employer who purports to make changes to terms and conditions of employment of an employee must engage in a consultation process with the affected parties. The key elements of a legitimate consultation process were enumerated by the Full Bench of the Western Cape High Court in *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another*¹² (“*Tlouamma*”) as follows:

“[92.1] The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. It would normally be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered.

¹¹ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), para [63] and *Maledu v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC), paras [78] to [80].

¹² 2016 (1) SA 534 (WCC).

[92.2] *Consultation entails a process in which more than one person confers in the sense of applying their minds together to consider the pros and cons of a matter. It may be formal or informal, oral or in writing. The essence of consultation is a communication of ideas on a reciprocal basis. The procedure is in the discretion of the person who has to consult. The procedure must, however, allow reasonable opportunity to both sides (the consulting and the consulted parties) to communicate effectively and achieve the purpose for which prior consultation is prescribed.*

[92.3] *The form of consultation is usually not important as long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another."*

[48] According to the CGE, in deciding to cease payment of the 17% pension/provident fund benefit, it did not purport to affect a change or alteration to the terms and conditions of its employment contract with the applicants. It further submitted that the CGE was essentially undertaking to correct an administrative error that had been made when the 17% pension/provident fund benefit was initially and erroneously awarded to all level 11 employees.

[49] These submissions are, with respect, untenable. There was clearly a provision in the contract to pay 17% pension or provident fund benefits and this was unilaterally revoked, without any prior consultation, based on a plenary decision.

[50] Insofar as the consultation process was concerned, the respondent's counsel submitted that the CGE did duly embark upon a consultation process as required by the law for the following reasons:

[50.1] the CGE communicated to the applicants on or about 21 August 2019 that the plenary decision to award the 17% pension/provident fund benefit to all level 11 employees was an administrative error and that such a decision contravened DPSA prescripts;

[50.2] the CGE also communicated to the applicants that a further plenary decision had been taken to correct the administrative error, that is to cease payment of the 17% pension/provident fund benefit to all level 11 employees;

[50.3] the CGE also engaged with the applicants on other occasions concerning its predicament regarding the 17% pension/provident fund benefit;

[50.4] following its communication 21 August 2019, the respondent engaged in a continuous consultation process with the applicants and other affected employees. Reference was made to the evidence of the consultation process in annexure "AA5" of the respondent's answering affidavit which was a letter stating *inter alia* that the CGE expressed its decision to "*continue consulting with the affected employees with the aim of ensuring*

that the matter is resolved amicably". To suggest that there was a continuing consultation process from 21 August 2019 is not borne out by the evidence.

[51] Upon a proper consideration of the correspondence exchanged and, in particular, the letter of the CGE dated 8 March 2022, it is clear that no proper consultation took place and the invitation two (2) years later suggesting "*proposed continuing consultation*" is misleading as there was simply no consultation prior to that. The aforesaid letter also states "[t]he Employer wishes to ensure that it has invoked procedurally fair process to you" and this, in my view, effectively amounts to a concession that it had not invoked a procedurally fair process prior to that.

[52] Counsel for the applicants further pointed out that consultation, in itself, is not enough and rather that consultation before the implementation of any change of contractual terms must be negotiated and agreed between an employer and employee. It was pointed out by the applicants' counsel that this proposition accords with what was held in *Mazista Tiles (Pty) Ltd v National Union of Mine Workers*¹³ where the Court held:

"An employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as it was the position in the case, that the employees refuse to enter into agreement relating to the alteration of

¹³ 2004 ILJ 2156 (LAC), para [48].

their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such employer to dismiss his employees in order to compel to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue the implementation, he has the right to invoke the provisions of s 189 and dismiss the employees provided the necessary requirements of that section are met.” (Emphasis added)

[53] I agree with the applicants that the documentary evidence placed before the court shows that there was never any meaningful consultation between the applicants and the CGE on the issue of withdrawing the 17% pension allowance. There was also clearly no agreement reached in this regard. The CGE unilaterally, without any meaningful consultation, withdrew the 17% pension benefit with effect from 1 April 2020.

[54] The CGE is in breach of its obligation to pay the 17% pension benefit and has been since 1 April 2020. As stated above, only the April and May 2020 amounts are impacted by the prescription argument.

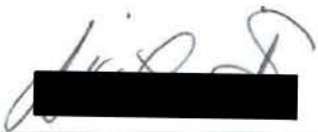
[55] Having regard to the importance of the matter to the parties, I am inclined to order the costs on scale B.

ORDER

In the circumstances, I am satisfied that the applicants have shown that the withdrawal of their 17% pension benefit was unlawful and was in breach of the

employment agreements concluded between them and the CGE. I accordingly grant an order in the following terms:

1. The respondent's withdrawal and/or termination of the applicants' 17% pension benefit with effect from 1 April 2020, is declared unlawful and in breach of the contracts of employment between the applicants and the respondent;
2. The respondent is ordered to reinstate the applicants' 17% pension benefit with effect from June 2020 in terms of the employment contracts between the applicants and the respondent;
3. The respondent is ordered to pay the applicants' 17% pension benefit with effect from June 2020 and to continue paying such benefit in compliance with the employment contracts between the applicants and the respondent;
4. The respondent is ordered to pay the costs of this application, including the costs of counsel, on Scale B.


[REDACTED]

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:
Date of judgment:
For the Applicants:
Instructed by:

29 November 2024
17 February 2025
Adv L Kalashe
Mjali & Zimema Attorneys

For the Defendant:
Instructed by:

Adv S Sethene
Lebea Inc. Attorneys