(1) Reportable: NO
(2) Of interest to other Judges: Yes

[redacted]

Signature 04 February 2026 Date

THE LABOUR COURT OF SOUTH AFRICA, HELD AT CAPE TOWN

Case No: C 438/2024

In the matter between:

CHEMICAL ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION obo MEMBERS	**Applicant**

And

AVACARE HEALTH GROUP (PTY) LTD	**First Respondent**
BARRS PHARMACEUTICAL INDUSTRIES (PTY) LTD	**Second Respondent**

Date of Hearing: 27 June 2025

Date of Judgment: 04 February 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be on 04 December 2026.

Summary: Section 77(3) of the Basic Conditions of Employment Act – application to enforce contractual right to payment of a 13th cheque. Breach of Employment Contract.

JUDGMENT

DANIELS, AJ

INTRODUCTION

1] This matter is concerned with an application in terms of section 77 of the Basic Conditions of Employment Act (BCEA)[1] regarding a dispute which arose between the applicants and the second respondent regarding terms and conditions relating to the applicant's employment contract, in particular the payment of a 13th cheque and whether this was a term and condition of the applicants' employment contract to which they were entitled.

2] The application is brought in terms of section 77(3) of the BCEA. The applicants seek to enforce their right to payment of a 13th cheque in terms of their contract of employment and seek the following relief:

[1] Act 75 of 1997.

i. Declaring that the Respondent's unilateral abolition of the payment of the 13th cheque to the Applicants' members with effect from December 2021 is a breach of contract;

ii. That the Respondent forthwith restore and comply with the terms and conditions of the Applicant's members' employment contracts entitling them to receive the payment of the 13th cheque;

iii. That the Respondent forthwith within 30 (thirty) from the date of this order, comply with the terms and conditions of the Applicant's members' contract of employment by paying to the members the 13th cheque effective from December 2021;

iv. That the Respondent desist from any action or conduct which infringes the Applicant's members' rights and entitlements arising from their employment contracts;

v. That the Respondent be ordered to pay the costs of this application.

3] There were a number of preliminary issues raised by the second respondent in its opposition to the application and an application for the joinder of the second respondent which was dealt with before the hearing of the merits.

4] I briefly set out the background to the dispute whereafter I will deal with the following preliminary issues:

4.1 The joinder of the second respondent. This application was brought by the applicant.

4.2 The three in limine points raised by the second respondent:

4.2.1 First, it was contended that the application is fatally defective because CEPPWAWU does not have the requisite authority to bring the application.

4.2.2 Second, the applicant does not list the members on whose behalf the CEPPWAWU acts; and

4.2.3 Thirdly, that CEPPWAWU does not have locus standi to institute proceedings in respect of applicants who are not members of CEPPWAWU.

5 The second respondent also placed in issue whether payment of the 13th cheque to employees was a contractual entitlement or a workplace practice. The second respondent contended in its answering affidavit that the applicant's ought to have instituted proceedings in terms of Old Rule 6/ Rule 11 of the Labour Court Rules (by way of action proceedings) and not instituted application proceedings given the material disputes of fact that are present in this matter, that these should have been foreseen. Despite raising this issue Barrs, contended that it will oppose any request for the matter to be referred to oral evidence if the court deemed it necessary and presumably, if the disputes of fact could not be resolved on the papers. Barrs contended that the Court must determine the matter solely on the papers filed by the parties and must rule in favour of its version in the event that there are material disputes of fact with reference to the trite legal principle in Plascon-Evans[2]. I deal

[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

with the issue of whether or not there are material disputes of fact and whether these can or cannot be resolved on the papers before the Court when dealing with the merits of the application.

BACKGROUND FACTS

6 The dispute *in casu* arose in 2021 during wage negotiations between when the second respondent ("Barrs") and its employees when Barrs unilaterally decided that it will no longer pay its employees a 13th cheque and instead replace payment of the 13th cheque with a system of performance-based bonuses. Barrs also offered employees who accepted this unilateral change without challenging same, a 5.5% salary increase. This is referred to by the applicants as the "carrot and stick approach". In what will be summarized b low as gleaned from the papers filed in this matter and the correspondence by Barrs to its employees during the negotiations which correspondence forms part of the affidavits filed herein, payment of the 13th cheque was not referred to as a workplace practice.

7 The employees who are the applicants herein contend that they are contractually entitled to payment of a 13th cheque annually in December.

8 From a reading of the papers filed herein the following facts are not in dispute:

8.1 In 2021, Barrs issued a letter to the Employees amid wage negotiations, advising as follows:-

8.1.1 The company intended to discontinue the 13th cheque and replace it with a performance-based bonus;

8.1.2 Employees were urged to accept this revised structure, which included forfeiting the contractual 13th cheque in exchange for a performance bonus and a 5.5% salary increase, effective January 2022.

8.1.3 Employees who refused the proposal would not qualify for the 5.5% increase.

8.1.4 Employees were required to make an election by no later than Thursday, 23 September 2021.

8.1.5 Employees were advised that any strike action in opposition to the proposed changes would be ineffective and futile.

8.1.6 This letter was aimed at forcing the Employees to surrender their contractual rights through a "carrot and stick" approach — offering a financial incentive for compliance and a threat of loss for non-compliance. At the same time, Barrs discouraged any collective bargaining by warning that strike action would be pointless.

8.2 Despite this pressure and what had been communicated in the various letters by Barrs to its employees, the employees initially stood firm and rejected the proposed change, maintaining their contractual entitlement to a 13th cheque.

8.3 In October 2021, Barrs issued a further communication unilaterally announcing the discontinuation of the 13th cheque and its replacement with a performance bonus.

8.4 The Employees clearly and consistently communicated their rejection of this proposed change, but despite the aforesaid, Barrs implemented this change in clear breach of the Employees' contractual right to a 13th cheque.

8.5 In December 2021, Barrs failed to pay the 13th cheque. Instead, Employees received a discretionary, ex gratia payment of R3 000 only.

8.6 Apart from this R3 000.00 payment, no 13th cheque or any form of bonus has been paid to the Employees to date.

8.7 As indicated in the correspondence from Barrs, Employees who did not accept the unilateral change were not given the 5.5% wage increase.

9] A dispute regarding the entitlement to a 13th cheque was referred to the CCMA in December 2021 in terms of the BCEA and resolved in favour of the Employees.

10] The CCMA ruled that the right to the 13th cheque "had unilaterally been retracted by the Respondent on 22 October 2021". However, because the entitlement to the 13th cheque no longer existed at the time of the referral, the CCMA held that it lacked jurisdiction in terms of the BCEA. The CCMA ruled that the dispute should be addressed in terms of section 64(4) of the LRA or by approaching the Labour Court or the High Court.

11] However, as stated herein above and Barrs expressly forewarned the Employees that industrial action would prove futile. In a letter dated 15 September 2021, Barrs stated that:-

> *"It is CEPPWAWU's rejection of the proposed change that has caused the deadlock. It appears as if CEPPWAWU intends to strike.*
>
> ……………………………………………
>
> *The employees who do not sign to the change, will not receive the increase. Furthermore, while such employees will be entitled to strike, management advises that the financial situation is such that management will endure the strike rather than agree to CEPPWAWU demand.*
>
> ……………………………………………
>
> *While management respects the right of employees to strike, the company's financial situation is such that the company would be constrained to endure a strike (even a long strike) rather than retain the guaranteed 13th cheque – which is serving to damage the company."*

12 The applicant contends that the Employees were left with no choice but to approach this Honourable Court, which it did with the present application.

13 In the interim, Barrs strategy had its intended effect. Following the CCMA's jurisdictional ruling, approximately 159 of the original 214 employees withdrew from the dispute and accepted Barr's terms, forfeiting their contractual right to a 13th cheque in exchange for the 5.5% wage increase. This is unfortunate and appears yet again to highlight the disparate and unequal bargaining power

employers have in relation to their employees who are reliant on a monthly salary.

14 It has since come to light that additional employees, who were originally part of this application, have also since relented and accepted offer of a wage increase in exchange for payment of an annual 13th cheque. Furthermore, some of the employees initially listed as members in this application are no longer members of CEPPWAWU. In light of these developments, the member list has been revised. There are, accordingly, 45 employees who remain applicants in this matter.

15 I now turn to address the preliminary issues whereafter I will deal with the merits of the application.

16 I also briefly deal with the application for postponement which the second respondent sought due to its legal representative withdrawing.

PRELIMINARY ISSUES

17 In argument before the Court, Ms Bismillah appeared on behalf of the applicant members of CEPPWAWU and a representative of the Company appeared on behalf of the second respondent.

The postponement

18 The second respondent made an application, on the date of the hearing, for a postponement for a period of 60 days in order to seek new legal representation and to engage in settlement. The second respondent was initially represented by Werksmans attorneys who withdrew as its attorneys of record, a notice of withdrawal having been filed on 29 May 2025, approximately a month before the hearing of this application.

19 After hearing argument from Ms Bismilla on behalf of the applicants and Barrs representative, I exercised my discretion and refused the postponement mainly for the following reasons:

19.1 Barrs belatedly requested a postponement without bringing a formal application for same 5 weeks (approximately 1 month) after its erstwhile attorneys withdrew and Barrs did not tender wasted costs of the postponement. However as argued by Ms Bismilla, the tender of wasted costs would do little to ameliorate the prejudice the applicants have to date suffered as a result of the ongoing dispute and Barrs unilateral change to the contractual entitlement of its employees to the 13th cheque.

19.2 The applicants were present in Court and had waited for some time already for the application to be heard and the dispute to be finalized having approached this Court as a last resort.

19.3 The applicants were ordinary salaried employees, who live from pay cheque to pay cheque in order to provide for themselves and their families and ought not to have the hearing of the application delayed any further, especially in circumstances where the applicants have travelled to be at Court and in all likelihood incurred expenses to be in attendance at the hearing. Its Union also having incurred expenses to instruct an attorney and counsel to act on its behalf.

19.4 Despite the contention by Barrs that the postponement will not prejudice the applicant's, no basis existed for the submission. Barrs ought to have engaged the applicants well before the hearing date in an attempt to agree to a postponement, alternatively ought to have brought a formal application for same. Barrs failed to do so, and it further failed to tender costs, and it further failed to illustrate that the applicants would not suffer prejudice by the postponement.

20 I accordingly refused the postponement and ordered that the hearing proceed.

21 During the hearing and at the outset a number of concessions were made and it accordingly became unnecessary to deal fully with certain preliminary issues raised by Barrs and dealt with by the applicant in its heads of argument.

The Joinder Application

22 An application for the joinder of Barrs was necessitated by the objection by the first respondent that it was not the correct party before the Court. The first respondent had been erroneously cited herein on the basis that the second

respondent's business was sold to it as a going concern. There was no objection by Barrs to the joinder application given that it was not only an interested party but a necessary party in this litigation before the Court as it has a direct and substantial interest in the outcome of the pending application and relief sought[3].

23 The joinder of Barrs was therefore granted at the outset of the proceedings.

First point in limine -The Authority of CEPPWAWU to bring the application

24 The first point in limine raised by Barrs in answering affidavit pertaining to the authority of CEPPWAWU to bring the appl cation on behalf of its member employees, was abandoned at the hearing of the application. The Court nonetheless considered the question of authority and given the explanation in the applicants replying affidavit together with the explanatory affidavit by the attorney for the applicants to which the correct resolution was annexed, proved that the authority was in place at all times. This was in any event an overly technical objection[4] by Barrs which was addressed by the applicant prior to filing its replying papers. Barrs rightly abandoned the point at the hearing. The point in limine in any event stood to be dismissed.

[3] Cite relevant case.
[4] Thobakgale and Others v Manganyi and Others (JR1465/18) [2024] ZALCJHB 435 (8 November 2024) at para [11] and see important principle at para [12]-[13].

Second point in limine – The application does not list the members on whose behalf CEPPWAWU Acts

25 The second point in limine pertained to the failure of the applicant to list the members on whose behalf CEPPWAWU acts. From the papers this issue was resolved as far back as 30 October 2024 and this *in limine* point, suffers from the same fate as the first, as it is overly technical and the issue had been remedied by the applicant when it was first brought to the attention of the applicant's attorney. This point in limine is dismissed for similar reasons as the first in limine point.

Third in limine point – CEPPWAWU does not have the locus standi to institute proceedings in respect of applicants who are not its members

26 The third point *in limine* was correctly conceded by the applicants but it is not dispositive or determinative of the dispute. The applicant simply narrowed its list of employees who now seek relief in this application given that many of the applicant employees over time have capitulated and accepted the offer of the 5.5% increase in exchange for their contractual right to payment of a 13th cheque annually and some of the employees are no longer members of the applicant Union.

27 The points in limine were all overly technical and barring the third point, the *in limine* objections are dismissed.

MERITS OF THE APPLICATION

28 The essential dispute in this application pertains to the employees' contractual right to payment of a 13th cheque annually in December.

29 Barrs essentially contends that the payment of the 13th cheque was not a contractual right but instead a workplace practice which had developed and was implemented over time and therefore the employees have no right to enforce payment of the said benefit. The applicant's contend that this version has now been put up for the first time in this application and it is a belated attempt by Barrs to subvert its contractual obligations to its employees and in particular the remaining applicants herein, given that it had already conceded that the payment of the 13th cheque was a contractual term and a right to which the employees were entitled.

30 After careful consideration of the papers filed of record, the heads of argument and applicable authorities, there can be no doubt that the Employees are contractually entitled to a 13th cheque.

31 As pointed out by the applicants, which is not disputed by Barrs, the entitlement to the payment of a 13th cheque was the subject matter of proceedings in the CCMA in which proceedings Barrs conceded the contractual right to a 13th cheque. Barrs cannot now seek to dispute that which it already conceded without any valid explanation on affidavit before this Court as to why it seeks to withdraw

such a concession and effectively withdraw an admission previously made, albeit in a different forum. That admission has been properly placed in evidence before this Court and no genuine dispute has been raised.

32 In the Jurisdictional Ruling issued by the CCMA on 9 February 2022 under case number WECT17009-22, the following is recorded:-

32.1 Furthermore, the contractual right to a 13th cheque has also been confirmed in a settlement agreement dated 17 January 2020 signed by Barrs, wherein the following is recorded:-

> *"AGREEMENT ARISING OUT OF…*
>
> *…The Respondent is contractually obliged to pay each employee a 13th cheque …"*

33 Section 77(1) of the BCEA confers jurisdiction on the Labour Court to determine any matter concerning a contract of employment. This Court has consistently recognised the power and jurisdiction, in terms of section 77(3) of the BCEA.

34 In **Aucamp v SA Revenue Service**[5], this Court confirmed that where a benefit such as a 13th cheque forms part of the contract, an Employer must ensure that payment is made in terms of such contract, regardless of its financial situation.

[5] [2014] 35 ILJ 1217 (LC) at para [28].

35 This Court also recently confirmed in **UIS Analytical Services (Pty) Ltd v IDUSA**[6] that a distinction must be drawn between the right to payment of a bonus which right is to be found ex contractu, ex lege or in a policy, without which the issue of payment of bonuses is an interest dispute.

36 In light of the above I am in agreement with the applicant, that the contractual right to a 13th cheque is clear and apparent ex facie these documents, and Barrs has not disputed these documents. There can therefore be no question that there was a contractual entitlement to a 13th cheque. Barrs has however refused to pay this 13th cheque to its employees since December 2021.

37 I am furthermore in agreement and find that Barrs is in breach of the contract between itself and its employees.

Disputes of fact and plascon evans

38 Despite Barrs concession in the CCMA and in the settlement agreement referred to above, which records that the 13th cheque was a contractual entitlement, Barrs, for the first time in these proceedings, attempts to place the contractual right of the same employees to the 13th cheque, in dispute by making the allegation that the payment of the 13th cheque was a workplace practice.

[6] [2025] 2 BLLR 207 (LC).

39 Barrs also alludes to operational requirements as the reason it stopped paying the 13th cheque. This conflicts with the assertion that the 13th cheque was a workplace practice to which the employees are not contractually entitled to. Even if the assertion of a workplace practice does not contradict the operational requirements reasons for non-payment, Barrs has nonetheless expressly admitted that payment of the 13th cheque was a contractual right.

40 Based on these allegations, Barrs alleges that there are disputes of fact and that the matter is therefore not suited to motion proceedings.

41 I must agree with the applicants', that this subm ssion regarding disputes of fact, is without merit and must fail.

42 In **Wightman t/a JW Construction v Headfour**[7] the Supreme Court of Appeal reiterated that bald or uncreditworthy denials do not create genuine disputes of fact.

43 The evidence is clear ex facie the CCMA documentation that the 13th cheque was a contractual entitlement. In addition, Barrs has not placed any facts before this court to prove this allegation of a workplace practice. This is a belated attempt to obfuscate the responsibility to pay its employees and must be rejected as bald and far-fetched. In the circumstances, Barr's does not raise real, genuine and bona fide disputes of fact.

[7] (Pty) Ltd 2008 (3) SA 371 (SCA).

44 Plascon-Evans[8] confirms that when there's a dispute of fact between the Applicant and the Respondent in motion proceedings, the court must accept the version of the Respondent – unless that version is so far-fetched or clearly untenable that the court can reject it. I find for the reasons set out above, that the version of Barrs is far-fetched and untenable and must be rejected by this Court as such.

45 I proceeded to decide the matter on the papers before me in accordance with the trite principles set out herein and applicable authorities to the dispute.

Referral to oral evidence

46 It is submitted that to the extent this Honourable Court is not prepared to accept the Applicants' version on the papers, the dispute concerning the nature and enforceability of the 13th cheque entitlement may appropriately be referred to oral evidence.

47 The court in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**[9], confirmed that a matter may be referred to oral evidence where a real, genuine, and material dispute of fact arises which cannot be resolved on affidavit.

48 The above trite principle must be read with the the principle enunciated by the Labour Appeal Court in In KwaZulu-Natal Tourism Authority and Others v

[8] 1984 (3) SA 623 (A).
[9] 1949 (3) SA 1155 (T).

Wasa[10] where the LAC confirmed that this court has a discretion to deal with an application "in any manner it deems fit", which may include "referring a dispute for the hearing of oral evidence". That discretion, in keeping with general practice and principles applicable in relation to the determination of applications, should be exercised to ensure that justice is done with a view to resolving a dispute of fact.

49 I have already found that there is no real genuine dispute of fact raised on the papers and applying Plascon Evans and Room Hire, I have decided the application on the papers in favour of the applicant.

50 In the present matter, based on the undisputed facts, that the applicant employees have a contractual right to payment of a 13th cheque annually in December of each year. I accordingly find that a proper case for breach of contract has been made out and that this Court is empowered in terms of section 77 of the BCEA to grant the relief prayed for in the notice of motion.

COSTS

51 This only leaves the issue of costs. I have carefully considered the position of both parties herein and the submissions made. The parties have an ongoing employment relationship. Whilst Barr's approach to this matter was ill-conceived, it appears to have relied on and been advised by its erstwhile attorneys who withdrew a month before the application was heard. I have appreciation for the

[10] (2016) 37 ILJ 2581 (LAC) (28 June 2016).

applicant's motives, being the protection of its business, even though this approach was misguided and a breach of the employment contract between it and its employees who are the applicants herein. Mulching a party with costs would only serve to place further strain on the relationship in this context. Finally, I am guided by the judgment in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[11] where it comes to the issue of costs in employment disputes. Exercising the wide discretion I have in terms of section 162(1) of the LRA, I believe that this is a case where no costs order would be appropriate.

52 In the result, the following order is made:

ORDER

1. The applicants are entitled to payment of a 13th cheque in terms of their contract of employment.

2. The second respondent, Barrs Pharmaceutical Industries (Pty) Ltd is to pay each of the remaining 45 applicants a 13th cheque for each year it has failed to pay the said annual bonus from 2021 to date of final payment (inclusive), within 10 days of this Court's order.

3. No order as to costs.

[redacted]

Daniels, AJ

Acting Judge of the Labour Court of South Africa

[11] Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others [2018] ZACC 1.

<u>Representatives</u>

For the applicant:	Adv S Bismilla, Sandown Chambers
Instructed by:	KMNS Inc Attorneys, Sandton
For the Second Respondent:	In person.