



- (1) Reportable/Yes/NO
(2) Of interest to other Judges/Yes/No
(3) Revised

Signature

Date

17 Dec/25

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: C593/2023

In the matter between:

MUSHROOMS AND THINGS

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION
(CCMA)**

First Respondent

GERALD JACOBS (ARBITRATOR)

Second Respondent

NKOSEMVELA HUBERT MAGWANYA

Third Respondent

Heard: 31 July 2025

Delivered: This judgment was handed down electronically by uploading on *Caselines*; by circulation to the parties' legal representatives by email; and by publication on the Labour Court's website and *SAFLII*. The date for hand-down is deemed to be on 17 December 2025

Summary: Contract of employment – Repudiation – *Caveat subscriptor* – Parole Evidence Rule – Labour Relations Act Schedule 8 Code of Good Practice Dismissal – Sections 186 and 191 of the LRA. Reinstatement Arbitration Order

JUDGMENT

GURA, AJ

Introduction

- [1] The Applicant has brought an application in terms of section 145 of the Labour Relations Act¹ (LRA). The Applicant's prayers are for the review and set aside of an arbitration award dated 15 November 2023, under case no: WECT 1628/22 and for the Court to determine the matter in a manner the Court considers appropriate. The Applicant has further prayed for the further stay of the enforcement of the award pending the outcome of this review.
- [2] The review application is opposed by the Third Respondent.
- [3] The First Respondent is the Commission for Conciliation, Mediation and Arbitration ('CCMA'). The Second Respondent is Gerald Jacobs, a Commissioner appointed by the CCMA as the arbitrator who dealt with the dispute herein. The Third Respondent is Mr Nkosemvele Hubert Magwanya, a former employee of the Applicant, who was represented by Mr Wilber Mfebe from Johannesburg, under Rule 25 (6) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration ('CCMA Rules').
- [4] The Applicant's founding, supplementary and replying affidavits were deposed to by a Mr Harry Petersen, an Office Bearer with the Federation Hospitality Association of South Africa (FEDHASA), and the person who represented the Applicant at the arbitration hearing.
- [5] The Third Respondent conceded that, although Petersen was the individual who represented the employer at arbitration, Petersen needed to aver that he was duly authorised by the Applicant to institute these review proceedings.

¹ Act 66 of 1995, as amended.

Thus, authorisation for the institution of these proceedings is critical, which is lacking.

- [6] The Third Respondent argued that the Applicant's attempt to remedy same in its replying affidavit was insufficient, as the Third Respondent placed on record that a director or shareholder of the Applicant needs to authorise Petersen to institute these proceedings, as he was only a FEDHASA representative. Thus, the Third Respondent was still not satisfied that the application was properly before the court. (Was the issue of authorization dealt with??)
- [7] A further issue was raised by the Applicant in relation to the CCMA filing the incomplete record of proceedings. An agreement was, however, reached that the records before the Court were sufficient and that the proceedings may ensue.

Background

- [8] The Third Respondent worked for the Applicant as a truck driver since 1 March 1998, earning a salary of R10,850.00 per month at the time of his dismissal.
- [9] On 5 November 2021, the Third Respondent's manager called a special meeting and informed all drivers, their assistants and the Third Respondent that, as a result of reduced staff resulting from post-COVID, no drivers were allowed to take leave. Thus, no leave would be approved during the busy period between 13 December 2021 and 15 January 2022.
- [10] It is the Applicant's case during oral evidence that there were notices put up by the employer to further affirm awareness relating to leave.
- [11] On the same day, the Third Respondent applied for leave from his immediate manager. The Third Respondent's leave request was not approved, even after personally approaching his manager for approval. Later, it was reiterated to the Third Respondent that no leave could be taken during the requested period.
- [12] When the Third Respondent's absence was noted on 9 December 2021, his manager called him and enquired about his absence, and it was the Third

Respondent's response that he was on leave and that he refused to return to work, all this despite being reminded that his leave had not been approved.

- [13] It was common cause that several messages were then sent to the Third Respondent over the course of several days, being 10, 14, 22 and 23 December 2021, to the same device, which the Third Respondent had answered on 9 December 2021; however, no response from the Third Respondent was forthcoming.
- [14] On 6 January 2022, the Applicant forwarded the Third Respondent a notice via email informing him that due to his continuous unauthorised absence, the Third Respondent had repudiated his employment contract and that his repudiation was accepted.
- [15] On 10 January 2022, the Third Respondent attempted to return to work by arriving at the Applicant's premises and was informed of his repudiation. The Applicant furnished Third Respondent with the notice that had been sent to him on 6 January 2022. The Third Respondent thus referred the matter to the CCMA as an unfair dismissal dispute.
- [16] Third Respondent conceded that it is common cause between the parties that no disciplinary hearing was convened, and the Applicant continues to maintain that there exists no dismissal but rather a repudiation of the contract of employment.² The Third Respondent further argued that the other myriad of grounds relied upon by the Applicant do not go to the merits of the issue identified above, but rather a perceived bias, alternatively a dissatisfaction by the Applicant's representative with the way the arbitration proceeded.
- [17] The Third Respondent's case was that he was not aware that he was not supposed to take leave during the period in question, as he was not present during the meeting held on 5 November 2021. Furthermore, he always takes leave over the December period and thus decided to go on leave. He conceded that another manager, Rikki Da Silva, informed him that he could not take leave

² In its heads of argument, the Applicant further argued that repudiation is the high water mark of its case, that there existed no dismissal but rather a repudiation of contract. This is the argument of the Applicant on the merits in this review.

during the December period of that particular year, but did not give the reasons why. The Third Respondent further conceded to receiving the telephone call from his manager but stated he did not receive any of the messages and/or emails his manager sent to him through the same telephone number.

[18] The arbitration of the unfair dismissal dispute came before the Commissioner over a period of nine sittings, wherein it was held that there was a dismissal. Such dismissal was held to be both substantively and procedurally unfair. The Commissioner ordered reinstatement with retrospective effect and backpay.

[19] Since the arbitration award was delivered, it is common cause that the Applicant has not accepted the Third Respondent back at work, nor has the Applicant paid the remuneration as outlined in the award.

Application before the court

[20] The Applicant's point of departure is to the effect that the arbitration award was riddled with irregularities from the start. Same were listed as follows from the Applicant's founding affidavit:

1. The Second Respondent allowed the Third Respondent to be represented by a person who lacked the right of appearance.
2. The Second Respondent allowed a person who sought the right to appear before the Commission in terms of Rule 25 (6) without following the process in accordance with Rule 31 as required by Rule 25(6).
3. The Second Respondent constantly denied the Applicant's representative the right to object. This point was subsequently abandoned at the oral argument stage.
4. The Second Respondent assisted the Third Respondent's representative in formulating certain questions. This point was subsequently abandoned at the oral argument stage.

5. The Second Respondent unnecessarily delayed the matter, which commenced on 11 May 2022. Again, this point was abandoned at the oral argument stage.

- [21] The Third Respondent's stance is that at the heart of this matter is the question of whether the Applicant has succeeded in proving that the decision which the Second Respondent made is one that could not be made by any reasonable decision-maker with the material before him.
- [22] In opposition, the Third Respondent argues that the application enjoys no prospects of success and is hamstrung by a number of fundamental misunderstandings of law by the Applicant. Further that the Applicant has identified no grounds for review. The Applicant's principal ground of review is that it opines that there existed no dismissal, and absent a dismissal, the CCMA lacked jurisdiction to arbitrate the dispute.
- [23] The Third Respondent further argued that the Employer prays for the staying of the enforcement of the arbitration award, but does not provide any detail under oath why the Court should stay such an award. Further that there is no single averment that, should the award be enforced, the Applicant would suffer some form of prejudice. The Applicant has further not provided security as required in terms of section 145 (7) of the LRA, nor has the Applicant obtained any order dispensing with the security required as envisaged in Section 145 (8) of the Act. The relief sought is thus not competent and not on the papers, as per the Third Respondent.
- [24] Both parties were in agreement in relation to the issue that the Second Respondent was to decide on, in relation to whether repudiation took place. Mr Petersen and the legal representative for the Applicant, on the day of oral argument, argued to the effect that the Third Respondent was not dismissed but had repudiated his contract, which was accepted.
- [25] In his heads of argument, the Third Respondent argued as follows:

'[44] This point has previously served before many court and in the reported judgment of *South African Broadcasting (SOC) Limited V*

*Commissioner for Conciliation, Mediation and Arbitration and Others*³
stated:

“the point in limine amounts to an assertion that an employer is entitled to elect to treat an act of alleged misconduct by an employee either as a breach of contract, or a breach of a disciplinary rule. In the former case, the employee may not claim to have been dismissed in the sense that dismissal is defined in section 186 of the LRA, and may certainly not claim to have been unfairly dismissed. Any recourse by the employee, so the argument goes, is thus confided to a contractual remedy, a remedy that the CCMA is not empowered to grant. This proposition only has to be stated to those terms to illustrate how profoundly unsound it is. The definition of dismissal in s 186 of the LRA expressly includes circumstances where the employer has terminated employment with or without notice.” Whether the employer casts the termination in the contractual language of acceptance of repudiation of a contract of employment and an election to cancel the contract, this is no more or less than a termination of employment, with or without notice (i.e summary termination), which in turn, by definition, constitutes a dismissal for the purposes of s 186. This is a matter over which the CCMA exercises jurisdiction, at least where the reason for dismissal is misconduct, a reason that is not in dispute in the present instance (see s 191(5)) I find it disconcerting to have to record such a trite principle -to any labour lawyer, thus is a statement of the manifestly obvious. Were the SABC’s point in limine to be upheld, it would be open to employers to avoid the statutory consequences of an unfair dismissal simply by casting a termination of employment in common law contractual terms.”⁴

[26] Evidenced by the record of proceedings and the oral argument by the Applicant’s legal representative, it is common cause that the Applicant’s stance was placed on record on numerous occasions before the CCMA, during Mr Petersen’s oral evidence and in the heads of argument of the Third Respondent

³ (2020) 41 ILJ 493 (LC) at para 12.

⁴ The underlined portion is emphasised by the Third Respondent’s Counsel.

before this Court. Thus, the Applicant argued that the Third Respondent dismissed himself; he was not dismissed by the Applicant.

[27] The Third Respondent argued that the fact that he had returned to work on 10 January 2022 indicates that he did not desert and thus a desertion finding cannot be made. He further argued that if the Applicant's argument, that the Third Respondent had absented himself from 9 December to 10 January 2022, is accurate, such would only amount to misconduct. Thus, the Third Respondent argued that misconduct can thus in no way be couched in the contractual terms of repudiation and the acceptance of repudiation. The Third Respondent argued further that the fact that the Employee returned to work on 10 January 2022 further indicates that there was a dismissal of the employee, which dismissal was both substantively and procedurally unfair.

[28] The Applicant went into length during arguments in relation to Mr Mfebe, who was allowed by the Second Respondent to represent the Third Respondent at the arbitration proceedings. The Third Respondent argued that the issue of representation does not take the merits of the Applicant's case anywhere, as there is also no submission in the papers that the Applicant suffered some form of prejudice resultant from the Third Respondent's chosen representative. Further that the commissioner recorded the reasons why he allowed the Employee to be represented by Mr Mfebe, and there is nothing irregular about such a finding.⁵ Third Respondent argued further that whether or not there exists an order of Court regarding Mr Mfebe, this is not germane, nor relevant to the dispute and the award by the commissioner. Thus, he argued that the Applicant is clearly grasping at straws to find some semblance of argument to justify the unfair dismissal of the Third Respondent.

A determination of locus standi of the third respondent's representative is a legal point and not assessed against prejudice to a party. (Court must determine whether an individual excluded under Rule 25 of the CCMA rules can still represent a party, and if not, whether this constituted an irregularity and a misapplication of the law)

⁵ Rule 25 (6) of the CCMA Rules, as read with Rules 25 (1) (f) and 25 (6)(f).

The law

- [29] Arbitration awards are reviewable in terms of section 145 of the LRA. The test in deciding whether to review and set aside an arbitration award is well established. It is the reasonableness test as postulated by the Constitutional Court ⁶:

'The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

- [30] The proper application of the test on review is summarised by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁷. For an award to be reviewable, the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. Most importantly, a result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before them.
- [31] The Labour Appeal Court (LAC) has further confirmed that where a gross irregularity in the arbitration proceedings is alleged, the enquiry extends to whether the result was unreasonable. If the decision arrived at by the arbitrator is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material, then the award is not reviewable.⁸
- [32] An arbitrator must conduct an arbitration in a manner that he or she considers appropriate in order to deal with the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.⁹ The LAC has held that a court must be careful not to parse an award by a commissioner of the CCMA in the same fashion as one would an elegant

⁶ *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110, Navsa AJ's judgment.

⁷ [2013] 11 BLLR 1074 (SCA).

⁸ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

⁹ Section 138(1) of the LRA

judgment of the Supreme Court of Appeal or the Constitutional Court. Awards must be read for what they are, awards made by arbitrators, who are not judges:

'When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity ...'¹⁰

[33] It is trite that the test applicable in arbitrations conducted under the auspices of the CCMA is the balance of probabilities.¹¹ According to the test, where the evidence permits more than one reasonable inference, the selected inference must, by the balancing of probabilities, be the more natural and plausible conclusion of the possible inferences. The credibility of witnesses and the probability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the versions presented.¹²

[34] The court requested the litigants to address it on *caveat subscriptor* and the parole evidence rule. This the Court requested as same was the line of argument by the Applicants. The court was interested in the relevance of the principles, post the SABC Judgment, which was argued by the Third Respondent.

[35] It is a matter of common knowledge that a person who signs a contractual document thereby signifies assent to the contents of the document, and if these subsequently turn out unfavourable, there is no one to blame but him or herself. This general principle is our law and, usually traced to *Burger v Central South African Railways*¹³. Innes C. J held that '*Our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable.*'¹⁴ When a contract is founded on true consensus ad idem, that

¹⁰ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2899 (LAC), at 2906D – F.

¹¹ *Potgietersrus Platinum Limited v Commission for Conciliation Mediation and Arbitration and Others* (J1800/98) [1999] ZALC 191 (29 June 1999) at para 62.

¹² *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LC) at para 33.

¹³ 1903 TS 571

¹⁴ *ibid* at 576. See 1.5.2

is undoubtedly the law, but, as pointed out above, the *caveat subscripto* situation is not one of true consensus but of quasi-mutual assent, and it is axiomatic that the doctrine of quasi-mutual assent can only be applied in favour of a party in the position of the reasonable person.¹⁵

- [36] Corbett JA, In *Johnston v Leal*¹⁶, described the parole evidence rule in the following terms :

'As has been indicated, the parole evidence rule is not a single rule. It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 453 - 5. (For convenience I shall call this latter rule "the interpretation rule".)

Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence... the recorded terms of an integrated contract in order to rely upon the contract as altered.'

- [37] The Court, in applying the law to the facts, will not repeat issues dealt with above. The Applicant argued that the Second Respondent's decision is reviewable and should be set aside on the grounds that:

1. The decision was so grossly unreasonable and clearly indicates that the Second Respondent failed to apply his mind to the facts presented before him. Second Respondent found that the Third Respondent lied under oath by placing on record that he was not aware that he could not take leave over the December period. However, the Second Respondent conflicted with this view by finding that the dismissal was without a valid reason.

¹⁵ See 2.1.3

¹⁶ 1980 (3) SA 927 (A) at 942H - 943F.

2. The Third Respondent's stance herein was silent, lacking submissions and/or inputs to rebut and or controvert the same herein. The Applicant's Counsel placed on record that the Applicant had to employ three drivers on a part-time basis, to cover three routes which fell under the Third Respondent. The latter was an experienced driver and could solely cover the said routes and was further considered as a Senior Driver. Mushrooms were rotting in the trucks; thus, they had to be delivered to restaurants, moreover, after the covid lockdown had just been lifted.
3. The Applicant further argued that there is no rational connection between the facts presented before the Second Respondent and the conclusion the Second Respondent reached. The Second Respondent found that the Third Respondent '*took leave without the necessary permission, during a crucial period where the Company could not afford to be without its regular drivers*', to the Applicant's dismay, the Second Respondent found that such behavior did not justify dismissal. The Third Respondent's stance herein was silent even on the day of *viva voce* arguments.
4. The Applicant further argued that the Second Respondent committed misconduct in relation to the duties of a commissioner whose duty it was to merely arbitrate on the salient facts presented before him and not to push his own agenda by presenting his own evidence and deliberating on it. No evidence was presented before the Second Respondent in relation to Clause 5.1 of the employment contract. Thus, entering into the arena and proving bias. The Third Respondent's response herein was silent, although the Court had invited inputs in relation to *caveat subscriptor* and the Parole Evidence Rule. The Court received no submissions from the Third Respondent. (Because of relevance to the issues for determination by the Court)
5. The Applicant further argued that the Second Respondent, without a doubt, had also committed a gross irregularity in the conduct of the arbitration proceedings when he openly favoured the Third Respondent's case. The Second Respondent requested the Third

Respondent several times to reinstate the Third Respondent, as he is almost at retirement age, and it would be difficult for the Third Respondent to get employment somewhere else. This evidence was again left uncontroverted.

6. The Applicant argued further that the Second Respondent failed to take a holistic approach in relation to the facts presented before him, for one, that the Third Respondent told his manager that *'I'm just going to take leave and you can do what you want, and if you give me a warning, I will take you to the CCMA'*. Secondly, the Third Respondent disconnected the call whilst his manager was still speaking to him, then ignored the follow-up calls from his manager. Thirdly, and of importance in relation to procedural fairness, the Second Respondent failed to pronounce on the evidence presented that the Third Respondent was indeed afforded the opportunity to present his case on 10 March 2022 at the Applicant's place of business and was also afforded legal representation. Fourthly, the Applicant argued that the Second Respondent failed to place on record that on 28 February 2022, he himself referred the matter back for a disciplinary enquiry to afford the Third Respondent the opportunity to provide reasons for his absence. This enquiry was held on 10 March 2022, and the Third Respondent was represented by a legal representative, Mr Magqanngana, from the EFF Labour Help Desk. Thus, the Third Respondent then referred the matter to the Second Respondent after the matter remained unresolved on 14 March 2022.

7. A fifth argument by the Applicant is that the Second Respondent failed to appreciate that the Third Respondent's exclusive purpose of returning to the Applicant's place of business was to enquire about the messages sent on his phone and as to whether same meant that he was dismissed. As a sixth argument in relation to the Second Respondent's failure to have a holistic approach, the Applicant argued that the Second Respondent failed to appreciate that the Third Respondent was afforded several opportunities to return to work and only when he continued to disregard the employer's instructions, was the employer left with no

alternative but to accept that Third Respondent had repudiated the contract of employment. That the Applicant had to set a precedent that insolence will not be tolerated from the remaining employees. Thus, the Applicant's prayer is that a proper case has been made for the entire decision by the Second Respondent to be set aside.

8. Paragraphs 62 to 69 of the Third Respondent's heads of argument were abandoned by the latter, dealing with their argument that the commissioner unnecessarily delayed the matter. Likewise, paragraphs 70 to 74, dealing with and or headed '*The Commissioner assisting in formulating questions*' and refusing Petersen the right to object. Thus, it is the Third Respondent's conclusion that the Applicant has failed to prove that the Second Respondent arrived at an unreasonable result, and the application stands to be dismissed.

Evaluation

[38] A contract of employment is an agreement between two legal personae (parties) in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them.¹⁷ Once the parties have agreed on the essential terms of the contract, its terms are fixed in the sense that neither party may unilaterally vary them unless the original contract provides for variation. If a contract provides for variation in writing, only a written variation will be effective.¹⁸ There is a fine line between unilateral variations of contractual provisions and changes to working practices.

[39] In *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA & others*¹⁹, the LAC ruled that an employer's instruction to its employees to operate two machines instead of one as before did not constitute a unilateral

¹⁷ J Grogan, 'Workplace Law', 13th ed. Juta, at p 31.

¹⁸ *Southgate v Blue IQ Investment Holdings* (2012) 33 ILJ 2681 (LC). Upheld on appeal in *Blue IQ Investment Holdings v Southgate* (2014) 35 ILJ 3326 (LAC).

¹⁹ (1995)16 ILJ 349 (LAC).

variation. The Labour Court has also held that, in the absence of a contractual provision governing shift times, a change in the shift system is merely a change of work practice.²⁰

[40] In *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others*²¹ (SABC), Judge van Niekerk (as he then was) re-emphasised the notion that the employee's breach of contract (often referred to as a repudiation) and the acceptance thereof by an employer in its very nature is a dismissal. Judge van Niekerk did not take lightly to having to explain a principle so trite in South African law. The SABC was unhappy about the ruling by the CCMA and on review sought to review and set aside the ruling that the CCMA lacks jurisdiction to arbitrate the employee's dispute. The SABC approached the Labour Court for a further order in terms of which it sought to stay the arbitration proceedings until the review had been decided. Judge van Niekerk held that the submissions made by the SABC were profoundly unsound and held as follows:

'The definition of 'dismissal' in s 186 of the LRA expressly includes circumstances where the employer 'has terminated employment with or without notice'. Whether the employer casts the termination in the contractual language of acceptance of the repudiation of a contract of employment and an election to cancel the contract, this is no more or no less than a termination of employment, with or without notice (ie a summary termination), which in turn, by definition, constitutes a dismissal for the purposes of s 186. This is a matter over which the CCMA exercises jurisdiction, at least where the reason for dismissal is misconduct, a reason that is not in dispute in the present instance (see s 191(5)). I find it disconcerting to have to record such a trite principle to any labour lawyer, this is a statement of the manifestly obvious. Were the SABC's point in limine to be upheld, it would be open to employers to avoid the statutory consequences of an unfair dismissal simply by casting a termination of employment in common-law contractual terms. The inadequacies of the law of contract to protect employees against a termination of employment without a fair reason and without following a fair procedure is the *raison d'être* of the

²⁰ *Apollo Tyres SA (Pty) Ltd v National Union of Metalworkers of SA & others* (2012) 33 ILJ 2069 (LC); *Cape Clothing Association v SA Clothing & Textile Workers Union & another* (2012) 33 ILJ 1643 (LC).

²¹ (2020) 41 ILJ 493 (LC) at para 12.

statutory protection against unfair dismissal. This protection has its roots in the power imbalance inherent in the employment relationship and the remedial constitutional right to fair labour practices, a fact acknowledged many times over by this court, the LAC and the Constitutional Court.'

- [41] In an article discussing the Labour Court's findings in *SABC*, the following was observed:

'is therefore evident that employers should not view the acceptance of a breach of contract as a distinct and separate concept from a dismissal. The end result remains the same; there is a termination of the employment relationship between the employer and the employee. It then follows that the same rules of fairness apply, regardless of whether the employee's conduct is described as a breach of contract or as misconduct. Employers are warned against using this argument to escape the remedies available to an employee at the CCMA by alleging that the CCMA does not have jurisdiction to arbitrate a breach of contract matter. As indicated by Judge van Niekerk, the power imbalance in the employment relationship cannot be protected by depriving employees of the right to fair terminations of employment. A dismissal dressed as a breach of contract is still a dismissal as defined in the LRA. Accordingly, the CCCMA can have the necessary jurisdiction to arbitrate disputes involving the breach of a contract that leads to termination of employment.'²²

- [42] Schedule 8 of the Code of Good Practice: Dismissal²³, provides guidelines as to the handling of dismissal for reasons related to conduct or capacity, including setting out that a dismissal must be for a fair reason, discusses the concept of disciplinary measures short of dismissal, the fair procedure to be followed with respect to disciplinary procedures and further provides guidelines in cases of dismissal for misconduct

- [43] Nowhere during the oral arguments by the litigants was the Court directed by the Applicant as having observed and or followed the law above, as per the

²² C Nolan, 'A dismissal dressed as a breach of contract is still a dismissal: a warning to employers', 24 March 2020, <https://www.ensafrica.com/news/detail/2390/a-dismissal-dressed-as-a-breach-of-contract-i>.

²³ Schedule 8 of the LRA (repealed, effective 4 September 2025).

LRA. (Unless evidence as summarized elsewhere @ para 37(6) suggested that the Third Respondent was called to a hearing in March 2022)

- [44] Rather, counsel argued that the Applicant would have sued the Third Respondent for specific performance as its stock, the mushrooms, were rotting in the truck, as there was no driver to deliver at their client's restaurants, due to the Third Respondent's absence. Hence, the Applicant employed three drivers to cover the Third Respondent's route. The common cause being that since the Third Respondent in *casu* was a senior and experienced employee, he would have covered three deliveries driving one route.

Conclusion and costs

- [45] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*²⁴, the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their dispute dealt with and, on the other hand, allowing parties to bring to this court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

- [46] Herein, this judgment, the Court has taken the litigants through a journey of the common law contract of employment, breach by way of repudiation as alleged by the Applicant, *caveat subscriptor*, the parole evidence rule, wherein either the employer or employee sues for specific performance, not under the auspices of the Labour Court.

- [47] I thus reiterate Judge van Niekerk's words in *SABC*²⁵ and I quote and reiterate as well:

'... Whether the employer casts the termination in the contractual language of acceptance of repudiation of a contract of employment and an election to cancel the contract, this is no more less than termination of employment, with or without notice (i.e summary termination), which in turn, by definition,

²⁴ (2018) 39 ILJ 523 (CC) at para 24.

²⁵ *Supra*.

constitutes a dismissal for the purposes of s.186... I find it disconcerting to have to record such a trite principle -to any labour lawyer, this is a statement of the manifestly obvious.'

- [48] In applying the law to the facts and the reinstatement order, it is common cause that the Third Respondent herein would have reached the retirement age of 65 from the time of the commencement of the dispute. (Was this issue ventilated before the Arbitrator?)
- [49] The LAC has held in the case of *South African Municipal Workers Union obo Koopman v City of Cape Town and Others*²⁶ (*Koopman*) that an employer is not obliged to keep an employee's seat warm where the employee has not tendered their services within a reasonable period following a reinstatement order. Where an employee fails to reinstate their services within a reasonable period, their entitlement to reinstate lapses and an employer is not entitled to reinstate them. Further, an order of reinstatement does not in itself reinstate the employee. Rather, it creates reciprocal obligations on the employer and the employee: the employee must tender their services, and the employer must accept the employee back into its employment.
- [50] Further, when an employee receives a reinstatement order, the employee is provided with an election. If the employee wants to be reinstated, the employee must tender their services within the specified period in the reinstatement order, on good cause shown, within a reasonable period thereafter. The arbitration award at paragraph 81 was to the effect that the employee was to have tendered his services to the employer on 1 December 2023. There has been no evidence adduced to this court as to whether the offer of services or acceptance was made. Thus, three years have passed to date, and the Employee was 62 at the commencement of this dispute. It would thus go without saying that he has reached the statutory retirement age. (The lapse of time due to review proceedings??)

²⁶ (2025) 46 ILJ 1132 (LAC).

- [51] The LAC in *City of Johannesburg and Another v Independent Municipal and Allied Trade Union on behalf of Erasmus and Another*²⁷ held that where a tender of services is made so late, no valid tender could be made later, and the entitlement to reinstate lapsed for those reasons. The LAC cautioned that the right to fair labour practices also extends to employers. It would be unfair and unreasonable to expect employers to keep a position open indefinitely for an employee who was unfairly dismissed and was awarded reinstatement, only to decide for themselves when they deem appropriate to return to work and to tender their services. The Third Respondent argued that upon his return from his unapproved leave, this was proof that he had not repudiated the contract. The LAC in the *Koopman* held it would be appropriate to refer judgment to the Minister of Employment and Labour to consider potential legislative amendments that could remedy similar situations in the future. The Court proposed that employers be required to initiate communication with an employee after review or appeal proceedings are finalised, informing them of as to when they are expected to tender their services. This, according to the LAC, will provide clarity and certainty for both employers and employees while maintaining the onus on the employee to tender services.
- [52] [The Constitutional Court relied on *Koopman* in *National Union of Metalworkers of South Africa obo Fohlisa and Others v Hendor Mining Supplies (a division of Marchalk Beleggings)*²⁸ which held that a reinstatement order does not itself revive the contract of employment rather, the contract is restored when the employer accepts the employee's offer to return to work. The Constitutional Court stated that this principle is not authority for the proposition that a reinstated employee is only entitled to be paid as from the date of their factual reinstatement. The Labour Court had incorrectly found that the contract was restored by the first Labour Court's order, not by the arbitration award. Arbitration awards reinstate an employee on the terms and conditions which existed at the time of dismissal, unless the order expressly provides otherwise.

(Not sure I follow the context in respect of reference to *Hendor*)

²⁷ (2019) 40 ILJ 1191 (LAC).

²⁸ 2017 (7) BCLR 851 (CC).

[53] The LAC held in *Coca Cola Sabco (Pty) Ltd v Van Wyk*²⁹, an employee who is successful in his/her claim following a reinstatement following dismissal is entitled to be paid for the time between the granting of the order of reinstatement and the date of the actual implementation of the arbitration order if the employee tendered his/her services and has proven his damages during that period. Should the employer fail to pay the employee for such time, the employee is not automatically entitled to such remuneration. However, he/she may launch action proceedings by virtue of breach of contract. In such circumstances, the employer may insist that the employee prove his/her damages.

[54] The Labour Court exist as a court of law and equity in terms of section 151 (1) of the LRA. It must also give effect to section 1 (d) (iv) of the LRA, which reads as follows :

‘The purpose of this Act is to advance economic development , social justice , labour peace and the democratization of the workplace by fulfilling the primary objects of this Act , which are –

...

(d) to promote –

...

(iv) the effective resolution of labour disputes.’

[55] The Labour Court has held in *Kolobe v Proxenos (Sophia’s Restaurant)*³⁰, the word ‘effective’ should be equated with ‘speedy’.

[56] In *Bader (Bop) (Pty) Ltd & another v National Bargaining Council and Others*³¹, Pillay J held:

‘...bound in terms of section 1(d) ... to channel the dispute in a way that it avoids a spiraling of the dispute in an abyss of technicalities.

²⁹ [2015] 8 BLLR 774 (LAC).

³⁰ (2000) 21 ILJ 1130 (LC).

³¹ (2001) 22 ILJ 2431 (LC) at 2433C – E.

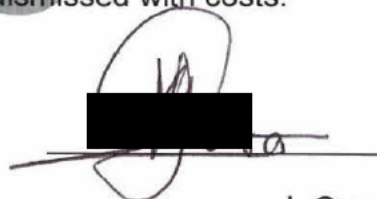
In making the order that I do, and without denying the parties such rights as they may have in law, the court prevails on the parties, including the Bargaining Council, to address the dispute effectively and substantively.'

The Second Respondent 's analysis of evidence with particular reference to Paragraph 60 to 66 , 71 and 72 are correct , in analyzing the contract of employment , common law and suit for damages , which does not exonerate the employer from the statutory mandate in the Labour Relations Act.

[57] In the premises, the following order is made:

Order

The Applicant's application is dismissed with costs.



L Gura

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: C A Casner

Instructed by: Elroy Adams and Associates

For the third respondent: Brett Aarninkhof

Instructed by: Aarninkhof Attorneys

LABOUR COURT