THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **2025 – 202752**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo MEMBERS **Applicant**

and

STEEL TRADING (PTY) LTD **First Respondent**

SIBANYE RUSTENBURG PLATINUM MINES (PTY) LTD **Second Respondent**

Heard: **11 November 2025**

Delivered: **19 November 2025**

This judgment / reasons was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 19 November 2025.

Summary: **S 189A(13) – only applicable once s 189A finds application – determining when s 189A applies entails complying with the qualifying provisions in s 189A(1) – applicant failing to prove that s 189A applies –**

requirements for application of section not met – Court having no jurisdiction to consider applicant's s 189A(13) application

S 18A(13) – applicant contends that section may be applied to any challenge of procedural unfairness in the case of all operational requirements dismissals – applicant relied on judgment in *Solidarity obo Members v Barloworld Equipment Southern Africa* – applicant's case wrong and misdirected – s 189A(13) only applies where s 189A applies – where s 189A does not apply procedural unfairness may be changed in the ordinary course of unfair dismissal dispute under s 191 of LRA – not competent to approach Court directly on the basis of urgency under s 189A(13)

Jurisdiction – applicant seeking relief against party that is not employer – no basis under the LRA to grant relief against party not the employer – applicant failing to make out any basis for relief against second respondent – Court having no jurisdiction to entertain relief sought by applicant against second respondent

Jurisdiction – s 158(1)(a) considered – section does not confer jurisdiction but only conveys powers on Court – jurisdiction must be conferred on other provisions under LRA for s 158(1)(a) to apply – applicant's reliance on s 158(1)(a) misplaced – section cannot be used to provide jurisdiction to consider applicant's application

Jurisdiction – Court having no jurisdiction to consider applicant's application – application dismissed for want of jurisdiction

Costs – application constitutes an abuse of process and hopeless – application should never have been pursued and / or persisted with – principles relating to punitive costs considered – punitive costs awarded

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JUDGMENT: REASONS

SNYMAN, AJ

Introduction:

[1] In the current matter, the applicant brought an urgent application on 27 October 2025 against the first and second respondents. The applicant seeks several items of interdictory relief against both respondents, as well as an order reinstating four individual applicants that were dismissed by the first respondent for operational requirements on 17 October 2025. The applicant has pleaded reliance on section 189A(13) and section 158(1)(a) of the Labour Relations Act (LRA)[1], as basis for the relief it seeks. The application was opposed by both the first and second respondents, who filed answering affidavits. The applicant also filed replying affidavits to these answers.

[2] Because the applicant sought final relief in motion proceedings, it was necessary for the applicant to show: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[2] Also, and where it comes to resolving factual disputes in such cases, the principles enunciated in the well-known judgment of *Plascon Evans Paints v Van Riebeeck Paints*[3] find application. In short, it follows that it is the admitted or undenied facts together with the facts as stated by the respondents that must be utilized in deciding this matter. The only exception would be if the respondents simply offer a bald denial, or the facts as stated by the first respondent are patently false, absurd or fanciful.[4] Insofar as the applicant relies on section 189A(13), the application of such

[1] Act 66 of 1995 (as amended)

[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20. In particular, and in respect of section 189A(13) proceedings, see *Communication Workers Union v Telkom SA SOC Ltd and Others* (2017) 38 ILJ 360 (LC) at para 6.

[3] 1984 (3) SA 623 (A) at 634E-635C, where the Court said: '*… in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order …*'. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 53; *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27; *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38.

[4] See *Minister of Justice and Correctional Services and others v Tshifhango and Another* [2019] 7 BLLR 627 (LAC) at para *26; TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another* (2017) 38 ILJ 2721 (LAC) at para 29; *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC) at para 12.

section does not detract from the application of these *Plascon Evans* principles.[5]

[3] Having considered all the facts in this matter, as it emanated from the affidavits and by virtue of application of the *Plascon Evans* principles as set out above, and having heard submissions on behalf of both the applicant and respondents, it was clearly apparent to me that the application brought by the applicant was doomed to fail and was actually hopeless. This is because the Labour Court simply does not have jurisdiction to entertain the application brought by the applicant, based on its case as pleaded.[6] As a consequence, I made the following order on 11 November 2025:

1. The applicant's application is dismissed for want of jurisdiction.

2. The applicant is ordered to pay the first and second respondents' costs on the scale as between attorney and client.

3. Written reasons for this order will be handed down on 19 November 2025.

[4] This judgment now constitutes the written reasons referred to in paragraph 3 of my order, above.

<u>Background facts</u>

[5] In setting out the background facts in this matter, below, I will limit my exposition in this regard only to those facts that are pertinent and relevant in deciding the issue of jurisdiction. I do not propose to deal with any of the facts relating to the merits of the applicant's application, because if this Court has no jurisdiction, then there is no point to do so. The backgrounds facts relating to jurisdiction are straight forward, and fortunately, largely uncontested. For ease of reference, I will refer to the applicant union as '*NUMSA*', the first

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[5] See *Communication Workers Union* (*supra*) at para 6; *Banks and another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC) at para 14; *Insurance and Banking Staff Association and Another v Old Mutual Services and Technology Administration and Another* (2006) 27 ILJ 1026 (LC) at para 24.

[6] See *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 75; *Mbatha v University of Zululand* (2014) 35 ILJ 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 *ILJ* 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 *ILJ* 1098 (LAC) at para 37; *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC) at para 42; *Public Servants Association on behalf of Members v Minister of Health and Others* (2019) 40 ILJ 193 (LC) at para 15.

respondent as '*Steel Trading*' and the second respondent as '*Sibanye*' in this judgment.

[6] Steel Trading and Sibanye have a commercial relationship by virtue of a service level agreement concluded between them as far back as January 2014 (the SLA). In terms of the SLA, Steel Trading renders services to Sibanye in the form of providing engineering work, which work primarily takes place underground. Steel Trading employs approximately 270 employees on site at Sibanye. As said, these employees work primarily underground installing conveyor and mining steel plant structures and bulk transfer structures. Steel Trading also instals underground ventilation fans.

[7] It was common cause that all the members of NUMSA on site at Sibanye, which includes the four individual members (individual applicants) to which the current matter relates, are employed by Steel Trading and not Sibanye. No employment relationship ever existed between these individual employees of Steel Trading and Sibanye.

[8] As a result of dissatisfaction with the outcome of demarcation proceedings brought by Steel Trading against NUMSA and the MEIBC, pertaining to its operations at Sibanye, as coupled with a number of other grievances employees had against Steel Trading as their employer, the members of NUMSA employed by Steel Trading at Sibanye's Kwezi Shaft in Rustenburg, embarked upon unprotected strike action on 25 September 2025. The strike lasted for a period of seven days until an order interdicting the strike was granted by Makhura J in this Court on 2 October 2025.

[9] NUMSA and Steel Trading engaged in settlement discussions following the granting of the Labour Court order, in order to resolve the underlying issues that gave rise to the strike. This culminated in the conclusion of an agreement called a '*Substantive Wage Agreement*' on 4 October 2025 (the agreement), resolving the underlying grievances and disputes. The agreement would apply for a three year period. In terms of the agreement, the employees would receive year end incentives, back pay in the form of hardship allowances, annual increases and all employees that participated in the strike would receive

final written warnings valid for 12 months. Also, three employees that been dismissed for intimidation would be reinstated with final written warnings.

[10] According to Sibanye, it was unaware of the dealings between NUMSA and Steel Trading with regard to the employees that embarked upon the unprotected strike action and the employees that had been dismissed. In fact, and according to Sibanye, it was only told by Steel Trading that all these employees would be subjected to disciplinary action. The next Sibanye knew of what happened, after these disciplinary proceedings, was when the individual applicants (together with the other employees of Steel Trading) arrived on site at the Kwezi shaft to resume their duties, and this then led to the events below.

[11] On 6 October 2025, all the employees reported for duty at the Kwezi shaft. However, and when seeking to report for work, the four individual employees in this case were refused site entry by Sibanye and they were required by Sibanye to report at the Steel Trading offices. These four employees were W Makhuru, J T Ngomane, L D Motswane and J W Moyo. These employees then reported at Steel Trading's offices, where they were instructed not to report for work but remain home, until called back by Steel Trading.

[12] What happened which caused the above event was that Sibanye informed Steel Trading on 6 October 2025, in terms of the SLA between these two parties, that the four employees will not be allowed back at work on any Sibanye site. This instruction was then confirmed in writing in a letter by Gravett Mckenzie, the HR manager of Sibanye, sent to Pieter Bezuidenhout, the group HR manager of Steel Trading, on 10 October 2025, which letter reflected the following:

> 'We refer to your correspondence dated 6 October 2025 and note Steel Trading's decision regarding the reversal of the termination of the four (4) employees listed.
>
> Notwithstanding Steel Trading decision, we confirm that these four (4) employees will not be granted access to the shafts or any of Sibanye Stillwater ("the Company") operational areas.

The Company bears a statutory obligation. including under the Mine Health and Safety Act, to provide and maintain a working environment that is safe and without risk to the health of employees. Permitting the return of these individuals would amount to non-compliance with the Company's operational standards and safety protocols designed to protect its property and safeguard the rights, wellbeing, and safety of all persons on Site. Their presence would expose the Company's employees and operations to unnecessary and entirely avoidable health and safety risk. and such presence would negatively impact on the harmonious workplace environment the Company seeks to maintain.

Directing these employees to return to Site in the current circumstances would, in our view, fall short of the standard of care and diligence expected of a contractor such as Steel Trading when performing services on the Company's premises …*'*

[13] According to Steel Trading, it had no choice but to comply with this instruction from Sibanye, and as a result, was no longer able to utilise the services of these four employees. Steel Trading then decided to initiate proceedings in respect of these employees relating to operational requirements.

[14] On 13 October 2025, Steel Trading then issued the four employees each with a notice of contemplated retrenchment in terms of section 189(3) of the LRA. The notice recorded that the reason for embarking upon this process was because Sibanye refused these employee access to site going forward, meaning that the employees would no longer work. Important to the case *in casu*, the notice recorded that only these four employees were affected by the contemplated retrenchment, and that Steel Trading had not dismissed any employees during the preceding 12 months for operational requirements. And lastly, the notice recorded that Steel Trading employs 270 employees on the Sibanye sites. This notice was also sent to NUMSA, and it was invited to attend consultations due to take place on 13 October 2025, 15 October 2025 and 17 October 2025.

[15] As to what happened in the course of these consultations, whether NUMSA and the employees were properly consulted as contemplated by section 189 of the LRA, and what transpired with regard to several items of correspondence that passed between the parties, is an issue that relates to the merits of the case, and will not be dealt with further. Suffice it to say, and on 17 October

2025, all four the employees received letters of retrenchment, terminating their services due to operational requirements, as a result of the events as set out above.

[16] On 20 October 2025, the attorneys for NUMSA wrote to Steel Trading, requesting information concerning the process that led to the retrenchment of the four employees on 17 October 2025, and threatened legal action if this information was not forthcoming. On 29 October 2025, Steel Trading answered the attorneys for NUMSA, and *inter alia* stated that as far as it was concerned, the retrenchment process had been concluded, and the employees' employment had been finally terminated on 17 October 2025. But by that time, the current application had already been brought.

Urgency

[17] I intend to first deal with the issue of urgency. The four employees were retrenched on 17 October 2025, and the application followed just more than a week later, after NUMSA's attorneys had received no response to their letter to Steel Trading on 20 October 2025. I consider this action to be sufficiently expeditious to satisfy urgency. Steel Trading and Sibanye were afforded sufficient opportunity to oppose and answer the application. And when the matter was argued, urgency was not really placed in issue. In line with the principles set out in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[7], I will accept that NUMSA took sufficiently prompt and urgent action, satisfied the requirement that the application was in effect brought at the earliest appropriate opportunity, and that this is not a case of self-created urgency. It is in any event in my view important that this matter be disposed of on the merits, considering that it concerns an issue of jurisdiction.

Analysis

[18] As I have touched on above, NUMSA faces two insurmountable hurdles in this application, concerning the jurisdiction of this Court to grant it the relief sought.

[7] (2016) 37 ILJ 2840 (LC) at paras 21 – 26. See also *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

In fact, and in my view, these jurisdictional difficulties are obvious and trite, and it is simply an untenable proposition for NUMSA to have brought the application in the first place. I am of the view that what happened in this case is nothing short of an abuse of process, but I will deal with this later in this judgment, when addressing the issue of costs.

[19] I will start with the first jurisdictional problem faced by NUMSA. NUMSA pins its application squarely on section 189A(13) of the LRA, which allows for urgent intervention by this Court in retrenchment proceedings where section 189A finds application.[8] But does section 189A even find application in this case? The answer must be a firm no. This is because section 189A(1) specifically defines when section 189A applies, which would obviously include when section 189A(13) applies, being part and parcel of section 189A as a whole. Section 189A(1) reads:

> '(1) This section applies to employers employing more than 50 *employees* if-
>
> *(a)* the employer contemplates dismissing by reason of the employer's *operational requirements*, at least-
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> (i) 10 *employees*, if the employer employs up to 200 *employees*;
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> (ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;
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> (iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;
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> (iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or
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> (v) 50 *employees*, if the employer employs more than 500 *employees*; or
>
> *(b)* the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds

[8] Section 189A(13) reads: '*If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order- (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate*'. Further, section 189A(17) reads: '*(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed …*'.

the relevant number specified in paragraph *(a)*.'

[20] The issue of when section 189A(13) can be relied on was specifically dealt with by the Constitutional Court (CC) in *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others*[9], where the Court held:

> '… It is convenient to start with the issue of the circumstances under which the orders under subsection (13) may be granted. It is important to address right at the outset the question of the circumstances in which s 189A applies. That is to be found in s 189A(1).
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> 58] It is clear from this provision that s 189A applies to dismissals for operational requirements by employers who employ more than 50 employees when they contemplate dismissing certain numbers of employees in their workforce for operational requirements. …' (emphasis added)

The Court pertinently concluded:[10]

> 'The procedure and remedies provided for in ss 13 only apply to employees whose employer is subject to s 189A, namely employers who employ more than 50 employees. Employees employed or formerly employed by an employer who employed less than 50 employees cannot utilise s 189A(13). Those may use s 191 of the LRA to get their disputes about the procedural fairness of a dismissal for operational requirements resolved.'

[21] In *Solidarity on Behalf of Members v Humansdorpse Landbou Koöperasie Ltd*[11] the Court similarly decided, where the Court held as follows:

> 'This case largely turns on whether or not the respondent should have dealt with the retrenchment process in terms of s 189A and not solely in terms of s 189 as it has done. The jurisdictional factors for the applicant to approach this court in terms of s 189A which in its terms provides various remedies to employees falling in a certain category are provided for in s 189A(1).' (emphasis added)

[9] (2024) 45 ILJ 1723 (CC) at paras 57 – 58.
[10] Id at para 217
[11] (2023) 44 ILJ 2039 (LC) at para 12.

[22] On the undisputed facts *in casu*: (1) Steel Trading employs 270 employees at Sibanye; (2) it has not dismissed any employees in the preceding 12 months due to operational requirements; and (3) the retrenchment proceedings only applied to the four individual employees in this case, and they were the only four employees then dismissed for operational requirements. These being the facts, there is simply untenable to say that Section 189A applies. Yes, it is true that Steel Trading employs more than 50 employees, as it employs 270 employees. But that is only half of what must be considered in determining if section 189A applies. Considering that Steel Trading employs between 200 and 300 employees, the retrenchment process must at least apply to a minimum of 20 employees, for section 189A to find application. The retrenchment process, as said, only applied to the four individual employees *in casu*. And that must be the end of it. Section 189A, and with it section 189A(13), simply does not find application. If it does not find application, then this Court has no jurisdiction to grant the applicant the relief it seeks against Steel Trading on this basis.

[23] A pertinent comparable example can be found in *National Union for All Sectors and Others v 3sixty Life (Pty) Ltd and Others*[12]. In that case, the employer employed 66 employees but only four employees were affected by the retrenchment process and one further employee had been dismissed for operational requirements in the preceding 12 months.[13] Based on these facts, the Court found that section 189A did not apply, and thus section 189A(13) could not be relied on, with the Court reasoning:[14]

> 'Section 189A applies to large-scale retrenchments and it is evident from subsection (1)*(a)* that an employer who employs at least 50 employees and up to 200 employees must contemplate retrenching at least ten employees, including those retrenched in the preceding 12 months, for the provision to apply. …
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> The further requirement is that such employer with between 50 employees and up to 200 employees must contemplate retrenching at least ten

[12] (2024) 45 ILJ 1841 (LC).
[13] Id at para 28.
[14] Id at paras 30 – 32.

employees. Therefore, if such employer contemplates retrenching less than ten employees, s 189A does not apply to the contemplated retrenchments.

Applicants did not put up a version contesting the first respondent's version that it intended to retrench a total of four employees and that it had retrenched one employee in the preceding 12 months. These figures are disclosed in the s 189 notices issued to the applicant employees. Therefore, the applicants cannot utilise s 189A(13) to obtain relief from this court in circumstances where s 189A did not apply to the retrenchment process embarked upon by the first respondent …'

[24] The requirements for section 189A to apply and then for section 189A(13) to be able to be utilised, are in my view patently obvious, especially when the undisputed facts are applied to the numerical requirements set out therein. It must be the easiest thing in the world for NUMSA and its attorneys to simply do a count, considering that they always had these facts and information available to them. This count shows that there are 270 employees, however only four are affected. The application should thus never have been brought, was simply completely lacking in merit, and actually hopeless.

[25] Undeterred, the attorney for NUMSA, despite being confronted with these clear statutory prescripts, forcefully argued that no matter what section 189A(1) may provide for, section 189A(13) can always be applied to any retrenchment, because that is what was purportedly held by the CC in *Solidarity obo Members v Barloworld Equipment Southern Africa*[15]. I must confess that I am mystified how this judgment can assist NUMSA or that it even says what NUMSA contended for. *Barloworld* does not deal with the question when section 189A applies, which is the question pertinently dealt with by the CC two years later in *Regenesys supra*. In *Barloworld*, it was never in contention that there was a mass retrenchment as contemplated by section 189A and that section 189A(13) in fact applied. In *Barloworld*, the Court decided how section 189A(13) should be interpreted and applied, and not when it should be applied. But according to the attorney for NUMSA, the

[15] (2022) 43 *ILJ* 1757 (CC).

following *dictum* in *Barloworld* supported the proposition that section 189A(13) can be applied in any retrenchment:[16]

> 'It follows from this jurisprudence that, in order for the Labour Court to adjudicate a claim of the unfairness of a procedure in dismissals for operational requirements, the court must be approached in terms of s 189A(13) on the basis of non-compliance with the procedures prescribed by s 189 or 189A of the LRA. …'

[26] However, this reliance by NUMSA on the various *dicta* in *Barloworld* is entirely misplaced. The Court was only dealing with retrenchments where section 189A actually applied. There was no finding that section 189A(13) can be applied in all retrenchments even where section 189A did not apply, on the basis that the Court was precluded from deciding procedural fairness in a retrenchment without section 189A(13) being followed, which is in essence what NUMSA is suggesting. If there is any doubt about this, the reasoning in *Barloworld* was specifically considered by the CC in *Regenesys supra*, where the Court held:[17]

> **'**The Labour Court's jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements to which s 189A does not apply and which are referred to it for adjudication in terms of s 191(5)*(b)*(ii) is not ousted by subsection (18). That jurisdiction remains intact and the Labour Court has jurisdiction to adjudicate such disputes.'

The Court in *Regenesys* then referred to the reasoning in *Barloworld*, and said:[18]

> 'The essence of this court's judgment in *CC Barloworld* was that, by virtue of subsection (18), the Labour Court no longer had jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements referred to it in terms of s 191(5)*(b)*(ii) but that it did have

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[16] Id at para 68. See also para 71, where the Court said: '*Firstly, the power of the Labour Court to adjudicate the procedural fairness of retrenchment consultations is limited to the 'fair procedure' that is prescribed in ss 189 and 189A, which give effect to s 188. Secondly, it is evident that a party seeking the Labour Court's intervention when an employer fails to follow a fair procedure during retrenchment consultations must approach the court for relief in terms of s 189A(13). This is because the Labour Court is barred from determining the procedural fairness of a dismissal based on operational requirements when it is approached in terms of s 191(5)(b)(ii).*'.

[17] Id at para 146(c).

[18] Id at para 183.

jurisdiction to adjudicate disputes about the procedural fairness in dismissals for operational requirements to which s 189A applied if they were brought by way of applications in terms of subsection (13). While the second part of this statement correctly reflects the legal position, the first part does not, in my respectful view, reflect the correct interpretation of subsection (18). This is so because the Labour Court still has jurisdiction to adjudicate disputes about the procedural fairness of dismissals based on the employer's operational requirements of employees to whose employer s 189A does not apply and the first part of that statement says the opposite.'

[27] Therefore, and contrary to what is said by NUMSA, any case concerning procedural unfairness relating to the dismissal of the four employees for operational requirements, can be dealt with in the ordinary course in an unfair dismissal dispute pursued under section 191 of the LRA. That dispute would ultimately be referred to this Court in terms of section 191(5)(b)(ii) of the LRA, and when deciding such a case, the Court would be entitled to consider and decide the issue of procedural fairness, precisely because section 189A does not apply. But this Court simply does not have jurisdiction to decide this question directly, by way of applying section 189A(13).

[28] In summary, and because NUMSA based its application for relief against Steel Trading squarely on section 189A(13) of the LRA, in circumstances where that section does not find application, this Court simply has no jurisdiction to afford NUMSA the relief sought. The application against Steel Trading must be dismissed on this basis alone.

[29] I now turn to the application for relief against Sibanye. I believe it faces the same fate. What NUMSA asks for, against Sibanye, is that it should be interdicted '*… from unlawfully violating the Applicants members' rights to employment as embedded in their contracts of employment with the 1st Respondent …*', the first respondent being Steel Trading. On what basis this Court would have any jurisdiction to grant such an order against Sibanye it unclear.

[30] First and foremost, it must be emphasised that Sibanye is not the employer of NUMSA's members (and the four employees) and never was. There exists no employment relationship between such members and Sibanye. The

relationship between Sibanye and Steel Trading is purely a commercial one, in the form of Steel Trading being a service provider to Sibanye. Neither NUMSA nor its members are a party to such relationship.

[31] The above being the undeniable facts, where does the jurisdiction of this Court then lie? The jurisdiction of the Labour Court is defined in section 157 of the LRA. It is critical to appreciate that section 157(1) does not establish a general jurisdiction that the Labour Court can exercise, in all instances where a litigating party approaches the Labour Court and pleads the dispute is one related to an employment law matter.[19] In order for the Labour Court to have jurisdiction, the issue for determination must be specifically provided for in the LRA, or in any other related employment law, such as for example the Employment Equity Act (EEA)[20] or Basic Conditions of Employment Act (BCEA)[21], to be decided by the Labour Court. The applicant must also indicate on what provision in any of these items of legislation the applicant relies.[22]

[32] The whole issue of the lack of general justification of the Labour Court in what may be termed any employment related dispute was recently revisited in *Cibane and Another v Premier of Province of Kwazulu-Natal*[23], where the Court pertinently held, in the context of the Labour Court intervening in incomplete disciplinary proceedings in an employer:

> ‘In the absence of any statutory provision conferring jurisdiction on the Labour Court both in respect of employer conduct alleged to be unlawful and in employment-related matters generally, there can thus be no general rule, as the judgment in *Booysen* might be construed, to the effect that the Labour Court has jurisdiction to intervene *in medias res* to restrain any alleged illegalities, irregularities or unfairness in incomplete disciplinary proceedings.’

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19 In *Baloyi v Public Protector and Others* (2021) 42 *ILJ* 961 (CC) at para 24, it was held: ‘… *Crucially, s 157(1) does not afford the Labour Court general jurisdiction in employment matters …*’ See also *Soobedar and Another v Minister of International Relations and Cooperation and Another* (2021) 42 ILJ 1761 (LC) at para 12; *Booysen v Beaufort West Municipality and Another* (2021) 42 ILJ 2415 (LC) at para 5.

20 Act 55 of 1998 (as amended).

21 Act 75 of 1997 (as amended).

22 In *SA Medical Association Trade Union on Behalf of Rikhotso v Member of the Executive Council, Department of Health, Limpopo Province and Others* (2023) 44 ILJ 1779 (LC) at para 6, the Court said: *‘… an applicant must necessarily identify the statutory provision that confers jurisdiction on the court …’*. In *Booysen* (*supra*) at para 5, it was held that: *‘… A party referring a dispute to this court for adjudication must thus point to a provision of the LRA or some other law to establish that the matter is one over which this court has jurisdiction …’.* See also *Shezi v SA Police Service and Others* (2021) 42 *ILJ* 184 (LC) at para 10.

23 [2025] 10 BLLR 1004 (LAC) at para 27.

The same, in my view, clearly applies to any situation where urgent intervention by the Labour Court is sought under section 158(1)(a) of the LRA, which is what NUMSA, from what it has said in its founding affidavit, appears to do.

[33] Turning then to section 158(1) itself, it is the section that deals with the powers of the Labour Court. It has been recognised that there are in essence two categories of powers envisaged by section 158(1). The first category is those powers that can only be exercised if it is first found that the Labour Court has jurisdiction on another basis. The second category is what can be described as jurisdiction conferring powers, meaning that the power itself establishes jurisdiction. This was made clear in *South African Municipal Workers Union and Others v Mokgatla and Others*[24], as follows: '*… While s 157(1) and (2) relate, broadly, to the jurisdiction of the Labour Court, s 158(1) both lists specific remedial powers and provides substantive jurisdictional bases of that court. …*' The same was said in *Du Plessis v Public Protector and Others*:[25] '*This then only leaves s 158. Even though this provision on face value appears to deal with powers that are conveyed to the Labour Court only once jurisdiction is first established to exist, this section must be read in conjunction with s 157 as a source of jurisdiction as well …*'.

[34] The nature of the powers of the Labour Court under section 158(1), was pertinently dealt with in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[26]. In that judgment, the Court accepted that section 157 is the primary provision in the LRA which deals with the Labour Court's jurisdiction,[27] however the Court added that section 157(1): *'… directs the reader of that section to the sources of the Labour Court's exclusive jurisdiction, albeit in very vague and general terms …*'. Because of this, the Court expressed the view that:[28] *'… As a result, the interpreter is saddled with the difficult task of having, for example, to distinguish purely jurisdictional provisions from general empowerment provisions. This difficulty is exacerbated by sections which purport to contain mere empowerment*

[24] 2016 (5) SA 89 (SCA) at para 11.
[25] (2020) 41 ILJ 919 (LC) at para 24.
[26] (2016) 37 ILJ 1857 (LAC).
[27] Id at para 28.
[28] Id at para 30.

provisions, whereas they, on proper construction, also actually contain provisions which are sources of the Labour Court's jurisdiction'. That all being said, the Court then concluded:[29]

> 'Section 158 is such a section. Its introductory wording specifically states that it deals with the powers of the Labour Court. Because the introductory words of the previous section, that is s 157, state that it deals with the jurisdiction of the Labour Court, the immediate expectation is that s 158 is not a source of jurisdiction, but merely contains provisions defining the powers of the Labour Court in respect of matters, which, in terms of some other provision in that Act, fall under the jurisdiction of the Labour Court. However, a close reading of the entire s 158 dispels that initial notion. It does deal with powers (post jurisdiction), but also with powers which cannot but be construed and understood as sources of jurisdiction.'

[35] The Court in *Merafong supra* provided examples of provisions found in section 158(1) that conferred jurisdiction, as opposed to those that could only be exercised if jurisdiction was first established elsewhere under the LRA. In this regard, the Court said:[30] '*Section 158(1)(a) is clearly an example of the powers the Labour Court may exercise in respect of a matter falling within its jurisdiction, and it does not purport to grant the Labour Court jurisdiction, in the sense of the power to hear and determine the matter in the first place. On the other hand, s 158(1)(i) clearly bestows on the Labour Court jurisdiction in the latter sense*'. The Court also referred to section 158(1)(h) as being a source of conferring jurisdiction and then empowering the Labour Court to hear and determine applications to review any decisions taken or acts performed by the State in its capacity as employer.[31]

[36] It follows that each individual provision in section 158(1) must be carefully scrutinised in order to ascertain whether the provision confers jurisdiction on the Labour Court in addition to providing it with the power, or is only a provision providing the Labour Court with powers to exercise once it has jurisdiction established by other means in the first place. In this regard, the Court in *Merafong supra* has clearly said that the powers in terms of section 158(1)(a) do not serve to confer jurisdiction, and can only be exercised if

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[29] Id at para 31.
[30] Id at para 33.
[31] Id at para 34.

jurisdiction exists in the first place. Using a simple example relevant to the case *in casu*, the Labour Court has the power to grant an interdict under section 158(1)(a)(ii), but can only exercise this power if it already has jurisdiction to entertain the dispute.

[37] It must follow that the reliance of NUMSA on section 158(1)(a) as a source of jurisdiction is ill-founded. This is not a jurisdiction conferring provision. It is a provision providing certain powers to the Labour Court, only once jurisdiction is conferred from another source. And *in casu*, there is no such source.

[38] According to NUMSA, Steel Trading is in essence working under instruction of Sibanye, as it is beholden to Sibanye. The argument goes that if it was not for the instruction given by Sibanye, the four employees would still be working and would not have been retrenched by Steel Trading. Therefore, it is contended that Sibanye is unlawfully interfering in the employment relationship between the members of NUMSA (the four employees) and Steel Trading, and fairness dictates that it should be interdicted from doing so.

[39] None of the aforesaid can however serve to confer jurisdiction on this Court to grant relief against Sibanye. Sibanye owes no duty to the employees of Steel Trading, under the LRA, because, in short, it is not their employer. If Steel Trading may accede to unlawful demands by Sibanye and dismiss employees as a result, that should be challenged as an unfair dismissal against Steel Trading, on the basis that there exists no fair reason for dismissal. This situation is commonly known as dismissal at the behest of a third party, and may be found to be a fair or an unfair dismissal by the employer itself.[32] But it does not make the third party to also be a party to any unfair dismissal case and that it must somehow be regarded as an employer for the purposes of the application of the LRA. What NUMSA is in essence asking for is that I regard Sibanye as some sort of employer in equity, but no such thing exists. As said in *Buffalo Signs Co Ltd and Others v De Castro and Another*[33]: '*… a person either falls within the definition of employer or he does not. There is*

[32] See for example *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC); *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC).
[33] (1999) 20 ILJ 1501 (LAC) at para 16.

no employer in equity …'. In *Dawn Ltd and Others v Molefe and Others*[34] the Court pertinently said:

> 'It follows that it was not competent nor permissible for the second respondent to extend the relief he awarded to Polanofield because he may have considered it just and equitable to do so, and because he believed it as a group holding company should be liable for the debts of its subsidiaries. The reasons for this simply are that there was no case made out to justify the piercing of the corporate veil. In fact, that was not even asked for. Secondly, and in terms of the LRA in the case of unfair dismissal disputes, relief can only be made against an employer. There is no such thing as a fictional employer, or an employer in equity, which is what the approach of the second respondent would have to contemplate, as Polanofield was never the actual employer of the first respondent.'

[40] Another avenue to perhaps render Sibanye liable would be to pierce the corporate veil as it may exist between Steel Trading and Sibanye[35], but no such case was ever pleaded or proven. Or reliance can be placed on section 200B of the LRA[36], but once again, no such case was pleaded or even made out in the founding affidavit. But in any event, and considering the nature of the case the applicant is actually pursuing, reliance on section 200B would not be competent, having regard to what the Court held in *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*[37], as follows:

> 'The effect of s 200B, while crucial, is merely to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on an associated or related activity or business by or through an employer. They are regarded as employers for the purposes of liability. But it is only if they are in an associated or related business with the employer which is intended to defeat, or has the effect of defeating, the purposes of the LRA or any other employment law, either directly or indirectly, that they would be treated as the employer. The purpose for this is clear from s 200B(2). They are regarded or treated as such for the purposes of liability —

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[34] (JR2114/21) [2024] ZALCJHB 111 (4 March 2024) at para 50.
[35] See *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC) at paras 36 – 39.
[36] Section 200B(1) reads: '*For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law*'.
[37] (2019) 40 ILJ 2707 (LAC) at para 47.

> they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. In other words, s 200B(1) defines 'employer' for a very specific purpose and that purpose is found in s 200B(1) read with s 200B(2). The section cannot be utilised generally for making persons or entities the employer(s) of others.' (emphasis added)

[41] Therefore, this Court simply has no jurisdiction to grant NUMSA the relief it seeks against Sibanye. There is no source for such jurisdiction to be found in the LRA or any other employment law for that matter, for the simple reason that Sibanye is not the employer of the employees in this case and there exists no employment relationship between such parties. The application against Sibanye falls to be dismissed on this basis alone.

Costs

[42] This then only leaves the issue of costs. I am fully aware of the principles applicable to costs in employment disputes as articulated by the Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[38]. However, *Zungu* is not a blanket immunity against costs orders. The fact is that this Court always retains a discretion, as contemplated by section 162(1) of the LRA, to make a costs award against a party. In *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[39] the Court said:

> 'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …'

[43] Sibanye has complained that NUMSA saw it fit to cite Sibanye as a party to these proceedings and to compel it to defend an urgent application that was, even on its face, legally incompetent and devoid of any factual or jurisdictional

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[38] (2018) 39 ILJ 523 (CC) at para 24.
[39] (2021) 42 ILJ 2371 (CC) at para 35.

basis against Sibanye. This resulted in it having to incur unnecessary costs in opposing an application which it should never have been a party to in the first place, which application was in any event misguided and frivolous. Sibanye sought punitive costs.

[44] Steel Trading followed suit where it came to the making submissions on the issue of costs. It was especially critical of the that it was patently obvious that section 189A did not apply, and that by attempting the current course of action, NUMSA was effectively trying to bypass the ordinary dispute resolution proceedings under the LRA and gain an undue advantage. It also sought costs on a punitive scale.

[45] In my view, there is force in the contentions raised by Steel Trading and Sibanye. NUMSA brought an application to this Court when it should not have done so in the first place. It must have been clear that the requirements of Section 189A simply did not apply in this case, and that no relief could ever be competent against Sibanye as it was not the employer. I am also convinced that the reliance by NUMSA on the judgment in *Barloworld* was deliberately misconstrued to suit a particular narrative which was simply unsustainable. The case was, for all intents and purposes, hopeless. In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*[40] the Court had the following to say:

> 'Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. …'

[46] But it is what NUMSA did after being confronted with what Steel Trading and Sibanye had to say in their answering affidavits that is particularly concerning. It surely then must have been clear that there is simply no way in which section 189A(13) could apply or that any kind of relief against Sibanye would

[40] 2013 (2) SA 213 (SCA) at para 35. See also *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC) at para 14.

be competent. At that point, NUMSA should have carefully considered its options, and should have explored how the application could be abandoned. If perhaps NUMSA had thrown in the towel at that point, it may have escaped a costs order. But it doggedly persisted with the application, and in reply did not even deal with what it has been confronted with, simply baldly saying that section 189A(13) applied and that Sibanye should be liable because Steel Trading was operating under its 'instructions'. I take guidance from the following *dictum* in *Sepheka v Du Pont Pioneer (Pty) Ltd*[41], in a case where the Court was actually dealing with costs in the context of a punitive costs order:

> 'Punitive costs will also be justified where a litigant adopts what is called an 'unconscionable stance', or conducts him/herself in an unacceptable manner in the course of the proceedings. Punitive costs also serve as a mark of a court's displeasure. …'

[47] Considering that, in my view, a costs order against NUMSA is certainly earned and justified, the next question is whether punitive costs are justified and appropriate. In *Public Protector v South African Reserve Bank*[42] the Court succinctly said:

> 'More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. …'

[48] As to when punitive costs may be considered to be appropriate, the Court in *Stainbank v SA Apartheid Museum at Freedom Park and Another*[43] held as follows:

> 'Punitive costs have been granted when a practitioner instituted proceedings in a haphazard manner; wilfully ignored Court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous. …'

[41] (2019) 40 ILJ 613 (LC) at para 42. See also *Mukanda v South African Legal Practice Council* 2021 (4) SA 292 (GP) at para 13.
[42] 2019 (6) SA 253 (CC) at para 223.
[43] 2011 JDR 0706 (CC) at para 53.

[49] The Court in *Sephaka supra* also set out circumstances in which a punitive costs order may be appropriate, as follows:[44]

> 'Punitive costs will also be justified where a litigant adopts what is called an 'unconscionable stance', or conducts him/herself in an unacceptable manner in the course of the proceedings. Punitive costs also serve as a mark of a court's displeasure. The failure to maintain a reasonable standard of workmanship and skill in the drafting of documents and bringing of a case to court may also justify a punitive costs award, where the ultimate cause fails as a result of this failure.'

And *Geerdts v Multichoice Africa (Pty) Ltd* [45] it was said:

> 'In awarding costs on the attorney and client scale, the court has a discretion, to be exercised judicially upon a consideration of all the facts. As between the parties, it is a matter of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs.'

[50] It has been held that where is case is persisted with when it must have been apparent, by way of the exercise of due care an diligence, that the case should never be persisted with, it could serve as a basis for punitive costs.[46] For example, in the case of a litigant opposing an appeal where it was apparent that it should not have done so, the Court *Madzunye and Another v Road Accident Fund*[47] had the following to say:

> 'Regarding the costs of the appeal it was submitted on the appellants' behalf that the Court *a quo's* judgment was so clearly wrong that the respondent should never have opposed the appeal. It was accordingly argued that, as the respondent had acted unreasonably and irresponsibly by opposing the appeal, particularly considering its special status, it should bear the costs of the appeal on the scale as between attorney and own client, alternatively on the attorney and client scale. Mindful of this Court's general disinclination to use hindsight in assessing a party's conduct in considering punitive costs awards

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[44] Id at para 42.
[45] [1998] ZALAC 10 (29 June 1998) at para 48.
[46] See *NCP Chlorchem (Pty) Ltd v National Energy Regulator and Others* 2017 (6) SA 158 (GJ) at para 55.
[47] 2007 (1) SA 165 (SCA) at para 16.

(*AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) in para [20]), I am, however, inclined to agree with the appellants' sentiment.'

[51] Also, and in the case of frivolous litigation embarked upon by a litigant when it is clear that the Court would have no jurisdiction to entertain the same, such conduct could be equally deserving of punitive costs orders.[48]

[52] All the above considered, I believe that this is a case where a where a punitive costs order against NUMSA is unfortunately justified and warranted. NUMSA is an experienced trade union, well versed in the LRA and the legal proceedings associated with it, and has been a party to many precedent setting pieces of litigation. It was at all times legally assisted. It should have known better, and then worse, should have rather abandoned a course of action that was patently obviously doomed to fail, rather than persisting with it. In *National Union of Metalworkers of SA on behalf of Members v BMW (SA) (Pty) Ltd*[49] the Court held, specifically in the context of NUMSA pursuing an urgent application it never should have:

> 'NUMSA was legally assisted throughout these proceedings, and is itself an experienced and well-resourced trade union, fully familiar with litigation in this Court concerning LRA disputes. NUMSA should thus have known, from the outset, that its application was doomed to fail. I also consider that NUMSA in fact deliberately designed the current application to try and effectively scupper the disciplinary proceedings, with the view to compelling BMW to negotiate some alternative resolution to the matters with it rather than dismissing its members. … This kind of behaviour of bringing applications to achieve ulterior purposes is not conducive to the fundamental requirement of the expeditious resolution of employment disputes, would be an abuse of the scarce resources of this Court, and should be frowned upon.'

[53] The continuous failure by litigants to heed the numerous warnings by this Court where it comes to these kinds of applications, which is effectively what NUMSA has done in this instance, must be visited with adverse

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[48] See *Du Plessis v Public Protector and Others* (2020) 41 ILJ 919 (LC) at para 48; *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province and Others* (2019) 40 *ILJ* 2533 (LC) at para 20; *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 *ILJ* 1692 (LC) at para 29.

[49] (2025) 46 ILJ 2712 (LC) at para 67. See also *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14.

consequences.[50] It constitutes an abuse of process to pursue a case which is for all intents and purposes hopeless. I fully align myself with the following *dictum* in *Mokoena v Merafong Municipality and Others*[51]:

> 'In casu, the applicant brought a meritless application to this court and fairness dictates that the respondents cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this court on an urgent basis. …'

[54] An apposite expression of the position, which I believe finds proper application *in casu*, can be found in *Minya v SA Post Office Ltd and Others*[52], where the Court decided:

> '… This application ought never have seen its day in court in the light of its ill-conceived nature, more particularly in view of the procedural complaints raised by the applicant. The applicant's attorneys of record and counsel ought to have foreseen the futility of bringing this application. To reiterate, this court ought not to be seen as a first port of call for all workplace related complaints when these can be sufficiently dealt with internally. In the event that an employee is still aggrieved after the internal process, such issues can properly be addressed through the dispute-resolution framework of the LRA. This is something of which the applicant, being legally represented, ought to have been made aware. In the circumstances, I therefore agree that the requirements of law and fairness dictate that a punitive costs order should follow. …'

[55] For all the aforesaid reasons, I thus believe it is appropriate to exercise my discretion with regard to costs by making a punitive costs order against NUMSA, on the scale as between attorney and client.

<u>Order</u>

[56] It is for all the reasons set out in this judgment that I made the order as set out in paragraph 3 of this judgment, *supra*.

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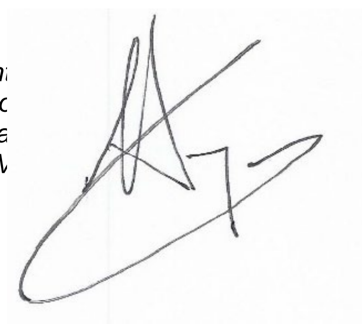
[50] See, for example, *Magoda v Director-General of Rural Developmen*
(2017) 38 *ILJ* 2795 (LC) at para 20; *Botes v City of Joburg Property Co*
(2021) 42 ILJ 530 (LC) at para 50; *Shikwane and Another v Bojanala Pla*
Others (J 774/20) [2020] ZALCJHB 191 (29 August 2020) at para 64; *BM*
[51] (2020) 41 ILJ 234 (LC) at para 36.
[52] (2021) 42 *ILJ* 141 (LC) at para 29.



S Snyman

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

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For the First Respondent:	Advocate D Groenewalt
Instructed by:	Serfontein Viljoen & Swart Attorneys
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